The Florida Senate

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Committee on Governmental Oversight and Productivity — Senator Nancy Argenziano, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 119.084, F.S., DATA PROCESSING SOFTWARE

SUMMARY

Under Florida law, data processing software is a public record. Section 119.084(2), F.S., provides general authority to agencies to copyright data processing software that they develop and to enforce their copyrights. The provision also authorizes agencies to sell or license the use of the software based upon market considerations. If, however, agency-copyrighted software is required by a user *solely* for application to public records held by that agency, the standard public record copying fees of s. 119.07(4), F.S., apply instead of the market-based fee. The general authority of agencies to copyright data processing software will expire October 2, 2006, unless the Legislature reviews and saves the section from repeal.

The general authority permitting agencies to copyright and sell their software based upon market considerations is, in effect, an exemption from public records requirements. The public necessity statement enacted in support of the provision provides that copyright authority enables agencies to recoup production expenses, which accrues to the benefit of the public.

Based upon survey responses, it appears that few agencies are using the authority to copyright the data processing software that they create. Nevertheless, a few agencies continue to copyright and sell their data processing software and these agencies have received substantial sums from sales. Further, these entities recommend retention of the provision. As the provision is still being used by a small number of agencies, and as the provision meets the requirements of the Open Government Sunset Review Act of 1995, s. 119.084, F.S., is recommended for retention.

BACKGROUND

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[2] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

The Public Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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

Unless specifically exempted, all agency[4] records are available for public inspection. The term Apublic record@ is broadly defined to mean:

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[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution
[3] Chapter 119, F.S.
[4] 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,

> 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.[5]

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.[6] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[7]

General policy standards related to computer records are contained in s. 119.01, F.S. Agency use of computers should not restrict access to public records.[8] Agencies are required to consider whether a computer system is capable of providing data in a common format when designing or acquiring an electronic recordkeeping system.[9] Further, agencies are prohibited 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 that agency. Agency use of proprietary software must not diminish the right of the public to inspect and copy a public record, subject to copyright and trade secret laws.[10]

Only the Legislature is authorized to create exemptions to open government requirements.[11] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[12] A bill enacting an exemption[13] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[14]

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.[15] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[16]

The Open Government Sunset Review Act of 1995[17] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public

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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."

[5] Section 119.011(11), F.S.

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

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

[8] Section 119.01(2) (a), F.S., provides that ". . . [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."

[9] Section 119.01(2) (b), F.S.

[10] Section 119.06(o), F.S., makes exempt data processing software obtained by an agency under a licensing agreement which prohibits its disclosure if that software is a trade secret as defined in s. 812.081, F.S.

[11] Article I, s. 24(c) of the State Constitution.

[12] *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).

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

[14] Art. I, s. 24(c) of the State Constitution.

[15] Attorney General Opinion 85-62.

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

[17] Section 119.15, F.S.

purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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.[18]

The act also requires consideration of the following:

(1) What specific records or meetings are affected by the exemption?
(2) Whom does the exemption uniquely affect, as opposed to the general public?
(3) What is the identifiable public purpose or goal of the exemption?
(4) Can the information contained in the records or discussed in the meeting by readily obtained by alternative means? If yes, how?

In addition to these considerations, pursuant to amendments to the section made by ch. 2005-251, L.O.F.,[19] that are not effective until October 1, 2005, consideration must also be given to the following:

(1) Is the record or meeting protected by another exemption?
(2) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act of 1995 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.[20] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Copyright Authority – The Federal Copyright Act of 1976[21] protects

> . . . original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

To be subject to copyright, a work must be original, an independent creation of the author, and "fixed in any tangible medium," such as the written word, sound recordings, and visual images. Copyright protection is available only for an *expression* of an idea and not for the idea itself.[22]

Works created by an officer or employee of the United States government as a part of his or her duties are in the public domain and may not be copyrighted.[23] Federal law, however, does not

[18] Section 119.15(4) (b), F.S.
[19] *See*, Committee Substitute for Senate Bill 1144 by the Committee on Governmental Oversight and Productivity and Senator Argenziano.
[20] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974).
[21] 17 U.S.C. 2. 102(a).
[22] *Circular 1, Copyright Protection*, U.S. Copyright Office
[23] 17 U.S.C. s. 5.

prohibit copyright of works produced by other governmental entities.[24] As a result, state and local governments may copyright their works, depending upon the law of the jurisdiction.[25] Some states (some examples include California,[26] Alaska,[27] Minnesota,[28] Oregon,[29] and North Dakota,[30] among others) have permitted agencies to copyright agency-created software.

