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Access to Electronic Public Records

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ACCESS TO ELECTRONIC PUBLIC RECORDS

BARBARA A. PETERSEN* and CHARLIE ROBERTS**

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I. INTRODUCTION

Florida has consistently been a leader in open government, with some of the country's strongest policies favoring disclosure of public records.¹ This rich tradition of open access culminated in the November 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to government records and stipulating that all laws shall "apply to records of the legislative and judicial branches" and remain in effect until they are repealed.²

Recently, however, many are questioning the efficacy of Florida's Public Records Law in the electronic age.³

[Because] 'new technology is putting considerable pressure on the laws that were passed to regulate [g]overnment information policy when information only existed on paper or other hardcopy formats . . . there may be a need to' [amend Florida's Public Records Law] 'to make certain that the benefits of broad disclosure of [g]overnment information are not lost as . . . [that] information becomes electronic.'⁴

In response to these issues, the Joint Committee on Information Technology Resources (Joint Committee) conducted an in-depth interim study, including three public hearings, and prepared a report on

1. See Patricia E. Chamberlain, *The Public Records Act: Should Trade Secrets Remain in the Sunshine?*, 18 FLA. ST. U. L. REV. 559, 560 (1991).

2. FLA. CONST. art. I, § 24(d).

3. See, e.g., JT. LEGIS. INFO. TECH'Y RESOURCE COMM., FLORIDA'S INFORMATION POLICY: PROBLEMS AND ISSUES IN THE INFORMATION AGE (1989) [hereinafter PROBLEMS AND ISSUES]; GROWTH MANAGEMENT DATA NETWORK COORDINATING COUNCIL, PUBLIC RECORDS LAW SUBCOMMITTEE, FINAL REPORT (1992) [hereinafter PRLS FINAL REPORT]; JT. LEGIS. INFO. TECH'Y RESOURCE COMM., A CRITICAL ANALYSIS OF PROPOSED AMENDMENTS TO FLORIDA'S PUBLIC RECORDS LAW (1992) [hereinafter CRITICAL ANALYSIS]; see also Sigman Spichal, *Florida Newspapers and Access to Computerized Government Information: A Study of How They Are Dealing with the New Technology* 3 (1991) (paper presented to the Southeast Colloquium of the Ass'n for Education in Journalism and Communication, Mar. 1991) (citation omitted) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

4. Jerry Berman, *The Right To Know: Public Access to Electronic Public Information*, 3 SOFTWARE L.J. 491, 523-24 (1989) (citation omitted).

the policy issues raised by the use of new information technology in government recordkeeping, titled *Electronic Records Access: Problems and Issues*.⁵

The purpose of this Article is to examine the issues raised during the interim study, and to discuss 1994 legislation filed in response to the Joint Committee's recommendations. Section II provides a brief history of the Joint Committee, as well as an overview of Florida's Public Records Law, codified at chapter 119, *Florida Statutes*. Section III examines the issues raised by the increasing computerization of public records. Section IV highlights the Joint Committee's conclusions and recommendations for legislation concerning the issues identified in Section III. Finally, Section V discusses the electronic records legislation and proposed amendments that the Legislature considered but failed to pass during the 1994 Regular Session.

II. OVERVIEW

A. *The Joint Committee on Information Technology Resources*

In the early 1980's, the president and speaker of the Florida Legislature established a "Joint Select Committee to develop recommendations for the Legislature on means to improve State development, acquisition, operation and control of electronic data processing systems."⁶ The Joint Select Committee studied the management of information technology in Florida government, and issued a report "based on the belief that the quality and quantity of services provided by state government for its citizens will suffer if action is not taken to better utilize" new and changing information technology.⁷ The Joint Select Committee recommended legislation to ensure "that new information technologies are acquired and used by state agencies in a manner that improves service delivery and . . . reduces the information burden for all levels of government. . . ."⁸ To achieve this goal, the Legislature created the Information Resource Commission—a Cabinet-level commission charged with implementing a comprehensive in-

5. See JT. LEGIS. INFO. TECH'Y RESOURCE COMM., *ELECTRONIC RECORDS ACCESS: PROBLEMS AND ISSUES* 34 (1994) [hereinafter *ELECTRONIC RECORDS REPORT*].

6. JT. SELECT COMM. ON ELECTRONIC DATA PROCESSING, *FINAL REPORT* 1 (July 25, 1983) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

7. *Id.*

8. *Id.* at 5.

formation policy and planning process—and the Joint Committee.⁹ The Joint Committee must

- 1) recommend necessary legislation in the area of information technology resources management and use;
- 2) review the use and management of information technology by state agencies; and
- 3) assist other committees "with such services as the joint committee may deem necessary, including, but not limited to, review of agency information technology resource plans . . . and evaluation of the overall impact of resource acquisitions on the productivity and services of the agencies."¹⁰

Since its inception, the Joint Committee has analyzed the impact of information technology on Florida's Public Records Law and has been active in legislative efforts focusing on information technology issues. In 1985, for example, the Joint Committee was instrumental in enacting the first legislation in the nation recognizing the impact of new computer technologies on public records.¹¹ Responding to complaints from records custodians of frequent requests for copies of entire computerized data bases, allegedly requiring substantial computer resources, the Joint Committee recommended that the Legislature amend the Public Records Law to allow for a special service charge for requests involving extensive use of information technology resources.¹² Senate Bill 208 also authorized state and local agencies to provide access to public records by remote electronic means as an additional method of "inspecting, examining, and copying public records."¹³ Furthermore, amendments to Florida's Public Records Law granted County constitutional officers the authority to include a "reasonable charge" for the labor and overhead associated with duplicating county maps or aerial photographs,¹⁴ and provided exemptions for certain agency software.¹⁵

9. See ch. 83-92, 1983 Fla. Laws 316 (codified at FLA. STAT. § 11.39 (1993)).

10. FLA. STAT. § 11.39(2) (1993).

11. See JT. LEGIS. INFO. TECH'Y RESOURCE COMM., DESCRIPTION OF THE JOINT COMMITTEE ON INFORMATION TECHNOLOGY RESOURCES 2 (1993) (on file with comm.).

12. See ch. 85-86, § 1, 1985 Fla. Laws 583 (codified at FLA. STAT. § 119.07(1)(a) (1993)); PROBLEMS AND ISSUES, *supra* note 3, at 36.

13. Ch. 85-86, § 2, 1985 Fla. Laws 583, 585 (codified at FLA. STAT. § 119.085 (1993)); see also JT. LEGIS. INFO. TECH'Y RESOURCE COMM., REMOTE COMPUTER ACCESS TO PUBLIC RECORDS IN FLORIDA (1985) [hereinafter REMOTE COMPUTER ACCESS].

14. See ch. 85-86, § 1, 1985 Fla. Laws 583 (codified at FLA. STAT. § 119.07(1)(a) (1993)).

15. See *id.* (codified at FLA. STAT. § 119.07(3)(q) (1993)). Section 119.07(3)(q) exempts software obtained by an agency if the licensing agreement prohibits its disclosure and the software is a trade secret. Agency-created software which is "sensitive" is also exempt. *Id.*

In 1989, the Joint Committee examined the major issues arising from the impact of technology on public records, and published a comprehensive report, titled *Florida's Information Policy: Problems and Issues in the Information Age*.¹⁶ The Joint Committee concluded in part that "[a]s more records are automated[,] there is a need to ensure that meaningful and equitable access to them is maintained," and recommended that the Legislature "continue to monitor access policies to determine if statutory changes are required."¹⁷

In the past two years, the Joint Committee has issued two public records reports. The first, *A Critical Analysis of Proposed Amendments to Florida's Public Records Law*, recommended that proposed amendments to chapter 119 restricting public records access should *not* be adopted by the Legislature, and suggested that the Department of State develop a model access policy "to help all government agencies in establishing access policies in compliance with the Public Records Law."¹⁸

The second report, *Agency-Created Data Processing Software as a Public Record: A Legal Analysis of § 119.083, F.S., Florida's Software Copyright Provision*,¹⁹ examined the extent to which Florida government agencies were using their authority to copyright and market agency-created software. Senator Daryl L. Jones,²⁰ Chairman of the Joint Committee, responding to controversy surrounding 1993 legislation, directed the Joint Committee staff to conduct "an in-depth interim study on the policy issues raised by the use of . . . new technology in government record keeping, and to prepare a report and make recommendations on the issues identified."²¹ Senator Jones identified five issues: defining reasonable access to electronic records;

16. PROBLEMS AND ISSUES, *supra* note 3.

17. *Id.* at 142.

