The Florida Senate

Interim Project Report 2005-138 *November 2004*

Committee on Governmental Oversight and Productivity Senator Nancy Argenziano, Chair

PUBLIC RECORDS AND MEETINGS: CLARIFYING AND STREAMLINING OPEN GOVERNMENT REQUIREMENTS

SUMMARY

Committee Substitute for Senate Bill 1678 passed the Legislature in 2004. The bill was based on Interim Project No. 2004-139, the first stage of a multi-year review of open government issues. The primary purpose of the bill was to reorganize the Public Records Act topically so that applicable standards could be easily located, thereby improving compliance.

In this second-stage report, the current *ad hoc* statutory structure for placement of an estimated 900 exemptions is reviewed and a uniform, coherent system is recommended. Further, a general exemption for trade secrets is recommended to begin the process of creating uniform exemptions, and of eliminating duplicates, where possible. The report also recommends that the Open Government Sunset Review Act be amended to require consideration of whether an exemption is redundant and if a general exemption would be appropriate.

Additionally, the report reviews issues related to the impact of technology on public records. Current law regulates the potential restrictive impacts of technology on access, but less guidance is provided regarding the negative impacts of expanded access, such as invasion of privacy and identity theft. Among other recommendations, the report recommends that potential negative impacts be addressed in statute by stating that exempt or confidential information on publicly-available agency websites should be redacted, unless an exception applies, and that agencies should continuously review their websites for this purpose. The report also recommends that affected individuals be permitted to request redaction if they discover exempt information is posted. The report additionally recommends requiring agencies to consider whether the information they collect is needed to perform their duties in order to limit unintended impacts on privacy.

BACKGROUND

General - Article I, s. 24 of the State Constitution provides Floridians with one of the most open governments in the United States. The section states in part:

> (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. . . .
> (b) 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 . . . except with respect to meetings exempted pursuant to this section. . . .

While Art. I, s. 24 of the State Constitution took effect in 1993, Florida already had a long tradition of open government. The Legislature and the courts had developed the right to inspect and copy records and to attend meetings of collegial bodies over the 90 years prior to the adoption of the amendment,[1] as is evidenced by ch. 119, F.S., the Public Records Act, and by s. 286.011, F.S., the Government-in-the-Sunshine Law (the "Sunshine Law"), and the case law interpreting those provisions. These

[1] The first law providing access to public records was enacted in 1909. *See*, Chapter 5942, L.O.F. (1909).

provisions applied to "agencies."[2] The amendment raised these statutory rights to a constitutional level and explicitly extended open government principles to the legislative and judicial branches.

During the 2004 legislative session, the Legislature passed the Committee Substitute for Senate Bill 1678.[3] This bill was based on Interim Project No. 2004-139, the first stage of a multi-year review of public records and meetings issues. The primary impact of the bill was to reorganize the Public Records Act topically, as it had become unorganized and disjointed during the roughly forty years since it was first adopted. As a result, the act now has an alphabetized definitions section, public policy statements are co-located, access standards are in one section, fee requirements are together, and penalties are in one section.

Exemptions - The Committee Substitute for Senate Bill 1678 did not affect exemptions to open government requirements. The interim report on which the bill was based, however, recommended that a two-pronged review of exemptions be performed after the act was reorganized. First, the report recommended an organizational review of the *ad hoc* statutory placement of exemptions to identify an improved method so that agencies and the public can locate exemptions quickly and easily. Under the State Constitution, the Legislature is the only entity authorized to create such exemptions.[4] As the State Constitution only permits the enactment of exemptions that are a public necessity, it is important that information that the Legislature has determined to be private or potentially harmful not be inadvertently released. With improved notice, agencies and members of the public will be better apprised regarding what may or may not be inspected and copied and what portion of meetings can be closed.

In addition to an organizational review, the interim report recommended a topical review of exemptions to identify duplicative exemptions for repeal and, if possible, to create general exemptions. A reduction in the number of exemptions would improve awareness of what the Legislature has made exempt. Further, the creation of general exemptions, where appropriate, should provide greater uniformity, and result in more consistency of application.