In Florida, a state agency is a creature of statute. As such, it has only those rights and privileges given to it by the Legislature:[31]

> An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.[32]

The Legislature has not provided general statutory authority to all agencies to copyright their work products.[33] The Legislature, however, has delegated the authority to obtain copyrights to specific agencies. For example,

> [t]he Department of State is authorized to do and perform any and all things necessary to secure letters patent, copyright and trademark on any invention or otherwise, and to enforce the rights of the state therein; to license, lease, assign, or otherwise give written consent to any person, firm or corporation for the manufacture or use thereof, on a royalty basis, or for such other consideration as said department shall deem proper; to take any and all action necessary, including legal actions, to protect the same against improper or unlawful use or infringement, and to enforce the collection of any sums due the state . . . .[34]

Other specific examples where the Legislature has delegated statutory authority to obtain copyrights are for instructional materials and ancillary written documents;[35] projects of the Florida Space Authority;[36] and general authority for the Department of the Lottery,[37] the Department of Transportation,[38] the Department of Citrus,[39] water management districts, [40] and the Florida Institute of Phosphate Research[41] to obtain copyrights, patents, and trademarks.[42]

In some instances, the Legislature has *required* an agency to obtain a copyright. For example, the Department of State is required to obtain a copyright for the Florida Administrative Code.[43]

Section 286.021, F.S., establishes legal title to patents, trademarks, and copyrights obtained by the state, or any of its boards, commissions or agencies in the Department of State. Consent of the

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[24] *See Bldg. Officials & Code Adm'rs v. Code Tech. Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980); *and see*, *County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 188 (2nd Cir. 2001).

[25] The U.S. Copyright Office states in *The Compendium of Copyright Office Practices* that legislative enactments, judicial opinions and administrative rulings, whether federal or state, are ineligible for federal copyright protection for public policy reasons.

[26] See, s. 6254.9 *Cal. Gov. Code*, in which agency-produced software is defined not to be a public record and which is permitted to be copyrighted.

[27] Sec. 44.99.400, *Alaska Statutes*.

[28] Sec. 13.03, *Minnesota Statutes*.

[29] Sec. 291.042, *Oregon Revised Statutes*.

[30] Sec. 44-04-18.5, *North Dakota Statutes*.

[31] *Seaside Properties, Inc., v. State Road Department*, 190 So.2d 391 (3rd DCA 1966).

[32] *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5th DCA 1985).

[33] See, *Microdecisions, Inc. v. Skinner*, 889 So.2d 871 at 875 (2nd DCA 2005), noting that no statute authorizes a county property appraiser to hold a copyright. *See also*, AGO 2003-42, noting no statute generally authorizes counties or county agencies to secure copyrights. *See also*, AGO 2000-13 holding that "a state agency is not authorized to secure or hold a trademark in the absence of specific statutory authority to do so."

[34] Section 286.031, F.S., originally enacted by s. 2, ch. 21959 (1943).

[35] Section 288.047(7), F.S.

[36] Section 331.303(16), F.S.

[37] Section 24.105(10), F.S.

[38] Section 334.049, F.S.

[39] Section 601.101, F.S.

[40] Section 373.608, F.S.

[41] Section 378.101, F.S.

[42] This list is not a comprehensive list of all delegations of statutory authority to obtain copyrights, patents, or trademarks.

[43] Section 120.55(1) (a) 1., F.S.

department is required for use.[44] There are, however, numerous statutory exceptions to this general rule that establish legal title in other agencies.[45]

While some Florida agencies have been authorized to hold copyrights since at least 1943, it could be argued that in a state with a constitutional right of access to public records, agency work products that are public records should be considered to be in the public domain, like those of their federal counterparts. The term "public domain" has been defined as a ". . . true commons comprising elements of intellectual property that are ineligible for private ownership."[46] Under copyright law, works that are in the public domain are not copyrightable and may be freely used by any member of the public. If public records are in the public domain, it could be argued that a public record should be precluded from copyright protection.