18. See CRITICAL ANALYSIS, *supra* note 3, at 41. Generally, the proposed amendments would have: (1) distinguished inspection from other requests for records; (2) established a records custodian's proprietary interest in public records; (3) expanded the definition of "actual cost of duplication" to include the labor and overhead costs associated with the duplication of requested records; (4) based assessment of fees on the identity of the requestor and the purpose for which the record was requested; and (5) amended the definition of "data processing services" and "information technology resources" to include data base development. *Id.* at 17-18.

19. See JT. LEGIS. INFO. TECH'Y RESOURCE COMM., AGENCY-CREATED DATA PROCESSING SOFTWARE AS A PUBLIC RECORD: A LEGAL ANALYSIS OF § 119.083, FLORIDA STATUTES, FLORIDA'S SOFTWARE COPYRIGHT PROVISION 17 (1993) [hereinafter JCITR SOFTWARE REPORT]. The Joint Committee first explored computer software issues in its 1989 report, FLORIDA'S INFORMATION POLICY: PROBLEMS AND ISSUES. See PROBLEMS AND ISSUES, *supra* note 3, at 83-96.

20. Dem., Miami.

21. See Letter from Sen. Daryl L. Jones, Chairman of the Jt. Legis. Info. Tech'y Resources Comm., to all members of H. and S. Govtl. Ops. Comm. (Feb. 24, 1993) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

establishing statutory fees for specific types of public records; redacting exempt or confidential information; copyrighting computer software; and managing the impact of technology on an individual's right to privacy.²²

B. Florida's Public Records Law

1. A Brief History

Before the enactment of Florida's Public Records Law in 1909, Floridians enjoyed a common-law right to inspect governmental records. This limited common-law right required a person seeking access to demonstrate a legally recognized interest in the record.²³ The 1909 Public Records Law codified the common law and broadened the right of access and inspection by ensuring that "all [s]tate, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida."²⁴ A legal interest in the record was not required.²⁵ A 1975 amendment expanded this right by removing the citizenship limitation.²⁶ As Attorney General Butterworth has noted, Florida's Public Records Law "[is] unique in the breadth and scope of . . . [its] guaranty of public access. No other state can match Florida's commitment to its citizens that their government will be open and accessible to all."²⁷

Florida's exemplary tradition of public access continued in the 1992 general election with passage of a constitutional amendment guaranteeing public access to the records of all three branches of state government.²⁸ Allowing for the creation of exemptions by general law, the

22. *Id.*

23. See PROBLEMS AND ISSUES, *supra* note 3, at 27. See also Burt Braverman & Wesley Hepler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 723 (1981).

24. Ch. 5492, § 1, Laws of Fla. (1909) (codified at FLA. STAT. § 119.01 (1910)).

25. See OFFICE OF THE ATT'Y GEN., FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 84 (1992) [hereinafter SUNSHINE MANUAL] ("Chapter 119 requires no showing of purpose or 'special interest' as a necessary condition of access to public records.") (citation omitted).

26. FLA. STAT. § 119.01(1) (1993); SUNSHINE MANUAL, *supra* note 25, at 75.

27. SUNSHINE MANUAL 8 (1991).

28. FLA. CONST. art. I, § 24 (a). Specifically, the new amendment guarantees 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," including "the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or th[e] Constitution." *Id.* (emphasis added).

amendment requires the Legislature to: (1) state with specificity the public necessity justifying any exemption; (2) narrowly tailor all exemptions to accomplish the stated purpose of the law; and (3) provide for exemptions in single subject bills.²⁹ Under the amendment, any exemptions that were in effect on July 1, 1993—the amendment's effective date—remain in force until repealed.³⁰ The same is true of all rules of court controlling access to judicial records adopted before the November election.³¹ Thus, in October 1992, the Supreme Court of Florida adopted rules restricting public access to judicial and Florida Bar records, and during 1993 Special Session B a bill was passed regulating access to legislative records.³²

2. *The Basics*

Currently, state and local agencies may develop their own policies to implement the Public Records Law. Such access policies must comply with the requirements of chapter 119 and their judicial interpretations. Agencies do not have the discretion "to alter, change or place conditions upon the statute's provisions."³³ Factors to be considered in determining access policy include: the definition of key words, the cost of access and fees to be charged, the form in which the record is maintained and requested, the content of the public record and the number and substance of legislative exemptions, and procedures for enforcement and sanctions for violations.³⁴

a. *Cost of Access*

Concomitant with the right to inspect public records is the right to photocopy public records.³⁵ Under Florida law, the public records custodian must furnish a copy of the record upon payment of the fee

29. *Id.* § 24(c).

30. *Id.* § 24(d).

31. *Id.*

32. See *In re* Amendment to Fla. R. of Jud. Admin.—Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992) (amending FLA. R. JUD. ADMIN. 2.051); Fla. SB 20-B (1993).

33. See 1990 FLA. ATT'Y GEN. ANN. REP. 10 (citation omitted); 1992 FLA. ATT'Y GEN. ANN. REP. 9.

34. See PROBLEMS AND ISSUES, *supra* note 3, at 29.

35. See *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977) (citing *Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607 (Fla. 1944)). In *Winter*, the court found that "the right to inspect would in many cases be valueless without the right to make copies," and denying the right to copy the inspected record "would lead to an absurd result." *Id.*; see also FLA. CONST. art. I, § 24(a) (guaranteeing the right to inspect or copy any public record).

prescribed by law.³⁶ If there is no prescribed fee, the custodian may collect no more than fifteen cents for a one-sided copy of legal-size paper or smaller, and not more than an additional five cents for each two-sided copy.³⁷ For copies other than paper, such as, a magnetic tape or diskette, a custodian may charge both the actual cost of duplication³⁸ and the cost of any extensive use of agency resources incurred in complying with the request.³⁹

The actual cost of duplication includes only the cost of material and supplies used to duplicate the record; labor and overhead costs are specifically non-recoverable.⁴⁰ The charge for copies of county maps or aerial photographs supplied by county constitutional officers, such as sheriffs, tax collectors, property appraisers, supervisors of elections, and clerks of the court, may include a reasonable charge for the labor and overhead costs associated with duplication.⁴¹

In addition to the actual cost of duplication, a special service charge for record requests involving extensive use of information technology resources or agency personnel may be recovered.⁴² Although the statute stipulates that extensive-use charges must be reasonable and based on actual costs incurred by the agency, "extensive" is not defined. As a result, state and local agencies have considerable flexibility in determining access policy and assessment of fees.

The Public Records Law also authorizes state and local agencies to provide access to public records by remote electronic means, stipulating that fees for such access provided to the general public must be in accord with chapter 119's general fee provisions.⁴³ However, when remote electronic access is provided as a special form of access under contract with a specific user, an agency is required to charge a fee which includes both the direct and indirect costs of providing access.⁴⁴

36. See, e.g., FLA. STAT. § 28.24(9) (1993) (establishing a service charge for microfilm copies of public records supplied by circuit court clerks); *id.* § 322.20(10)(a) (establishing fees for various services and documents supplied by the Department of Highway Safety & Motor Vehicles); *id.* § 119.07(1) (authorizing county constitutional officers to include a reasonable labor and overhead charge for duplications of county maps or aerial photographs).