Technology - Interim Project Report No. 2004-139 also recommended that the impacts of technology on public records be considered. The impacts of technology on public records involve issues of personal privacy, identity theft, public security, privatization, and copying costs, among others. The impact of technology has been one of the most significant issues affecting public records for quite some time and the Legislature has struggled with the issue regularly.[5] Numerous task forces, councils and commissions have been created in recent years to consider this dynamic topic.[6]

The number of U.S. households with personal computers grew from 8.2% in 1985 to 56.5% in 2001.[7] By some estimates, 78% of U.S. households will have personal computers by 2007.[8] Because of the Internet, personal computers can be used for banking, shopping, and receiving government services. The use of computers and the Internet to perform government services and to provide information are positive developments that have the potential to reduce the size of government, to decrease agency costs, and to improve service delivery by allowing members of the

---

[2] The Public Records Act applies to an *agency*, which 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 . . . the Commission on Ethics, the Public Service Commission, and the Office of the Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency*. Section 286.011, F.S., the Sunshine Law, applies to 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.

[3] The bill was approved by the Governor on June 18, 2004; *see*, ch. 2004-335, L.O.F.

[4] Article I, s. 24 (c), State Constitution.

[5] It is clear that all record formats, including electronic or digital records, are included in the definition of "public record" found in s. 119.011(11), F.S., as the term includes information ". . . regardless of physical form, characteristic, or means of transmission."

[6] *See*, *Task Force on Privacy and Technology Report*, February 1, 2001; Privacy and Technology: Background Information, House Committee on State Administration, October 2001; *Privacy and Electronic Access to Court Records Report and Recommendations*, Judicial Management Council of Florida, November 15, 2001; Florida Supreme Court Committee on Privacy and Court Records (report due July, 2005).

[7] NTIA and ESA, U.S. Department of Commerce, using U.S. Census Bureau Current Population Survey Supplements.

[8] Infoplease.com citing Jupiter Research.

public to obtain government information and services from home 24-hours a day.

Even though computer technology has obvious benefits, the Legislature has long been cognizant that digital records may have negative impacts, as well. These potential negative impacts flow in two opposing directions. Technology may either *impede* or *expand* access to public records.

Technology may impede access to public records that are stored electronically if information is stored in non-standard formats or retained only in off-site computers by private service providers, effectively limiting or precluding inspection. In response to these concerns, the Legislature placed some general policies in law regarding computer use by agencies. The Public Records Act was amended to state that providing access to records is a duty of each agency and that the use of computers must not erode that right.[9] Additionally, agencies were required to consider whether a computer system is capable of providing data in a common format when designing or acquiring an electronic recordkeeping system.[10] Further, agencies were prohibited from entering into a contract for the creation or maintenance of a database if that contract impairs the ability of the public to inspect or copy agency records.[11]

While restrictive impacts of technology have been addressed, the negative aspects of the expansive impacts of technology were, at first, less noticeable. Computerization permits the aggregation and manipulation of large amounts of data, which has positive implications for efficiency. When a large amount of aggregated information is available about an individual, however, personal privacy can be affected. Where a trip to the court house or an agency was once required to inspect and copy a public record, now anyone in the world with access to the Internet can obtain the same records from home 24-hours a day. Access is thus increased exponentially, often with unintended consequences. The types of information that agencies collect and the ease by which the Internet permits anyone access can give one pause, especially given the impact of such access on personal privacy.

Article I, s. 23 of the State Constitution, states that:

> Every person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. . .