It must be noted, however, that the public does not have unfettered access to all public records. The Legislature has the constitutional authority to create exemptions under s. 24, Art. I of the State Constitution, that limit or proscribe public access. Thus, it could be argued that exempt records are not in the public domain and the Legislature may authorize copyright of those records. The Second District Court of Appeal noted that

> . . . Florida's Constitution and its statutes do not permit public records to be copyrighted unless the legislature specifically states they can be.[47]

Further, the court stated

> To be sure, the legislature may exempt specific public records from the public records law *[citations omitted]*. The Sunshine Amendment permits the legislature, by two-thirds vote, to enact exemptions for public records, but only after specially defining a public necessity and narrowly tailoring the exemption to that necessity *[citations omitted]*. Accordingly, the legislature has allowed restrictions on the unlimited access to some public records by enacting specific statutes authorizing certain agencies to obtain copyrights in particular circumstances *[citations omitted]*. . . .*A law permitting copyright protection of public records creates a public records exemption as contemplated in the Sunshine Amendment [emphasis added]* . . . .[48]

Copyright of Agency-Created Data Processing Software –Section 117 of the Copyright Act authorizes the copyright of computer programs. Section 119.084(2), F.S., authorizes any agency to copyright data processing software that it develops. "Date processing software" is defined by statute to mean[49]

> . . . the programs and routines used to employ and control the capabilities of data processing hardware, including, but not limited to, operating systems, compilers, assemblers, utilities, library routines, maintenance routines, applications, and computer networking programs.

"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.

Subsection (1) of s. 119.084, F.S., however, explicitly excludes some of the entities that are included in the general definition of "agency" provided in the Public Records Act. This subsection provides

> [a]s used in this section, "agency" has the same meaning as in s. 119.011(2), except that

[44] Originally enacted by s. 1, ch. 21959 (1943). See AGO 2000-13 noting that "[n]othing in these sections (referring also to s. 286.031, F.S.) would authorize the Department of State to apply for trademarks on behalf of an agency that could not demonstrate *independent statutory authority* for securing a trademark *[emphasis added]*."

[45] See, for example, s. 331.355, F.S., vesting ownership in the Florida Space Authority and s. 334.049, F.S., vesting ownership in the Department of Transportation.

[46] Litman, *The Public Domain*, 39 Emory L.J. 965 at 974 (No. 4 Fall 1990).

[47] *See*, *Microdecisions, Inc*., *supra*, at 876.

[48] *Ibid* at 875.

[49] Section 119.011(6), F.S.

> *the term does not include any private agency, person, partnership, corporation, or business entity [emphasis added]*.

Under subsection (2), the agency is authorized to sell or license the software it creates and it is permitted to establish the price for the sale or license based on market considerations. If, however, that software is required by a user solely for application to information maintained or generated by the agency, pricing for the software defaults to the general fee structure for public records provided in s. 119.07(4), F.S.,[50] because that information is public record and must be accessible.

Under s. 119.084(2)(b), F.S., the provisions of the section are supplemental to, and do not supplant or repeal, any other provision of law that authorizes an agency to acquire and hold copyrights.

The provision also permits an agency to enforce its copyright. The authority of agencies to copyright data processing software will expire October 2, 2006, unless the Legislature reviews and saves the section from repeal.

The public necessity statement supporting the provision notes that copyright and sale of agency-created software enables agencies to recoup production expenses. Further, the statement provides that copyright authority protects the integrity and development of computer technology design by restricting its use. Most importantly, public access is retained by requiring a reversion to the standard copying fee when the software is necessary ". . . solely for application to information maintained or generated by the agency . . . ." The public necessity statement concludes

> . . . Thus, the public benefit in copyrighting governmental software significantly outweighs any public or private harm because the use of this information without the necessary restrictions adversely impacts governmental agencies' proprietary rights.