37. *Id.* § 119.07(1)(a).

38. *Id.*

39. *Id.* § 119.07(1)(b) (expressly stating that a special service charge for extensive use of agency resources may be charged *in addition to* the actual duplication cost).

40. *Id.* § 119.07(1)(a).

41. *Id.*

42. *Id.* § 119.07(1)(b).

43. *Id.* § 119.085.

44. See *id.* § 119.085.

b. Form

Florida's Public Records Law affords any person, regardless of interest, purpose, or intent, the right to inspect and copy any nonexempt public record.⁴⁵ The statute does not specifically oblige an agency to provide copies of public records in a particular form, such as a paper copy or a magnetic tape. In *Seigle v. Barry*,⁴⁶ the Fourth District Court of Appeal found that the intent of chapter 119 is to make public records available "in some meaningful form,"⁴⁷ but not necessarily that which is requested, and held that "access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records."⁴⁸ Noting that a records custodian has the option of complying with requests for a particular form, the court stated that in the event meaningful access is not permitted, a court may order access when "for any reason the form in which the information is proffered does not fairly and meaningfully represent the records"⁴⁹

In accordance with *Seigle*, the Department of State promulgated a rule on long-term electronic records storage requiring a records custodian to accommodate requests for specific forms of public records copies *if* the agency maintains the record in that form. If the record is not maintained in the requested form, the agency must provide access in some meaningful form as required by chapter 119.⁵⁰

c. Content and Exemptions

Under common law, records considered private, secret, or confidential were exempted from public inspection.⁵¹ In weighing the impor-

45. See *SUNSHINE MANUAL*, *supra* note 25, at 84; *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905).

46. 422 So. 2d 63 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

47. *Id.* at 66.

48. *Id.*

49. *Id.* at 66-67. The court listed three other situations where access may be permitted, including where

(1) available programs do not access all of the public records stored in the computer's data banks; or

(2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or

. . . .

(4) the court determines other exceptional circumstances exist warranting this special remedy.

Id. at 67.

50. See *FLA. ADMIN. CODE ANN.* r. 1B-26.003(6)(f)(3) (1992). The rule applies only to records which must be retained for 10 years or longer.

51. *PROBLEMS AND ISSUES*, *supra* note 3, at 31.

tance of public access against the harm that might result from disclosure, the courts determined the records that could be withheld, providing exemptions well into the 1970s.⁵² In 1979, however, the Supreme Court of Florida held that only statutory exemptions to the Public Records Law are allowed.⁵³ In response, the Legislature carved out specific exemptions from the public access requirement of chapter 119.⁵⁴ As a result, there are more than 500 statutes that either contain exemptions to chapter 119 or regulate the use of information obtained from public records.⁵⁵

Florida's Public Records Law requires that a records custodian claiming an exemption for a public record or a portion of a public record state the basis for the exemption, including its statutory citation.⁵⁶ Additionally, if a record contains both exempt and nonexempt information, the records custodian must delete or redact that portion of the exempted record and provide the remainder of the record for inspection and copying.⁵⁷ The statute does not state whether the cost of redaction is to be absorbed by the agency or passed on to the requester.⁵⁸

d. Enforcement and Sanctions

When denied access to a public record, a requester may institute a civil action to compel compliance. Such actions have priority over other pending cases, and courts are required to set an immediate hearing.⁵⁹ Upon court order opening the record for inspection and copying, the agency must comply within forty-eight hours unless otherwise provided⁶⁰. Additionally, if the court determines that the custodial agency "unlawfully refused to permit" access, the court is required to "assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees."⁶¹

Two types of sanctions are provided for violations of the Public Records Law. First, a public officer who knowingly violates section

52. *See id.*

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

54. *See* § 119.07(3)-.07(7) (1993).

55. *See* SUNSHINE MANUAL (1992), *supra* note 25, at 145.

56. FLA. STAT. § 119.07(2)(a) (1993).

57. *Id.* § 119.07(2)(a), (b).

58. *See* 1981 FLA. ATT'Y GEN. ANN. REP. 203; *cf.* *Florida Institutional Legal Serv. v. Florida Dept. of Correct.*, 579 So. 2d 267 (Fla. 1st DCA) (permitting an assessment of a special service charge for extensive uses of clerical assistance), *petition for review denied*, 592 So. 2d 680 (Fla. 1991).

59. FLA. STAT. § 119.11(1) (1993).

60. *Id.* § 119.11(2).

61. *Id.* § 119.12(1).

119.07(1) is subject to suspension and removal or impeachment, and is guilty of a first-degree misdemeanor punishable by a definite term of imprisonment not exceeding one year and a fine of up to \$1,000.⁶² Second, a public officer violating any provision of chapter 119 "is guilty of a noncriminal infraction, punishable by fine not exceeding \$500."⁶³ A willful and knowing violation is a first-degree misdemeanor.⁶⁴

III. ISSUES

A. *Defining Key Words*

The breadth of Florida's Public Records Law is most apparent when considering the statutory definition and interpretation of key terms. Because of the increasing conversion of public records from paper to electronic form and the complexity of modern information technology systems, the scope of the Public Records Law was brought to the Legislature's attention.

1. "Record"

Although an electronic record is as much a public record as the printed version, the scope of the term "record" when public records are in an electronic format is unclear. To illustrate, most government agencies maintain large data bases comprising millions of pieces of information.⁶⁵ A specific "record" may not be created until a query is formed and software processes the information. The data base is "information stored on a computer," and is clearly a public record under the Public Records Law.⁶⁶ Any record created from information stored in that data base also is a public record. The problem becomes more acute, however, as modern information systems become more complex.

Chapter 119 broadly defines the term "public record" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound

62. *Id.* § 119.02; §§ 775.082(4)(a), .083(1)(d).

63. *Id.* § 119.10(1).

64. *See id.* § 119.10(2).

65. The Department of Highway Safety & Motor Vehicles, for example, monitors computer records on more than 12 million driver license files and more than 15 million vehicles.

66. The high courts of both New York and Illinois have recently held that a computer data base is a public record, and agencies in those states are required to provide a copy of the data base on disk if requested. *See* Peter Harris, *Public Records Go Electronic*, 18 ST. LEGISLATURES 25 (June 1992).

recordings or other material, *regardless of physical form or characteristics*, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."⁶⁷ This statutory definition has been interpreted by the Supreme Court of Florida to mean "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type,"⁶⁸ and has been found to include all of the "information stored on a computer."⁶⁹ According to testimony received during the Joint Committee's public hearings, the statutory definition of "public record" is generally sufficient,⁷⁰ but leaves unclear whether agency-created data processing software⁷¹ and electronic mail ("e-mail")⁷² are public records.

a. Agency-Created Data Processing Software

In 1993, the Joint Committee prepared a legal analysis of section 119.083, which allows all government agencies to copyright agency-created data processing software and to sell or license such software for a fee, based on market considerations.⁷³ In addition to interpreting

67. FLA. STAT. § 119.011(1) (1993) (emphasis added).

68. Shevin v. Byron, 379 So. 2d 633, 640 (Fla. 1980).

69. See Seigle v. Barry, 422 So. 2d 63, 65 (Fla. 4th DCA 1982) ("There can be no doubt that information stored on a computer is as much a public record as a written page in a book . . .") *petition for review denied*, 431 So. 2d 988 (Fla. 1983); see also 1990 FLA. ATT'Y GEN. ANN. REP. 4.

70. See, e.g., Ted Bahn, Dir. of Information Technology, Office of the County Administrator, Hillsborough County, Testimony at JCITR Public Hearing in Tampa Bay, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Bahn testimony (Sept. 9, 1993)] (currently broad definition should be retained because technology will continue to change); Frank Hagy, MIS Director, Orlando, Fla., Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Hagy testimony (Sept. 13, 1993)] (current definition is clear). *But see* Comments Submitted by Times Publishing Company, St. Petersburg, Fla. (Sept. 1993) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Times Comments].