This constitutional provision, however, also expressly states that this privacy right is not to be construed to limit the right of access to public records and meetings as provided by law. While the Legislature may determine that public necessity dictates that certain information is private and may create an exemption to protect it, without such an exemption a public record that contains private information must be released upon request.[12]

While the Legislature has regulated the restrictive impacts of technology, it has not yet adopted explicit, comprehensive *general* standards to regulate those negative *expansive* aspects of technology. This is likely for four reasons. First, computer technology has developed at a rapid pace and it has been difficult to create general policies for what is, in effect, a moving target. Second, given the variety of entities that fall within the definition of "agency" and their various sizes, functions and funding levels, it took a number of years for most entities falling within the definition to computerize their functions and to provide Internet access. Even today, some agencies are less computerized than others and there are agencies that do not provide Internet access to public records. Given these differences, provision of access to public records on the Internet has never been mandatory. Nevertheless, the Legislature appears to have assumed that over time agencies would use electronic recordkeeping and the Internet and the practice was encouraged in s. 119.01(2)(e), F.S.:

> Providing access to public records by remote electronic means is an *additional method* of access that *agencies should strive to provide to the extent feasible.* If an agency provides access to public records by remote electronic means, such access should be provided in the most cost-effective and efficient manner available to the agency providing the information [*emphasis added*].

A third issue affecting the development of general standards regulating the expansive impacts of technology is that limits on access to public records are dealt with on a case-by-case basis, i.e., by the creation of exemptions. Under the State Constitution, exemptions must relate to a single subject and be created in a separate bill. For example, in response to

[9] Section 119.01(2)(a), F.S.
[10] Section 119.01(2)(b), F.S.
[11] Section 119.01(2)(c), F.S.

[12] Federal law, however, may protect some information.

concerns about the availability of social security numbers, the Legislature created an exemption for social security numbers held by agencies.[13] At the same time, the Legislature established limitations on agency collection of social security numbers, requiring their collection to be relevant to the purpose for which they were collected and prohibiting their collection unless the need was clearly documented.[14] Agencies were required to review social security numbers collected prior to May 13, 2002, for compliance.[15] The collection of other types of potentially sensitive information by agencies generally, however, has not been addressed. Thus, given the historical and legal context of regulating access to public records, individual problems were more likely to be addressed by the enactment of specific exemptions, than by the creation of general standards.[16]

The fourth reason affecting the development of general standards regulating the expansive impacts of technology is because access to public records on the Internet generally has been considered to be a very good development. If provision of access to documents at the courthouse was a public good, then provision of those documents on the Internet was even better. This view, however, has been challenged by two developments, concerns about domestic security and identity theft.

After the terrorist attacks of September 11, 2001, questions were abruptly raised about the availability of certain types of information on the Internet and the impact of that information on national security. The enactment of exemptions for security system plans, among others, is an example of the legislative response to this concern.[17] Nevertheless, as recently as October 2004, Florida public school plans were located on the Internet and copies were discovered in Iraq.[18] Additionally, as Internet use became more widespread, concerns about personal privacy were raised as identity theft rates increased. According to a Federal Trade Commission report, approximately 10 million Americans discovered that they were victims of identity theft in 2002.[19] The report estimates a $33 billion impact from identity theft during that one year period. It should be noted that complaints of identity theft to the Federal Trade Commission have continued to rise, from 86,212 in 2001 to 214,905 in 2003.[20]

A statutory mandate requiring Internet availability of public records provides an example of the unintended consequences of expanded access. In 2000, the clerks of the circuit court were required to provide Internet access to all official records[21] by January 1, 2006.[22] Thereafter, this mandate was modified after complaints were received regarding the disclosure of exempt, as well as other non-exempt but "sensitive" personal, information on these sites.[23] The Legislature expressly prohibited the posting of military discharge papers, death certificates, court files, records or papers relating to issues governed by the Florida Rules of Family Law, Juvenile Procedure, or Probate on the Internet. These prohibited records, however, were permitted to remain on the Internet if they had been posted already unless an affected party requested their removal in writing.[24]

---

[13] Section 119.0721, F.S.

[14] Additionally, the Legislature prohibited persons who prepare or file documents for recording with the county recorder on or after October 1, 2002, from including social security numbers unless expressly required by law.

[15] While agencies were required by the same section to report the commercial entities that requested social security numbers during the previous year, they were not required to report whether they had reviewed social security numbers collected prior to May 2002, for compliance with the standard enunciated in the section.

