

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7013 PCB GO 06-06 OGSR Copyright of Data Processing Software
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1038

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) State Administration Council		Williamson	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Data processing software is a public record under Florida law. 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.

The bill retains the authority for an agency to copyright data processing software and to sell that software based upon market conditions. It also makes editorial changes. This authority will repeal on October 2, 2006, if the bill does not become law.

The bill may have a limited fiscal impact on state and local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

Copyright Authority

The Federal Copyright Act of 1976¹ 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.²

Works created by an officer or employee of the United States government, as part of his or her duties, are in the public domain and cannot be copyrighted.³ Federal law, however, does not prohibit copyright of works produced by other governmental entities.⁴ As a result, state and local governments may copyright their works depending upon the law of the jurisdiction.⁵ As state governments do not come under the federal prohibition,⁶ Florida law determines whether an agency may obtain a copyright.⁷

In Florida, an agency may not copyright its works without specific statutory authority.⁸ The Legislature has provided general copyright authority for data processing software only.⁹

Data Processing Software

Data processing software¹⁰ is a public record under Florida law. As a result, the general authority permitting agencies¹¹ to copyright and sell their software based upon market considerations is, in effect,

¹ 17 U.S.C. 2. 102(a).

² *Circular 1, Copyright Protection*, U.S. Copyright Office.

³ 17 U.S.C. s. 5.

⁴ *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).

⁵ 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. Some states have permitted agencies to copyright agency-created software. Examples include California (s. 6254.9 *Cal. Gov. Code*), Alaska (sec. 44.99.400, *Alaska Statutes*), Minnesota (sec. 13.03, *Minnesota Statutes*), Oregon (sec. 291.042, *Oregon Revised Statutes*), and North Dakota (sec. 44-04-18.5, *North Dakota Statutes*).

⁶ *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).

⁷ *Microdecisions, Inc.*, *supra* at 874.

⁸ *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.”

⁹ Section 119.084, F.S.

¹⁰ “Data processing software” means “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.” Section 119.011(6), F.S.

an exemption from public records requirements.¹² As such, the law enacting this authority contained a statement of public necessity in support of the authority delegated.¹³

An agency has authority to acquire and hold a copyright for data processing software created by the agency, and to enforce its copyright.¹⁴ The agency may sell or license the software to a public agency or private person. The agency may establish a price for the sale and a licensing fee for the use of the software based on market considerations. However, if the software is required by a user solely for access to information maintained or generated by the agency, pricing for the software defaults to the general fee structure for public records¹⁵ because that information is a public record and must be accessible.¹⁶

Pursuant to the Open Government Sunset Review Act,¹⁷ the authority for agencies to copyright data processing software will expire October 2, 2006, unless reenacted by the Legislature.

Open Government Sunset Review Questionnaire

Agencies that responded to the Open Government Sunset Review questionnaire did not indicate a high level of use of the authority to copyright data processing software. Of the 20 state agencies that responded,¹⁸ only the Department of Juvenile Justice¹⁹ and the Florida Department of Law Enforcement (FDLE)²⁰ indicated they had obtained copyrights for agency produced data processing software. Only FDLE stated that it had sold or licensed its copyrighted software.²¹ Of the 11 counties that responded to the questionnaire,²² only one indicated that it had acquired a copyright for data processing software. Sarasota County indicated it had acquired three copyrights. In fiscal year 2005, Sarasota County received \$200,000 for software sales and in fiscal year 2006, it received \$500,000 in sales. None of the 37 cities that responded to the questionnaire indicated that they had acquired a copyright for agency created software. Thus, only four percent of state agency and local government respondents indicated that they had obtained copyrights for data processing software.

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.

Given the small percentage of respondents who have actually obtained copyrights for agency-created data processing software and the smaller number who have actually sold copyrighted data processing

¹¹ For purposes of granting authority to copyright data processing software, the term “agency” does not include a private agency, person, partnership, corporation, or business entity. Section 119.084(1), F.S.

¹² *Microdecisions, Inc.*, supra at 876.

¹³ Chapter 2001-251, Laws of Florida.

¹⁴ Section 119.084(2), F.S.

¹⁵ Section 119.07(4), F.S., provides that if the law prescribes a specific fee, then the custodian must furnish a copy upon payment of that fee. If no fee is 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.” The “actual cost of duplication” means the cost of material and supplies used to duplicate the record, but that does not include labor. Section 119.011(1), F.S. 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.

¹⁶ Section 119.084(2)(a), F.S.

¹⁷ Section 119.15, F.S.

¹⁸ The following state agencies responded to the questionnaire: Agriculture & Consumer Services; Legal Affairs; State Board of Administration; of Business and Professional Regulation; of Children and Families Services; of Education; Elderly Affairs; Environmental Protection; Financial Services; Fish & Wildlife Conservation Commission; Health; Highway Safety and Motor Vehicles; Juvenile Justice; Law Enforcement; Lottery; Management Services; Revenue; State; Workforce Innovation; Florida Parole Commission.

¹⁹ The Department of Juvenile Justice indicated that it had obtained one copyright.

²⁰ FDLE responded that it had obtained two copyrights.

²¹ FDLE indicated that it sold or licensed one sale of copyrighted software for \$75,000.

²² Of the 67 counties, the following responded to the questionnaire: Dixie; Franklin; Hernando; Lake; Levy; Manatee; Marion; Osceola; Pinellas; Putnam; Sarasota. This is a response rate of 16.4 percent.

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 useful to most agencies. Nevertheless, some agencies are making use of the authority to copyright and sell agency-created data processing software. For this small group, substantial sums have been obtained and the agencies within this group have recommended retention of the authority. Further, one respondent noted that the ability of an agency to obtain a copyright might provide that agency with some advantage when negotiating with a vendor for the production of a software package for that entity. Thus, there are some practical benefits from this authority.

Effect of Bill

The bill removes the repeal date thereby retaining agency authority to copyright and sell data processing software. It also makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 119.084, F.S., to remove the repeal date.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

As most agencies do not produce or market software, the bill should result in minimal or no fiscal impact on the private sector.

D. FISCAL COMMENTS:

For most state and local governments, the bill will have limited fiscal impact because most did not report that they produce and market their software. In the few instances where state and local governments do produce and sell their software, the bill should have a positive fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.