71. Compare Times Comments, *supra* note 70, at 13 ("government-created 'software' and government-created 'application programming' should be defined as records") with *State University System Comments to Jt. Legis. Info. Tech'y Resource Comm. on Access to Electronic Records* 1-2 (Sept. 15, 1993) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter *SUS Comments*] ("the records analyzed and the record(s) output constitute the public record—not the software").

72. See J. Robert Port, Staff Writer, ST. PETERSBURG TIMES, and Jim Baltzell, Ass't City Editor, OCALA STAR BANNER, Testimony at JCITR Public Hearing in Tampa Bay, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

73. See JCITR SOFTWARE REPORT, *supra* note 19. Section 119.083(3) stipulates, however, that the fee for a copy of the protected software used "solely for application to" the agency's data or information must be "determined pursuant to s. 119.07(1)," the general fee provision. FLA. STAT. § 119.083(3) (1993).

specific sections in the Public Records Law, the Joint Committee relied on *Shevin v. Byron*⁷⁴ and an Attorney General opinion to conclude that agency-created software is a public record.⁷⁵ As defined, "agency" is any state or local government entity or any other public or private entity acting on behalf of such agency.⁷⁶

The conclusions in the Joint Committee report were based on three arguments. First, because the copyright provision was drafted as an amendment to the Public Records Law by the Legislature rather than codified as an amendment by Statutory Revision,⁷⁷ the Legislature intended agency-created software to be a public record. Second, the report argued that section 119.07(3)(q), *Florida Statutes*, exempting "sensitive" agency-created software from the inspection and copying requirements of chapter 119, creates a presumption that *all* agency created software, whether sensitive or not, is a public record.⁷⁸ Finally, the Joint Committee reasoned that, because section 119.08(3) requires that fees for copies of agency-copyrighted software be determined in accordance with the general fee provision governing most public records, agency-created software is already a statutorily defined public record.⁷⁹

Not everyone agrees that software is a public record. One respondent testified in writing that there is a clear distinction between software, "a process which is used in conjunction with public records," and the records themselves:

Prior to use of computers and software, public records were analyzed by a person and then typed into a report. Software is a *tool* that helps in the analyzing [sic] and output phases. We believe the records analyzed and the record(s) output constitute the public record—not the software. Software is executable, records are not.⁸⁰

74. 379 So. 2d 633 (Fla. 1980). In *Shevin*, the Supreme Court of Florida held that "a public record . . . [as defined in chapter 119, *Florida Statutes*] is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* at 640 (emphasis added).

75. See JCITR SOFTWARE REPORT, *supra* note 19, at 55-57, 85. The Attorney General has cited *Shevin* as support for the conclusion "that a computer program developed by a public agency in order to perform certain . . . functions is a public record for the purposes of chapter 119." 1986 FLA. ATT'Y GEN. ANN. REP. 238.

76. FLA. STAT. § 119.011(2) (1993).

77. See JCITR SOFTWARE REPORT, *supra* note 19, at 56.

78. *Id.* at 56-57. Because there is a presumption in Florida that, absent a specific statutory exemption, all government records are open, non-sensitive agency-created software is subject to the inspection and copyright requirements of chapter 119, *Florida Statutes*.

79. *Id.* at 57. Unless otherwise prescribed by law, all public records are subject to the fee provisions dictated by section 119.07(1), *Florida Statutes*.

80. *SUS Comments*, *supra* note 71, at 2 (emphasis added).

The *Seigle* court, on the other hand, compared computerized public records to "information recorded in code," and held, "[w]here a public record is maintained in such a manner that it can only be interpreted by the use of a code then the code book must be furnished to the applicant."⁸¹ In other words, if a public record maintained or generated by an agency is accessible only through application of agency-created software, then the software is a public record.⁸²

b. E-Mail

Many state agencies and local governments have established electronic mail (e-mail)⁸³ systems for both inter- and intra-agency communication. E-mail is becoming an increasingly common and efficient means of communication.⁸⁴

Given the Supreme Court of Florida's definition of "public record" promulgated in *Shevin* ("any material prepared in connection with official agency business . . . intended to perpetuate, communicate, or formalize knowledge of some type,")⁸⁵ e-mail, which is a *form* of written communication between two or more people, is a public record under Florida law if generated by a public official or employee.⁸⁶ In fact, the debate is focused more on the lack of retention schedules and the practical or managerial problems of providing public access, rather than on the status of e-mail as a public record.

81. 422 So. 2d 63, 66 (Fla. 4th DCA 1982), *petition for review denied*, 431 So. 2d 988 (Fla. 1983) (citing *State ex rel. Davidson v. Couch*, 158 So. 103 (Fla. 1934)). The *Seigle* court also found "that *all* of the information" stored in a computer "should be available for examination and copying." *Id.* at 65 (emphasis added).

82. See FLA. STAT. § 119.083(3) (1993) (requiring that a copy of agency-copyrighted software be provided if necessary to access agency records); see also *Times Comments*, *supra* note 70, at 14 n.11 ("Where government-created software provides the only method by which [agency] information can be rendered meaningful, the software itself must be regarded as a public record.").

83. Electronic mail ("e-mail") is the generic term for electronic communication of text, data, or images "between a sender and designated recipient(s) by systems utilizing telecommunications links." David Johnson & John Podesta, ACCESS TO AND USE AND DISCLOSURE OF ELECTRONIC MAIL ON COMPANY COMPUTER SYSTEMS: A TOOL KIT FOR FORMULATING YOUR COMPANY'S POLICY 36 (Sept. 1991); see also GartnerGroup, INFORMATION TECHNOLOGY GLOSSARY: EXECUTIVE REFERENCE 72 (1993).

84. In North Carolina, for example, the Legislative Data Network carries approximately 80,000-100,000 e-mail messages each month the Legislature is in session. See Glenn Newkirk and Von Denton, *Capital Press Gains Access to Legislative Electronic Mail*, NALIT NEWSLETTER 4 (July 1993).

85. *Shevin v. Byron*, 379 So. 2d 633, 640 (Fla. 1980) (emphasis added).

86. Section 119.011(1), *Florida Statutes*, defines public records as "all documents, papers, letters, . . . or other material, regardless of physical form or characteristics . . ." (emphasis added). Furthermore, the Attorney General has found that communication between public officials sent via computer are public records subject to the Public Records Law. 1989 FLA. ATT'Y GEN. ANN. REP. 39.

For example, in September 1993, it was widely reported that a state attorney's office routinely deleted e-mail from office computers every ten days, and recorded over back-up tapes of the messages after only two weeks.⁸⁷ In reviewing a proposal by a state attorney, the Department of State determined that e-mail messages should be retained for at least one year.⁸⁸

In contrast, the Hillsborough County Administrator provides public access to the County's e-mail using a commercially available software program. The program displays e-mail messages in a simple format and automatically archives and indexes each record. On the e-mail sign-in screen, all county employees are notified that e-mail communications are public records. The volume of e-mail communication dropped dramatically after the system was first implemented. Lately, however, the volume has increased and the County Administrator plans to provide access through the county libraries on the Freenet information system. Additionally, the County Administrator obtained a site license and full distribution rights from the software vendor, and therefore can provide a copy of the software program to e-mail record requesters.⁸⁹

2. "Custodian"

When records were primarily maintained on paper, the public official having actual physical custody of the record was considered the "custodian."⁹⁰ Now, as public records are increasingly converted to electronic forms, a greater number of agencies may have simultaneous custody of any given record.