[16] During the interim, the Second District Court of Appeal noted that individuals have a legitimate expectation of privacy in their social security number. In that case, the plaintiffs refused to provide their social security numbers when applying for a homestead exemption and, as a result, their application was denied. The court held that the agency first should have determined whether the plaintiffs had a legitimate expectation of privacy in their social security numbers without regard to other considerations, such as the necessity to submit an application in order to obtain the benefit. If so, the agency would have to prove both a compelling state interest and that the requirement accomplished the state's goal by the least intrusive means. *See*, *Thomas and Thomas v. Smith, Nelson and Zingale*, Case No. 2D02-4018 (2nd DCA).

[17] *See*, ss. 119.071 and 286.0113, F.S.

[18] *See*, "Disks in Iraq hold details about U.S. schools," CNN.com, October 8, 2004.

[19] *Identity Survey Report*, Federal Trade Commission , page 4, September, 2003.

[20] *National and State Trends in Fraud and Identity Theft*, Federal Trade Commission, page 9, January 22, 2004.

[21] The Florida Statutes require that certain documents be recorded with the clerk's office. The purpose for recording a document is to put the public on notice regarding the contents of that document. Examples include, deeds, mortgages, notices of levy, tax executions, powers of attorney, judgments, and marriage licenses. Official records are public records.

[22] Section 28.2221, F.S.

[23] *See*, Final Staff Analysis of the Committee Substitute for House Bill 1679.

[24] Since that time, the Florida Supreme Court has issued

Social security numbers, bank account, debit, charge, or credit card numbers in court or official records that are exempt also were expressly permitted to remain available for inspection until January 1, 2006, unless a request for redaction is made. After January 1, 2006, the clerks must protect that information, even without a request for redaction.[25]

Thus, it is apparent that consideration should be given to what is being collected and made available on the Internet and what the potential impacts could be *prior* to posting it. Without such consideration, Internet use poses a significant concern.

METHODOLOGY

Staff interviewed experts in open records and meetings law, researched case law, and surveyed state agencies and representatives of cities and counties regarding issues that affect open government in Florida.[26]

FINDINGS

Organization of Exemptions – There are approximately 900 exemptions to public records and meetings requirements.[27] Exemptions are contained in the Public Records Act, in ch. 289, F.S., and throughout the *Florida Statutes*. The exemptions that are provided in the Public Records Act are located in three sections. Section 119.071, F.S., which is entitled *General exemptions from inspection or copying of public records*, however, contains just one exemption.[28] Additionally, there is a general exemption for social security numbers that is located in a separate section that would fit in s. 119.071, F.S., the general exemption section.[29]

The bulk of exemptions contained in the Public Records Act are located in s. 119.07(6)(a)-(jj), F.S. In addition to containing exemptions, however, that section also establishes standards for inspecting and copying records, sets permissible fees for copies, and establishes other requirements. Some exemptions in s. 119.07(6)(a)-(jj), F.S., apply generally to all agencies while others apply to only state agencies or local agencies, and others apply more specifically to a particular agency. All of these exemptions are mixed together. Further, for the most part, these exemptions are not organized according to topic. One example of an exemption that is topical is contained in paragraph (i) of subsection (6). This provision exempts information that would identify a variety of agency employees, their spouses and children.[30] While topical, the exemption is internally inconsistent from one employee group to another, often with no apparent basis for the distinction. This exemption, in and of itself, could be the topic of an entire interim study.

While most agencies indicated that they reviewed statutes annually to ensure they were aware of any new applicable exemptions, approximately 70% of agencies surveyed indicated that it would be helpful if the Legislature were to place general exemptions in one section of statute, instead of the current *ad hoc* manner in which exemptions are placed in the *Florida Statutes*. The current arrangement could be improved by retaining only those exemptions that apply to all agencies or multiple agencies in the Public Records Act, with appropriate subheadings. Further clarity could be provided by transferring and relocating agency specific exemptions to other appropriate sections of law.[31]

Amended Administrative Order No. AOSC04-4, which limits what *court* records could be placed on the Internet. That order has been challenged, but resolution is pending. Further, the Committee on Privacy and Court Records, a judicial committee, is preparing a report that will recommend comprehensive policies and rules governing electronic access to court records in a report due July 2005.

[25] Section 119.07(6)(gg), F.S.

