



The Florida Senate

Interim Report 2012-311

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Committee on Higher Education

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 267.1736(9), F.S., ST. AUGUSTINE HISTORIC DISTRICT

Issue Description

The 2007 Legislature¹ enacted a public records disclosure exemption for information held by the University of Florida's direct support organization that supports the university's historic preservation and historic preservation education responsibilities for the City of St. Augustine. The exemption applies to the identity of a donor or prospective donor to the direct support organization who desires to remain anonymous and all information identifying the donor or prospective donor. In accordance with the Open Government Sunset Review Act of 1995 under s. 119.15, F.S., this exemption shall be repealed on October 2, 2012, unless saved from repeal through reenactment by the Legislature.

Background

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 1892.² 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.³ Article I, s. 24 of the State Constitution, provides every person with a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

In addition to the State Constitution, the Public Records Act,⁴ 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. Unless specifically exempted, all agency⁵ records are available for public inspection. The term "public record" is defined to include "all documents,...or other materials...made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

¹ ch. 2007-77, L.O.F.

² Section 1390, 1391 Florida Statutes. (Rev. 1892).

³ Article I, s. 24 of the State Constitution.

⁴ ch. 119, F.S.

⁵ 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."

⁶ s. 119.011(12), F.S.

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

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption or substantially amending an existing exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act (the Act)¹⁴ 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. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

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.¹⁵ 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.¹⁶

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?

⁸ Art. I, s. 24(c) of the State Constitution.

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ s. 119.15, F.S.

¹⁵ *Id.*

¹⁶ s. 119.15(6)(b), F.S.

UF Historic St. Augustine, Inc. (UFHSA)

The 2007 Legislature authorized a direct support organization to assist the University of Florida in carrying out its responsibilities for historic preservation and historic preservation education for the City of St. Augustine and the state.¹⁷ In carrying out its purposes related to historic preservation of state owned historic properties in St. Augustine, the direct support organization is authorized to raise money; apply for and receive grants from federal, state and local governments and private sources; receive, hold, invest, and administer property; and make expenditures to or on behalf of the university. Following the development of a strategic plan for the historic area,¹⁸ the direct support organization was incorporated on June 28, 2010, as UF Historic St. Augustine, Inc. The UFHSA held its first board meeting on February 11, 2011.

According to the university, UFHSA has the following duties for historic preservation and historic preservation education:

- Responding to the state's needs for professionals in historic preservation, archaeology, cultural resources management, cultural tourism, and museum administration and helping meet the needs of St. Augustine and the state through educational internships and practicums;
- Preserving, maintaining, and exhibiting ancient or historical landmarks, locations, sites, monuments, buildings, remains or other property of historic or antiquarian interest within the City of St. Augustine, or surrounding areas;
- Assisting, establishing, or operating museums or other places for exhibits of documents and artifacts of historical interest;
- Promoting research and education in science, history, literature, music and art, and in connection therewith, publishing and procuring, for the use and benefit of the general public, books, reports, articles, documents, maps, photographs, or other media, about historic sites and persons in Florida history;
- To the extent permitted by law, soliciting, and receiving grants, gifts and bequests of money or property from the federal government, state government, foundations, business entities and individuals and holding or disposing of, and investing and reinvesting the same; and
- Acquiring, holding, managing, administering, selling, or in any manner, disposing of, dealing or trading in property of any kind.

Public Records Exemption

Under s. 267.1736(9), F.S., the following information held by UFHSA is exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- The identity of a donor or prospective donor to UFHAS who wishes to remain anonymous; and
- All information identifying such donor or prospective donor.

As of June 2011, no funds from the UFHAS have supported preservation activities, and no donors or prospective donors have requested anonymity. Thus, the public records exemption has not been used.

Findings and/or Conclusions

Florida Senate Higher Education Committee professional staff worked in consultation with professional staff of the Senate Committee on Governmental Oversight and Accountability and the Florida House of Representatives Government Operations Subcommittee of the Committee on State Affairs to determine whether the exemptions in s. 267.1736(9), F.S., meet the criteria for retention of the exemption. Senate professional staff surveyed the University of Florida concerning the use of the public records exemption and the records protected from public disclosure.