Custodianship issues arise when a requester seeks access from one of the custodial agencies rather than the agency creating the record. The Florida Local Government Information Systems Association (FLGISA) suggests a distinction between "custodian" and "steward" for purposes of maintenance and dissemination of public records.⁹¹

87. See, e.g., Jeff Stidham, *Prosecutor's Office Told to Keep E-Mail*, TAMPA TRIB., Sept. 11, 1993, at Florida/Metro 4; Bill Cotterell, *E-Mail Poses Policy Puzzle for Government*, TALLAHASSEE DEMOCRAT, Sept. 13, 1993, at 1B.

88. See Jeff Stidham, *supra* note 87. The Bureau of Archives and Records Management, Division of Library and Information Services of the Department of State, is statutorily authorized to "[e]stablish and administer a records management program . . . relating to the creation, utilization, maintenance, retention, preservation, and disposal of records." FLA. STAT. §§ 257.36(1)(b), 119.041 (1993).

89. See Bahn testimony (Sept. 9, 1993), *supra* note 70.

90. FLA. STAT. § 119.071(a) (1987).

91. See Florida Local Government Information Systems Association, Position Paper—"Who Is the Record Custodian?" (Dec. 29, 1992) (on file with the Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter FLGISA Position Paper].

Others argue that if requests for public records must be made at the originating agency, artificial barriers to access may be created.⁹²

Florida's Public Records Law requires "[e]very person who has custody of a public record" to permit inspection and examination of the record "under supervision by the custodian of the public record," who must furnish a copy of the record upon payment of the prescribed fee.⁹³ The "person who has custody of a public record" is further charged with the duty of redacting or deleting any exempt information,⁹⁴ and "custodians of vital, permanent, or archival records" must comply with certain storage and archival practices.⁹⁵

The term "custodian" is not defined in the statutes. Section 119.021 states that "[t]he elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records" shall be the designated custodian of the records.⁹⁶ Apparently, there could be multiple custodians of a given record. Less clear is whether the "person who has custody of a public record" is the same as the *custodian* of that record. Webster's defines "custodian" as "one that guards and protects or maintains," and "custody" is defined as "immediate charge and control . . . exercised by a person or authority."⁹⁷

Testimony provided at the Joint Committee's public hearings left no consensus concerning whether "custodian" should be defined. One local government representative testified that although a statutory definition of "custodian" is unnecessary, a distinction should be made between the records custodian and a steward.⁹⁸ If the suggested distinction is made, the custodian of a public record would retain control

92. See, e.g., David Bralow, Att'y, Holland & Knight, Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Bralow testimony (Sept. 13, 1993)].

93. FLA. STAT. § 119.07(1)(a) (1993) (emphasis added).

94. See *id.* § 119.07(2)(a) (emphasis added).

95. See *id.* § 119.031 (emphasis added).

96. See *id.* § 119.021 (emphasis added). In full, section 119.021 reads: "Custodian designated.—The elected or appointed, state, county or municipal officer charged with the responsibility of maintaining the office having public records, or his designee, shall be the custodian thereof."

97. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 318 (9th ed. 1991). According to the rules of statutory interpretation, the common definition of custodian should be used because the term is not defined in the statute. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1950).

98. Al Rutherford, Marketing Dir., Office of Computer Services and Information Systems, Metropolitan Dade County, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Rutherford testimony (Sept. 8, 1993)].

of and responsibility for access to the record, while the steward would refer requesters to the appropriate custodian.⁹⁹ Other local government representatives agreed, testifying that the complexity of modern information systems compels clarification of "custodian" as used in chapter 119.¹⁰⁰ The concern is that certain "information services staff" responsible for processing public records may not be aware of the applicable statutory exemptions and "the nuances or inter-relationships which must be considered before releasing public information."¹⁰¹ Those opposed to a distinction between custodian and steward are concerned with creating artificial access barriers, forcing requesters to play a "shell game" with public records and government agencies.¹⁰² This apprehension is echoed in two Supreme Court of Florida decisions.

In construing the requirement that all public records be open for inspection and examination "at any reasonable time, [and] under reasonable conditions,"¹⁰³ the Supreme Court of Florida held in *Wait v. Florida Power & Light Co.*¹⁰⁴ that reasonable conditions "refers not to conditions which must be fulfilled before review is permitted," but to "reasonable regulations" which would permit the custodian to protect the records "and also to ensure that the [requester] . . . is not subjected to physical constraints designed to preclude review."¹⁰⁵ In *Tribune Co. v. Cannella*,¹⁰⁶ the court, finding that "an automatic delay, no matter how short, impermissibly interferes with the public's right" to access, held that "[t]he only delay permitted by the [Public Records Law] is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt."¹⁰⁷ Furthermore, Florida courts have determined that the legislative intent "underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain ac-

99. See *id.*; FLGISA Position Paper, *supra* note 91, at 1. The FLGISA Position Paper cites the common definition of steward, "a person who manages another's property, finances, or other affairs." *Id.*

100. See, e.g., Hagy testimony (Sept. 13, 1993), *supra* note 70; Letter from Robert B. Keim, Systems Manager, Hillsborough County Geographic Information System, to Karen Stolting, Staff Director, Jt. Legis. Info. Tech'y Resource Comm. 1 (Aug. 16, 1993) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Keim Letter].

101. See *SUS Comments*, *supra* note 71, at 3.

102. See Bralow testimony (Sept. 13, 1993), *supra* note 92; Times Comments, *supra* note 70, at 15. The Times Publishing Company's proposed definition of custodian includes data center managers.

103. FLA. STAT. § 119.07(1)(a) (1993).

104. 372 So. 2d 420 (Fla. 1979).

105. *Id.* at 425.

106. 458 So. 2d 1075 (Fla. 1984).

107. *Id.* at 1079 (citations omitted).

cess to governmental records,"¹⁰⁸ and that the "spirit, intent and purpose" of the law "requires a liberal judicial construction in favor of the public."¹⁰⁹

Reading chapter 119 in its entirety, and considering the common definition of the term "custodian" and the phrase "every person who has custody," it appears that the two terms are synonymous, if not interchangeable. For example, Florida's Public Records Law requires "[a] person who has custody of a public record . . . who asserts that an exemption . . . applies to a particular public record or part of such record" to delete or redact the exempt portions of the record and produce the remainder for inspection and examination.¹¹⁰ Furthermore, "if an assertion is made by the *custodian* of a public record" that the requested record is statutorily exempt, then the record shall not be disposed of for a period of thirty days after the request for access was made.¹¹¹ According to the common rules of statutory construction, "[t]he same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute."¹¹²

Many believe that the critical factor in Florida is educating records custodians to make them aware of any applicable exemptions. However, the law specifically declares that *any person* who has custody of a public record has the affirmative duty to be knowledgeable of all applicable statutory exemptions and to produce the nonexempt portions of a record for inspection and copying.¹¹³ Additionally, a record or a portion of a record may be withheld only if there is a specific *statutory* exemption.¹¹⁴ Nuances or interrelationships are not grounds for withholding a record from public inspection.¹¹⁵ If public access is a

108. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985).

109. See *Florida Parole & Probation Comm'n v. Thomas*, 364 So. 2d 480, 481 (Fla. 1st DCA 1978). Although the issue in *Thomas* was construction of section 286.011, *Florida Statutes*, all statutes "enacted for the public benefit should be construed liberally." *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

110. FLA. STAT. § 119.07(2)(a) (1993). Referencing this specific statutory requirement, the Supreme Court of Florida held in *Cannella* that the only delay in access permitted under the Public Records Law "is the limited reasonable time allowed the *custodian* to retrieve the record and delete those portions of the record the *custodian* asserts are exempt." *Cannella*, 458 So. 2d at 1079 (emphasis added).

111. FLA. STAT. § 119.07(2)(c) (1993).

112. Llewellyn, *supra* note 94, at 404.

113. See FLA. STAT. § 119.07(2)(a) (1993) ("[a] person who has custody of a public record" is required to redact the exempt portions of the record and produce the remainder for examining and copying).