[26] The survey was forwarded to 44 entities that met the definition of "agency" for purposes of the Public Records Act. Of the 44 entities, 33 responded to the survey, which is a 75% response rate. It should be noted that the vast majority of entities surveyed (40) were statewide entities and water management districts. Originally, a larger sample of local governmental entities was to have been selected to be surveyed; however, only a few local governmental entities were surveyed due to the fact that a succession of hurricanes hit the state during the survey period.

[27] This estimate may be an undercount in that many statutory sections that are counted as a single exemption often protect multiple types of information.

[28] The exemption is for security system plans.

[29] Section 119.0721, F.S.

[30] This exemption is one of multiple exemptions that protect social security numbers.

[31] Section 119.07(6)(aa), F.S., provides a specific exemption for personal information in a motor vehicle record that identifies the subject. A "motor vehicle record" is defined to mean any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration or identification card issued by the Department of Highway Safety and Motor Vehicles. Section 119.07(6)(cc), F.S., provides a specific exemption for specific records held by the Department of Health or

Additional exemptions are scattered throughout the *Florida Statutes*. The exemptions that are contained outside the act typically relate to the entity that is covered in the other section of law. A few agencies recommended that all exemptions be placed in both the Public Records Act and in the section of the *Florida Statutes* to which they relate. This method would result in duplication of exemptions, as well as the potential for different amendments to those exemptions, which could result in conflicting exemptions, and is, therefore, not recommended.

General Exemptions – A general or uniform exemption may be defined as an exemption that applies to all agencies subject to open records or meetings requirements. For example, s. 119.0721, F.S., makes confidential and exempt social security numbers held by any agency. A specific exemption is an exemption that applies to records held by a particular agency.[32] Over the years, some exemptions that could have been drafted to apply generally were instead drafted to apply to a single agency in one section of law, and recreated to apply to another agency in another section of law, and so forth. For example, in addition to the general exemption for social security numbers, it appears that there are approximately 44 other provisions in the *Florida Statutes* that exempt social security numbers. For the most part, these specific exemptions predate the general exemption. Further, some of them contain different standards based on type of employment. Such a distinction may be appropriate in some cases, but may not in others. In most cases, however, redundant exemptions serve little purpose other than to increase the number of exemptions and often result in potential confusion.

Given the high number of exemptions, as well as the variety and complexity of issues affected by them, and the fact that new exemptions are created annually, a complete review of exemptions will take years to complete. Currently, there are three methods by which to review and modify existing exemptions. The first is by a member bill. The second is by assignment of an interim project and a committee bill. The third is by Open Government Sunset Review and committee bill.[33] All three methods are hampered by a constitutional limitation that requires exemption bills to relate to a single subject. The first two methods are not likely to occur periodically or on a scheduled basis. The third method, however, is already periodic and scheduled. Under the Open Government Sunset Review Act, all newly-created exemptions are subjected to review five years after enactment. This process currently requires the consideration of certain topics in the review process.[34] The act, however, does not require consideration of whether an exemption is redundant of other exemptions or if the exemption could be merged with other exemptions, or if a uniform exemption could be created. Amendment of the Open Government Sunset Review Act to require consideration of those issues could result in a periodic, scheduled review of a greater number of exemptions.

One uniform exemption that would help agencies, as well as the businesses who must file sensitive information with regulatory agencies, involves trade secret information. There are multiple exemptions for trade secrets for specific agencies,[35] but there is no exemption that applies to all agencies. A uniform exemption would reduce the number of exemptions, create more uniformity, and prevent agencies who receive trade secret information from having to release that information when they do not have an exemption.[36]

its service providers.

[32] It is estimated that there are approximately 45 instances in the *Florida Statutes* that provide exemptions for social security numbers.

[33] Section 119.15, F.S.

[34] Specifically, the Open Government Sunset Review Act requires consideration of: (1) what specific records or meetings are affected; (2) whom does the exemption uniquely affect, as opposed to the general public; (3) what is the identifiable public purpose or goal of the exemption; and (4) can the information be readily obtained by alternative means. An exemption is to be created or retained under the act only if it: (1) is of a sensitive, personal nature concerning individuals; (2) is necessary for the effective and efficient administration of a governmental program; or (3) affects confidential information concerning an entity.