A provision in law that is related to the copyright authority provided in s. 119.084, F.S., is contained in s. 119.07(6)(o), F.S.[51] This section provides that

> . . . data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in 812.081, and agency-produced data processing software that is sensitive,[52] are exempt from 119.07(1), and s. 24(a), Art. I of the State Constitution.

Section 119.011(13), F.S., defines "sensitive," for purposes of defining agency-produced software that is sensitive, to mean

> . . . only those portions of data processing software, including the specifications and documentation, which are used to:
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> (a) Collect, process, store, and retrieve information that is exempt from s. 119.07(1);
> (b) Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or
> (c) Control and direct access authorizations and security measures for automated systems.

Under this provision, agency-produced data processing software that is sensitive is exempt, even though the agency has not copyrighted that software.

METHODOLOGY

The methodology for this report included conducting a survey, with the assistance of the Legislative Committee on Intergovernmental Relations, of 500 state agencies and local governmental entities.[53]

[50] This section provides that if a specific fee is prescribed by law, then the custodian is required to furnish a copy upon payment of that fee. If a fee is not prescribed, an agency may not charge more than 15 cents per one-sided copy for a 14"x 8½" page. For all other copies, an agency may charge for the "actual cost of duplication," which is defined by s. 119.011(1), F.S., to mean the cost of material and supplies used to duplicate the record, but that does not include labor. A special service charge is permitted in addition to the actual cost if the nature or volume of the records requested requires extensive use of information technology resources or extensive clerical or supervisory assistance.

[51] This section will be renumbered as s. 119.071(1)(f), F.S.

[52] The designation of agency-produced software as sensitive does not prohibit an agency head from sharing or exchanging such software with another public agency.

[53] Of the 500 governmental entities surveyed, 68 responded, for a 13.6% response rate.

Additionally, the state universities were surveyed.[54] Staff also researched applicable case law, law review articles, and federal copyright law, and conducted interviews with experts on public records law, copyright law, and technology.

FINDINGS

Federal law expressly prohibits the copyright of works of the United States government.[55] State governments, however, do not come under this prohibition.[56] Thus, Florida law determines whether an agency may obtain a copyright.[57] In Florida, an agency may not copyright its works without a statutory delegation of authority to do so.[58] The Legislature has provided *specific* authority to a number of agencies to obtain copyrights. The Legislature has not provided general copyright authority for work products of agencies except for the authority to copyright data processing software.[59] Data processing software is a public record under Florida law.[60] As a result, the general authority permitting agencies to copyright and sell their software based upon market considerations is, in effect, an exemption from public records requirements.[61] As such, the law enacting this authority contained a statement of public necessity in support of the authority delegated.[62]

The public necessity statement supporting the exemption notes that copyright and sale of agency-created software enables agencies to recoup production expenses. Further, the statement provides that copyright authority protects the integrity and development of computer technology design by restricting its use. Thus, the exemption appears to fall within that portion of the Open Government Sunset Review Act of 1995 that supports reenactment for an exemption that protects ". . . 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."[63]

The provision protects only data processing software that has been copyrighted. Further, as any person may obtain a copy of the software upon payment of the standard fee if that software is necessary solely for application to agency data, the persons that are uniquely affected by the provision are those who wish to acquire the copyrighted data processing software for other purposes. Those persons must pay the market price under the statute. The identifiable public purpose of the exemption, as outlined in the statement of public necessity, is preservation of the proprietary rights of agencies. If agencies are able to recoup their development costs through sale of software at the market price, public coffers may receive additional funding, which benefits the public.

The information may be obtained for limited purposes under the standard fee provision, but like all copyrighted information, unauthorized use is actionable.

The agencies that responded to the survey did not indicate a high level of use of the authority granted under s. 119.084, F.S. Of the 20 state agencies that responded to the survey,[64] only the Department of Juvenile Justice[65] and the Florida Department of Law Enforcement (FDLE)[66] indicated that they had obtained copyrights for data processing software that they produced. Only the FDLE stated that it had sold or licensed its copyrighted software.[67] Of the 11 counties that responded to the survey,[68] only one indicated that