114. *Id.*

115. See *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979) (indicating that only the Legislature can exempt records from the access provisions of chapter 119).

consideration in the design and development of information systems, the concern for adequate education should become less problematic, if not moot.¹¹⁶

3. "Extensive" Use

Florida's Public Records Law allows a special service charge, in addition to the actual record duplication costs, for requests involving extensive use of information technology resources or agency personnel, or both.¹¹⁷ Before 1985, the additional charge was permitted only for extensive use of agency personnel.¹¹⁸ However, in response to an increase in requests for copies of entire computerized data bases—requests which allegedly required substantial computer resources—the Joint Committee recommended that the statute be amended to include extensive use of information technology resources.¹¹⁹

Although the statute allows a reasonable extensive use charge based on actual costs incurred by the agency, the statute does not define "extensive," and a uniform interpretation has not developed.¹²⁰ In a recent case challenging an agency's definition of extensive as "requiring *fifteen or more minutes* of work," the First District Court of Appeal ruled that the appellants failed to prove that the rule did not "comport with the intent and purposes" of the statute.¹²¹ On the other hand, the Pinellas County Sheriff's Office agreed that extensive use charges for agency resources would apply to requests requiring *four hours or more* of work.¹²²

At the Joint Committee's public hearings, many testified that the various agencies lacked a uniform definition of "extensive,"¹²³ and complained that this ambiguity, allowing for an impermissibly wide range of pricing policies among state agencies and local governments,

116. See *infra* notes 195-206.

117. FLA. STAT. § 119.07(1)(b) (1993).

118. Ch. 85-86, 1985 Fla. Laws 583 (codified at FLA. STAT. § 119.07 (1993)).

119. PROBLEMS AND ISSUES, *supra* note 3, at 36. "Information technology resources" is defined as "data processing hardware and software and services, supplies, personnel, facility resources, maintenance and training." FLA. STAT. § 282.303(13) (1993).

120. FLA. STAT. § 119.07(1)(b) (1993).

121. Florida Institutional Legal Serv. v. Florida Dept. of Correct., 579 So. 2d 267, 268 (Fla. 1st DCA 1991) (emphasis added); *but see id.* at 270 (Zehmer, J., dissenting) ("A mere fifteen minutes to locate, review, and copy a public document pursuant to a routine request such as [those at issue] . . . is simply not the kind of extensive service contemplated by the statute . . .").

122. See Neil Skene, *The Back Page: Regulations Needed to Govern "Extensive Use" Provision*, THE BRECHNER REPORT, Dec. 1991-Jan. 1992, at 6 (citing Pinellas Circuit Ct. No. 83-12464-11 (1985)).

123. See, e.g., Conrad Cross, Data Center Manager, Orlando, Fla., Testimony at JCITR Public Hearing in Tampa Bay, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Cross testimony (Sept. 9, 1993)]; Keim Letter, *supra* note 100, at 1.

requires either statutory definition or policy guidelines.¹²⁴ Other public hearing participants, however, testified that "extensive" is like "reasonable," a common term subject to multiple interpretations, and the term "extensive use of agency resources" will vary depending upon a variety of agency-specific factors.¹²⁵ Many were also concerned that some custodians employ the extensive use provision to collect fees, such as costs associated with system design and maintenance, prohibited under chapter 119.¹²⁶

One state agency representative testified that the agency applies the extensive use provision when a record is requested in a different form than the agency maintains.¹²⁷ The agency handles these requests "on a time available and cost reimbursement basis."¹²⁸ Although system development costs are not included in the fee, the agency recovers "the cost to generate public records in a special format which the agency would not otherwise generate for [its] use."¹²⁹ The fees charged under this scheme are permitted under chapter 119, but may violate section 119.07(1)(b), which stipulates that assessment of extensive use fees must be made on a case-by-case basis.¹³⁰

Because no definition of "extensive" exists in the *Florida Statutes*, each state agency and local government must determine what is an extensive use of resources. Varying definitions are to be expected; an extensive use of rural Levy County resources may not be the same as an extensive use of metropolitan Dade County resources. In 1989, the Joint Committee concluded that, although the extensive use provision "allows for inconsistencies in fees charged . . . [t]hese inconsistencies may reflect the variations which exist in each custodian's situation."¹³¹ Based on this conclusion, the Joint Committee recommended that government agencies "continue to be provided . . . the flexibility of defining what is extensive in their situation. However, records custodians should also establish costing algorithms *in writing* which accu-

124. See Bill Prewitt, News System Editor, TAMPA TRIB., Testimony at JCITR Public Hearing in Tampa Bay, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Prewitt testimony (Sept. 9, 1993)].

125. See Hagy testimony (Sept. 13, 1993), *supra* note 70.

126. See Carol LoCicero, Att'y, Holland & Knight, Testimony at JCITR Public Hearing in Tampa Bay, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Times Comments, *supra* note 70, at 16.

127. Martha Fields, *SUS Comments*, *supra* note 71, at 3.

128. *Id.*

129. *Id.*

130. FLA. STAT. § 119.07(1)(b) (1993) ("If the nature or volume of public records requested to be . . . copied . . . is such as to require" extensive use of agency resources, an agency may impose a special service charge) (emphasis added).

131. See PROBLEMS AND ISSUES, *supra* note 3, at 143.

rately reflect the costs they incur and form the basis for their charges."¹³²

As written, chapter 119 does not require government agencies to establish costing algorithms, or to adopt formal access policies similar to the Hillsborough County Administrator's. As a result, there are no assurances that custodians are applying the extensive use provision in a consistent, legitimate manner. Even when government agencies are making a good faith effort to follow the dictates of the Public Records Law, there are no model guidelines or policies. In a 1992 report, the Joint Committee recommended that "[s]tate-wide access policy guidelines be developed, and adopted by formal rulemaking procedures if necessary, by the Department of State, Bureau of Archives and Records Management, to help all government agencies in establishing access policies in compliance with the Public Records Law"¹³³ The Growth Management Data Network Coordinating Council (GMDNCC) recently approved a similar recommendation made by its Public Records Law Subcommittee.¹³⁴

B. Cost of Access and Fees to be Charged

The debate on access to electronic records centers around cost recovery and the extent to which fees may, or should, be recovered by an agency under Florida's Public Records Law. The commercial value of many electronic records, particularly geographic information system (GIS) records, far exceeds their regulatory value, tempting financially strapped governments to fund costly information systems with excessive public records fees.¹³⁵

132. *Id.* (emphasis added).

133. CRITICAL ANALYSIS, *supra* note 3, at 41.

134. See PRLS FINAL REPORT, *supra* note 3, at 49; Memorandum from David Stage, Staff Dir., GMDNCC, to Members of the Public Records Law Subcomm. (Oct. 5, 1993) (on file with the GMDNCC, Tallahassee, Fla.) [hereinafter Stage Memo]. After an extensive review of the issues, the PRLS concluded that "there is a great deal of confusion on the part of records custodians at both the state and local levels regarding the requirements and fee structure of chapter 119, Florida's Public Records Law," and recommended that the Bureau of Archives' model rule cover such issues as "allowable fees, format, identity of the requestor and purpose of use, and redaction." PRLS FINAL REPORT, *supra* note 3, at 49.

The GMDNCC was established in 1985 to facilitate the sharing of growth management information among state agencies. See Ch. 85-276, 1985 Fla. Laws 1759 (codified at Fla. Stat. § 282.403 (1991)). In July 1991, the Council "recognized the importance of addressing the issue of public access to electronic information," and formed the Public Records Law Subcommittee "to develop recommendations to the Council on the impact and implementation of Florida's Public Records Law in the Information Age." PRLS FINAL REPORT, *supra* note 3, at 1 (citation omitted).