[35] For example, s. 1004.4472(1)(a), F.S., contains an exemption for specific information held by the Florida Institute for Human and Machine Cognition, Inc. Specifically, the exemption protects material relating to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002 or proprietary information received, generated, ascertained or discovered during the course of research conducted by or through the Florida Institute for Human and Machine Cognition, Inc., and its subsidiaries, and business transactions resulting from some research.

[36] Given the process for review and repeal of new exemptions under the Open Government Sunset Review Act, it would be advisable to retain all other exemptions during the period prior to the review of a uniform exemption to ensure the viability of existing exemptions until it is clear the uniform exemption will be retained.

The creation of a uniform exemption for this information would also help to resolve a problem that was addressed in a recent case, *SEPRO Corporation v. Department of Environmental Protection* that is currently on appeal to the Florida Supreme Court. In that case, the statement of public necessity[37] for an exemption for ". . . data, programs or supporting documentation which is a trade secret as defined in s. 812.081, F.S., which resides or exists internal or external to a computer, computer system, or computer network . . .," that is found in s. 815.04, F.S., was interpreted by a district court to be an exemption.[38] This interpretation had the result of extending protection to certain information that had been filed with an agency, but the interpretation may not withstand Supreme Court review.

SEPRO contracted with the Department of Environmental Protection to assist in the eradication of hydrilla from certain lakes. A public records request was made by another party for information relating to SEPRO and its processes for treating hydrilla. Upon discovering the request, SEPRO's counsel informed the department that certain documents should be protected as trade secrets. The department advised that it intended to release the documents as the documents were not timely marked as confidential prior to receipt of the public records request.[39] The department did not release the documents as suit was filed to prevent disclosure. The circuit court found that certain documents could be disclosed and others could not. SEPRO appealed and the district court affirmed, finding that the documents that the corporation failed to mark as confidential prior to the public records request could be disclosed and held that the trade secret exemption applied to electronic mail sent to the department. Noting that it is a felony to release trade secret information under s. 815.04(3), F.S., the court stated:

> Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, *it is imperative that a public records exemption be created*. Currently, s. 812.081, F.S., provides a definition for "trade secret"[40] and makes it a felony of the third degree for any person to intentionally deprive or withhold from the owner the control of a trade secret, or to intentionally appropriate, use, steal, embezzle or copy the trade secret. . . . The original placement (of the exemption) . . . evinces a contemporaneous view that the exemption . . . applies to more than computer data, programs or supporting documentation. . . (*emphasis added*).

Enactment of a uniform exemption for trade secrets, along with removal of s. 815.045, F.S., from the *Florida Statutes*, would provide general protection for trade secrets and also ensure that statements of public necessity are not interpreted as exemptions.

Technology – As previously noted, the impact of technology is one of the most significant issues affecting public records. The distribution of public records on the Internet without consideration of the potential impact of global accessibility to the various types of information being disseminated is an issue of some concern. Internet accessibility may affect exempt or confidential records, as well as "sensitive," personal information that has not been made exempt.[41]

Article I, s. 24 of the State Constitution, the Public Records Act and the Sunshine Law apply to a wide variety of public entities at the state and local level, and to private entities that perform functions on their behalf. These agencies not only differ in function, but in size, funding levels, computerization of functions, and use of the Internet to provide public access to records and to perform other regulatory functions or services. As a result, creating very narrow standards that apply uniformly, as opposed to more general

[37] Section 815.045, F.S., which begins . . . "[t]he Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt . . . " is the required public necessity statement for s. 812.081, F.S.

[38] Article I, s. 24 of the State Constitution requires each exemption bill to contain a public necessity statement that supports it. Typically, a public necessity statement is published in the *Laws of Florida*, but not in the *Florida Statutes*. The CS/SB 1678 from 2004 struck two public necessity statements from the *Florida Statutes* but retained s. 815.045, F.S., because it was on appeal.