[54] Only the University of South Florida (USF) responded to the survey. The USF had indicated it had not obtained a copyright for data processing software it produced and made no recommendation whether to retain the section.
[55] 17 U.S.C. s. 105.
[56] *Ibid*. *See also, Bldg. Officials & Code Adm'rs v. Code Tech. Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980); *and see*, *County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 188 (2nd Cir. 2001).
[57] *Microdecisions, Inc., supra at 874*.
[58] AGO 2000-13.
[59] Section 119.084, F.S.
[60] Section 119.011(11), F.S.
[61] *Microdecisions, Inc.*, supra at 876.
[62] Ch. 2001-251, L.O.F.
[63] Section 119.15, F.S.
[64] The following state agencies responded to the survey: Agriculture & Consumer Services; Legal Affairs; State Board of Administration; Business and Professional Regulation; Children and Families Services; Education; Elderly Affairs; Environmental Protection; Financial Services; Fish & Wildlife Conservation Commission; Health; Highway Safety and Motor Vehicles; Juvenile Justice; Florida Department of Law Enforcement; Lottery; Management Services; Revenue; State; Workforce Innovation; Florida Parole Commission.
[65] The Department of Juvenile Justice indicated that it had obtained 1 copyright.
[66] The FDLE responded that it had obtained 2 copyrights.
[67] The FDLE indicated that it sold or licensed 1 sale of copyrighted software for $75,000.
[68] Of the 67 counties surveyed, the following counties responded to the survey: Dixie; Franklin; Hernando; Lake;

it had acquired a copyright for data processing software. Sarasota County indicated it had acquired 3 copyrights. In FY 2005 Sarasota County received $200,000 for software sales and in FY 2006 it received $500,000 in sales. None of the 37 cities that responded to the survey indicated that they had acquired a copyright for software they had created. Thus, only 4% of state agency and local government respondents indicated that they had obtained copyrights for data processing software.[69]

No agency indicated that it had received a request from a user for a copy of the copyrighted software for the standard public record fee.

Of the 20 state agencies that responded to the survey,[70] five made no recommendation whether to retain the exemption; and the remaining 15 state agencies (75%) recommended retention. Of the eleven counties that responded to the survey, six counties made no recommendation whether to retain the exemption, one county did not respond, and four counties (36%) recommended retention. Of the 37 cities that responded to the survey, 26 cities made no recommendation whether to retain the exemption; four did not respond, and seven cities (19%) recommended retention of the exemption. Thus, 38% of the respondents recommended retention of the authority to copyright agency-produced data processing software; 54% made no recommendation whether to retain; and 7% did not respond to the question.

Given the small percentage of respondents who have actually obtained copyrights for data processing software and the smaller number that have actually sold copyrighted data processing software, and given that the majority of respondents made no recommendation whether to retain the provision, it would appear that this general copyright authority has not been particularly useful to most agencies.

Nevertheless, it does still appear that some agencies are making use of the authority to copyright and sell agency-produced data processing software. For this small group, substantial sums have been obtained. The agencies within this group have recommended retention of the authority. Further, it was noted by one respondent that the ability of an agency to obtain a copyright may provide that agency with some leverage when negotiating with a vendor in the production of a software package for the entity. Thus, there are some practical benefits from this authority, even though limited at present.

As there are still practical benefits from this authority, even though only a small percentage of agencies appear to be using it, and as the provision preserves the ability of the public to obtain the copyrighted software for the standard fee when that software is necessary to apply to the agency data, retention of the provision is recommended.

RECOMMENDATIONS

Staff recommends that the Legislature retain the authority provided to agencies in s. 119.084, F.S., to copyright the data processing software that they produce, to sell such software based upon market considerations, and to enforce that copyright.

Levy; Manatee; Marion; Osceola; Pinellas; Putnam; Sarasota. This is a response rate of 16.4%.

[69] In the last Open Government Sunset Review of the authority to copyright agency-produced data processing software, 13% of respondents indicated they had copyrighted their software. Only one-half of 1% indicated that they had ever sold that software. Specifically, departments reported sales totaling $107,000; cities reported sales totaling $1,500; and counties reported sales totaling $683,000. *See*, *Copyright of Governmental Software*, by the Committee on Governmental Oversight and Productivity, Interim Project Report 00-79, page 4, September, 1999.

[70] Seventy-one percent of state agencies that were surveyed responded to the survey.