135. See, e.g., Stuart Bretschneider et al., Government Information and Information Services: Profit vs. Not-for-Profit Alternatives (July 1993) (draft manuscript, on file with Jt. Legis.

The commercial value of sophisticated information available on a digitized GIS map is growing rapidly. Using geographic coordinates, a records custodian can produce two- and three-dimensional computer-generated maps providing illustrative land use information. A GIS in a county property appraiser's office, for example, is capable of combining data supplied by other government agencies with the data compiled and maintained by the property appraiser onto a digitized map providing a comprehensive "picture" of the county, including population densities, existing structures, roads, utilities, zoning provisions, property values, tax bases, and school districts.

The data necessary for a GIS, however, can be very expensive to collect and maintain.¹³⁶ As written, Florida's Public Records Law does not distinguish between different types of information technology, and does not allow the agencies to recoup data base development and maintenance costs. As a result, commercial vendors are able to acquire a copy of an entire GIS data base, or any government data base, for a fraction of the cost incurred by an agency in the initial data base development.

Thus, there is increasing pressure on the Florida Legislature to authorize government agencies to recoup something more than the limited fees allowed under section 119.07(1) for large volume requests. However, a countervailing viewpoint asserts that "[s]ince vastly larger quantities of information may be contained in electronic format and easily reproduced for public disclosure than might have been reasonable were the information in paper form, the quantity of data covered by a request for electronic information becomes practically irrelevant."¹³⁷

Info. Tech'y Resource Comm., Tallahassee, Fla.); Kenneth B. Allen, *Access to Government Information*, 9 GOV'T INFO. Q 67 (1992); Stephen Krenzer, Vice President, Data Acquisition & Manufacturing, TRW/Redi Property Data, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Krenzer testimony (Sept. 8, 1993)]. According to a 1991 survey of all of Florida's daily newspaper editors, though, the cost of access "is a significant factor in deterring access to computerized records." See Sigman L. Splichal, *Special Report: Survey Finds Computer Access Limited*, BRECHNER REPORT, July 1991, at 5. The survey was funded by the Brechner Center for Freedom of Information at the University of Florida.

136. At a PRLS public hearing on this issue, one local government representative testified that of the \$10 million his agency spent for a GIS, \$7 million was invested in developing the data base. See PRLS FINAL REPORT, *supra* note 3, at 40. However, according to testimony received by the Joint Committee, these costs are steadily dropping. See Dean K. Jue, Dir., Technical Assistance Program, Fla. Resources and Environmental Analysis Center, Institute of Science and Public Affairs, Fla. State University, Testimony at JCITR Committee Meeting (Nov. 29, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

137. Paul R. Verkuil, et al., *Public Access to Government Electronic Information Under the Freedom of Information Act* 8 (Feb. 1990) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

In a briefing paper prepared for the public hearings, the Joint Committee identified three possible alternatives to Florida's "actual cost of duplication" approach: basing fees on the commercial value of the record requested, exempting specific types of information technology, or establishing a flat statutory fee for certain records.¹³⁸

1. Commercial Value

There have been numerous attempts in the early 1990's to amend Florida's Public Records Law to permit fees for public records access based on the requester's motivation.¹³⁹ Some contend that when public records are used for profit, the government should be allowed to share in the profits.¹⁴⁰ Florida's Attorney General, however, has opined that providing access to public records is a statutory duty and should not be considered a revenue generating activity.¹⁴¹ In addition, after holding a series of public hearings on access to automated public records, the Public Records Law Subcommittee (PRLS), in its 1992 report to the GMDNCC, concluded that the commercial value of a public record data base and the requester's motivation "are immaterial in determining access to that data base and the fee(s) to be charged for access."¹⁴² The PRLS recommended *against* amending the Public Records Law to allow for distinctions based on the requester's purpose or the public record's commercial value.¹⁴³ This conclusion is in accord with an earlier report by the Joint Committee on Information Technology Resources, *A Critical Analysis of Proposed Amendments to Florida's Public Records Law*, finding that such an amendment was not only problematic, but was also antithetical to the spirit and intent of chapter 119.¹⁴⁴

138. JT. LEGIS. INFO. TECH'Y RESOURCE COMM., ELECTRONIC RECORDS ACCESS: PROBLEMS AND ISSUES 7 (Jan. 1994) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

139. See Fla. SB 1404 (1993). Senate Bill 1404, which would have authorized an additional fee for GIS records based on the commercial use of such records, was withdrawn from consideration approximately one week after introduction; see also CRITICAL ANALYSIS, *supra* note 3, at 20-25.

140. See, e.g., Al Rutherford, *FLGISA Supports The Rights of Citizens to Inspect Public Records*, THE BRECHNER REPORT, Feb. 1993, at 6 [hereinafter Rutherford, *Rights of Citizens*].

141. See 85-3 Op. Fla. Att'y Gen. 4 (1985).

142. See PRLS FINAL REPORT, *supra* note 3, at 49-50.

143. *Id.*

144. CRITICAL ANALYSIS, *supra* note 3, at 25. The PRLS "was established to develop recommendations to the Council on the impact and implementation of Florida's Public Records Law in the Information Age." PRLS FINAL REPORT, *supra* note 3, at 1. The GMDNCC adopted the PRLS recommendations on Sept. 16, 1993. See Stage Memo, *supra* note 134, at 1. The Joint Committee report analyzed proposed legislation which would change the current statutory fee structure to authorize fees based on the purpose for which a public record was requested.

At the Joint Committee's public hearings, while there was a difference of opinion on whether chapter 119 should be amended to allow for a distinction between commercial and noncommercial use of public records, there was a general consensus that making such a distinction would be extremely difficult.¹⁴⁵

The Supreme Court of Florida ruled in 1905 that a county clerk could not charge an access fee based on the requester's commercial motive.¹⁴⁶ In 1934, the court emphatically stated that "excursions into the realm of motives actuating" a requester under the Public Records Law would "defeat the right secured by the statute."¹⁴⁷ More recently, the Second District Court of Appeal found that

[t]he legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. *The purpose for such inquiry is immaterial.* The breadth of such right is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability of government to maintain secrecy in the public interest.¹⁴⁸

Whether the Florida Legislature should amend chapter 119 to allow an assessment of access fees based on the commercial potential of a public record is a topic of debate. Those in favor of this approach propose that fees should be based either on the value of the record requested or on the requester's motivation.¹⁴⁹ Generally, a higher fee for public records used for commercial purposes is likened to a *user fee*. Those standing to benefit or gain financially from public records use should pay to help recover the cost of developing and maintaining

145. See, e.g., Pete Weitzel, Senior Managing Editor, MIAMI HERALD, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Weitzel testimony (Sept. 8, 1993)] (stating that because there are difficulties in distinguishing between a commercial and noncommercial use, public records should be made available on an equal basis); Bahn testimony (Sept. 9, 1993), *supra* note 70 (stating that the Hillsborough County Administrator does not attempt to determine commercial value of public records, but rather, the County uses a cost/benefit analysis in acquiring new technology); *SUS Comments*, *supra* note 71, at 3 ("We are concerned with the operational aspects of the consideration of separate rates for commercial purposes in that the burden is on the agency to determine the intended use of the information.").

146. See *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905).

147. *State v. Couch*, 156 So. 297, 300 (Fla. 1934).

148. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) (citing *News-Press Publishing Co. v. Gadd*, 388 So. 2d 276 (Fla. 2d DCA 1980); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976)).

149. See *Rutherford testimony* (Sept. 8, 1993), *supra* note 98; *Hagy testimony* (Sept. 13, 1993), *supra* note 70.

public records and the corresponding information systems.¹⁵⁰ Many supporters of access fees want government to act in a more business-like manner, a philosophy espoused by David Osborne and Ted Gaebler in *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*.¹⁵¹ While recognizing that user fees are "[p]erhaps the safest way to raise nontax revenue," Osborne and Gaebler caution that user fees, which lower demand for public services, are not appropriate for "collective goods" which benefit the public as a whole.¹⁵²

Osborne and Gaebler further explain that "in an age of fierce resistance to taxes," government can no longer afford to subsidize many public services.