[39] Section 688.002(4)(b), F.S., requires documents containing trade secrets be marked.

[40] Section 812.081(1)(c), F.S., states in part: "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. . . .

[41] For example, information in court or official records related to divorce proceedings.

legislative policies, could be counterproductive as overly-specific requirements could impede a variety of governmental operations. While determining such standards is difficult, given the Legislature's ". . . broad purpose of determining policies . . . ," the Legislature is the appropriate branch of government to establish general standards regulating the issue.[42]

One narrow standard, however, that could be explicitly stated is a requirement that any agency that makes public records available on a publicly-accessible Internet website must redact all exempt or confidential information in those records, unless an exception to the exemption applies. While this would clearly close any gaps that permit exposure of exempt or confidential information, it would be inconsistent with current law, at least as applied to the websites of the clerks of court.[43] The duties and functions of the clerk related to official and court documents are somewhat unique and arguments can be made for not including them within this requirement at this time. If, however, publication of exempt or confidential information, as well as other non-exempt "sensitive" information is not dealt with uniformly across agencies, gaping holes will continue to exist.

In conjunction with this policy, it would be appropriate to require agencies to review publicly-available websites to ensure that exempt or confidential information has been redacted. Further, it may be appropriate to authorize affected individuals who find exempt or confidential information related to them on a publicly-available agency Internet website to notify the agency and request redaction.

Based upon the survey results, it appears that executive branch agencies have reviewed the types of information they collect to determine if collection is necessary. This process, however, appears to have been primarily related to the social security number review process required by s. 119.0721, F.S. The Legislature may wish to consider enacting a general policy requiring agencies to periodically review the types of information that they collect to determine if it is necessary to perform their duties, especially in light of the right to privacy afforded Floridians under Article I, s. 23 of the State Constitution.

Further, the majority of executive branch agencies that provide Internet access to public records responded that they distinguish between the types of information that are available in traditional formats from that which they make available to the public on the Internet.[44] Most indicated that general policies, operating procedures, and reports were made available on-line. Nevertheless, some agencies provide far more information on-line than others. Further, a determination regarding what information is made available on the Internet is made without legislative input. As a result, the Legislature may wish to consider the appropriateness of distinguishing between public records that should be available to all persons on-line and those that should not because of a greater potential for misuse, even where such information is not exempt or confidential. A detailed examination of what individual records should or should not be available is beyond the scope of this report. Further, such an examination would benefit from the recommendations in the final report of the Florida Supreme Court Committee on Privacy and Court Records.

Survey results also showed some inconsistency regarding public notice of the right to inspect and copy public records. Given that this is a constitutional right, it may be appropriate to require agencies to post notice as this would provide consistency in practice, as well as educate the public.

The recommendations made in this report only begin the process of attempting to resolve some of the issues currently affecting open government. Both the creation of exemptions and the impacts of technology on open government will require constant monitoring. In the future, many records of all types may never have a physical existence but may be created and maintained digitally. Further, given continued outsourcing and privatization, it may be appropriate to revisit the general policies regulating the potential restrictive impacts of technology that are already in place, as well as the statutory fee structures in law.

RECOMMENDATIONS

Based upon the foregoing, it is recommended that:

1. Chapter 119, F.S., contain only those public records exemptions that apply to all agencies or groups of agencies and that other exemptions be transferred to other chapters.
2. A uniform exemption for trade secret information be considered.

[42] Section 20.02(1), F.S.

[43] Section 28.2221, F.S.; see also, s. 119.07(6)(gg), F.S.

[44] Some databases are accessible on the Internet by an agency, the vendor, and agency personnel, but not to the public.

3. The negative impacts of expanded access to public records be addressed in statute by:
    a. Requiring agencies to review information on publicly-accessible websites to redact exempt or confidential information and to permit affected individuals to request redaction.
    b. Requiring agencies to consider whether the information they collect is needed to perform their duties.
    c. Monitoring the final report of the Committee on Privacy and Court Records and to consider the recommendations of that report.
4. Requiring the posting of notice in agency places of business and on internet sites about the public right to access public records and meetings.