¹⁷ ch. 2007-54, L.O.F.

¹⁸ "St. Augustine Historic Area Strategic Plan," January 2009. Readable at:

http://www.facilities.ufl.edu/staugustine/docs/StAugustine_Historic_Area_Strategic_Plan_FINAL.pdf

The Specific Records Affected by the Exemption and Those Uniquely Affected by the Exemption

The public records exemption protects the identity and identifying information of donors and prospective donors of the UFHAS. The university anticipates that the “names, addresses, telephone numbers, other contact information, the amount of the respective gifts, paper and electronic correspondence, copies of checks, receipts, gift agreements, written direction from donors, and any other record from which the identity of a donor could be obtained, whether stored as hard copy and/or electronically” will be kept confidential. The prospective donors and donors to the UFHAS who wish to remain anonymous are the only individuals who would be affected by the exemption.

The Purpose and Public Necessity for the Exemption

The 2007 Legislature established the public records exemption, “to honor the request for anonymity of donors or prospective donors to the not-for-profit corporation and thereby encourage donations from individuals and entities that might otherwise decline to contribute.”¹⁹ The necessity of the exemption was explained as follows:

Without the exemption, potential donors may be dissuaded from contributing to the direct-support organization because such donors fear being harmed by the release of sensitive financial information. Difficulty in soliciting donations would hamper the ability of the direct-support organization to carry out its marketing, promotion, education, and preservation activities and would hinder fulfillment of the goal of the state in maintaining these state-owned properties and in preserving, promoting, and advancing historic preservation of these properties through funding by both the public sector and the private sector.²⁰

The public records exemption has not been used since the creation of UF Historic St. Augustine in June 2010. However, the University of Florida anticipates that providing anonymity to donors will be beneficial as the direct support organization continues fund raising efforts and has requested that the exemption be reenacted for that purpose.

Under s. 24(c), Art. I, of the State Constitution, the exemption must be no broader than necessary to accomplish the stated purpose of the law. The exemption in s. 267.1736(9), F.S., is narrowly drawn to exempt only the identity and identifying information about donors and prospective donors, and thus meets the constitutional requirement for a narrowly drawn exemption. The exemption serves one of the purposes for which an exemption may be created: it exempts information of a sensitive, personal nature concerning individuals.

Alternative Means for Obtaining the Records

According to the University of Florida, the information contained in the records could not be readily obtained by alternative means.

Other Exemptions Pertaining to the Records

As a state university direct support organization, the UFHAS receives a public records exemption under s. 1004.28(5), F.S., which provides an exemption for certain records relating to audits. This statute specifically exempts the identity of donors who desire to remain anonymous and requires that the anonymity of donors be maintained in the auditor’s report. This exemption does not specifically exempt the identity of prospective donors. The exemption in s. 1004.28, F.S.,²¹ was enacted prior to the constitutional amendment of 1992.

Possibly Combining Multiple Exemptions

A number of statutes create public records exemptions for the identity of donors and potential donors. In the future, the Legislature might consider combining such exemptions into a single one for each type of record, such as a general exemption for the identity of donors and prospective donors.

¹⁹ s. 2., ch. 2007-77, L.O.F.

²⁰ *Id.*

²¹ This section was previously codified as s. 240.299, F.S., and was renumbered as s. 1004.28, F.S., when the Florida School Code was rewritten in 2002.

Options and/or Recommendations

Senate professional staff has reviewed the exemption in s. 267.1736(9), F.S., and finds that the exemption meets the requirements for reenactment. The exemption, viewed against the Open Government Sunset Review criteria, protects information concerning individuals and is no broader than is necessary to allow UF Historic St. Augustine, Inc., to carry out its responsibilities for historic preservation and historic preservation education. While UFHAS has not used the public records exemption thus far, if a donor or potential donor to the organization requested anonymity, the exemption would be necessary to protect the information from public disclosure. Given the extensive duties of the organization for historic preservation and historic preservation education, it is likely that UFHAS will have occasion to use the exemption in the future. Accordingly, professional staff recommends that the public records and public meetings exemptions in s. 267.1736(9), F.S., be reenacted.