This is not to say that most public services should be sold for a profit—most shouldn't. But think of all the public services that benefit individuals: *the golf courses, the tennis courts, the marinas*. Typically, the taxpayers subsidize those services. Average working people subsidize the affluent to play golf and tennis or moor their boats. Why not turn such services into profit centers?¹⁵³

The difference between access to a marina or golf course and access to public records is that the former are recreational amenities enriching the users' quality of leisure time, while the latter are fundamental civic services. On the other hand, "publicly funded data are public assets . . . [which] strengthen the economy, develop knowledgeable citizens, and promote better decisions on public and private matters."¹⁵⁴

In addition to public policy concerns, constitutional compliance problems caution against distinguishing between users of public records. According to one respondent testifying at the Joint Committee's public hearing in Tallahassee, distinguishing between commercial and noncommercial users may violate the concepts of due process and

150. See, e.g., Letter from Lee Holroyd, Information Systems Dir., City of Ft. Lauderdale, to Sen. Daryl L. Jones, Chairman, Jt. Legis. Info. Tech'y Resource Comm. (Sept. 2, 1993) (on file with comm.) (access charges should reflect the cost of storing, maintaining, and securing public records); Rutherford, *Rights of Citizens*, *supra* note 140 ("taxpayers have a right to recoup the cost of development and maintenance of data when providing records for commercial use").

151. DAVID OSBORNE & TED GAEBLER, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1993).

152. *Id.* at 203-204.

153. *Id.* at 199 (emphasis added).

154. See National Geo Data Policy Forum, Summary Report: Present and Emerging U.S. Policies Governing the Development, Evolution, and Use of the National Spatial Data Infrastructure 6 (1993) (on file with Jt. Legis. Info. Tech'y Resource Comm.).

equal protection found in the Florida Constitution and the Fifth and Fourteenth amendments to the United States Constitution.¹⁵⁵ Because the right to access public records in Florida has been elevated from a statutory right to a constitutional right,¹⁵⁶ any law restricting that right will be held to the high standard of review adopted by the Second Circuit Court of Appeals in *Legi-Tech, Inc. v. Keiper*.¹⁵⁷

In *Legi-Tech*, a California corporation marketing computerized legislative information filed suit against the State of New York, challenging, on First Amendment grounds, the constitutionality of a state statute limiting access to public data bases by commercial vendors.¹⁵⁸ The State claimed that the regulation was not designed to suppress speech, but rather to prevent "free riding" on the State's costly efforts to develop and maintain its data bases.¹⁵⁹ Finding that the only purpose of the regulation was to limit the dissemination of speech, a right protected by the First Amendment, the court held that "[w]hen government regulates speech in the name of an interest unrelated to the suppression of speech, the regulation will survive constitutional challenge 'only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly.'"¹⁶⁰

Any legislation basing the assessment of public records access fees solely on the commercial nature of the intended use would "regulate[] speech in the name of an interest unrelated to the suppression of speech," undoubtedly triggering the standard of review articulated in *Legi-Tech*. It is doubtful that the government's interest in such legislation, designed to prevent the "free riding" of commercially motivated requesters, would be sufficiently compelling to override the constitu-

155. Bralow testimony (Sept. 13, 1993), *supra* note 92.

156. See FLA. CONST. ART. I, § 24 (guaranteeing "[e]very person . . . the right to inspect or copy any public record . . ."); see also Steve Metalitz, General Counsel, Information Industry Association, Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Metalitz testimony (Sept. 13, 1993)] (charging commercial value for public records is inconsistent with the new constitutional mandate and the record's status as a *public* record); Times Comments, *supra* note 70, at 5-8.

157. 766 F.2d 728 (2d Cir. 1985).

158. *Id.* at 730.

159. *Id.* at 735.

160. *Id.* (citing *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 n.7 (1983)). The United States Supreme Court has found that public access to government information is a right protected by the First Amendment. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501 (1984). Additionally, in *Minneapolis Star*, 460 U.S. at 586, the Court held that a state's interest in raising revenue is insufficient, in and of itself, to warrant any resulting restrictions on the ability of citizens to exercise their constitutional rights.

tional right to access public records guaranteed by article I, section 24 of the *Florida Constitution*, and by the First Amendment of the *United States Constitution*.

In addition, if a state or local agency has acquired new information technology systems based upon a supportive cost/benefit analysis, justifying increasing fees for public access simply because of the commercial value of certain records may be difficult.¹⁶¹ For example, the South Florida Water Management District, with the assistance of Andersen Consulting, prepared a cost/benefit analysis for the proposed acquisition of a GIS. Based on this economic analysis, the District concluded that the GIS acquisition would be a prudent investment, finding that "[t]he quantifiable benefits alone justify the costs required to implement a GIS with a payback period of four years."¹⁶² In fact, the new GIS paid for itself within two years.¹⁶³ Furthermore, in analyzing the non-quantifiable benefits, the District determined that the GIS, by allowing better response to public records requests, will enhance the District's ability to perform the statutory duty of providing access to public information.¹⁶⁴

A government agency attempting to justify the acquisition of new information technology on an ability to pass the costs of the new system to users through higher access fees is not necessarily acting in the public's best interests. As one respondent at the Joint Committee's Tallahassee hearing stated, "This is like the tail wagging the dog."¹⁶⁵ All Florida government agencies are statutorily required to provide access to nonexempt public records. Therefore, new information technology systems, such as a GIS, should be acquired because such systems increase an agency's ability to fulfill *all* of its statutory duties more efficiently.

161. A number of people testifying at the Joint Committee's public hearings advocated the use of a cost/benefit analysis in justifying the acquisition of new information technology. See, e.g., Weitzel testimony (Sept. 8, 1993), *supra* note 145; Dr. Bill Chamberlin, Dir., Brechner Center for Freedom of Information, U. of Fla., Testimony at JCITR Public Hearing in Tampa, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Chamberlin testimony (Sept. 9, 1993)]; Bralow testimony (Sept. 13, 1993), *supra* note 92.

162. See South Florida Water Management District, Geographic Information System Business Case 5 (Feb. 9, 1990) (on file with the Jt. Legis. Info. Tech'y Resource Comm.) [hereinafter GIS Business Case]. According to Ted Bahn, Hillsborough County conducts a cost/benefit analysis before acquiring new information technology systems. See Bahn testimony (Sept. 9, 1993), *supra* note 70.

163. See Robert T. Brown III, A Comparison of Actual and Projected Benefits and Costs For a 3 Year Implementation of a 58 Seat ARC/INFO Distributed System (1992) (on file with S. Fla. Water Mgmt. District).

164. GIS Business Case, *supra* note 162, at 17.

165. Bralow testimony (Sept. 13, 1993), *supra* note 92.

Finally, there are enforcement problems.¹⁶⁶ Any legislation distinguishing between commercial and noncommercial users forces records custodians to determine not only the requester's purpose, but also their identity. Such authority, which may chill a requester's constitutional right to access, has been criticized as "invit[ing] abuse."¹⁶⁷ According to Timothy Gassert, former Director and Counsel for the Massachusetts Division of Public Records,

the availability of information should not be related to the identity [or purpose] of a requester. Providing records custodians with the authority to question any and all requesters about who they are or how they intend to use public information invites abuses. Most legislatures recognized this when they first enacted freedom of information laws.¹⁶⁸

Indeed, Florida's history of open access to public records has not been limited to the more traditional purpose of government oversight, but has specifically included commercial access. At the beginning of this century, the Supreme Court of Florida noted that "mere curiosity or *commercial purposes* do not vest in either the courts or the custodian discretion to deny inspection."¹⁶⁹

Those testifying at the Joint Committee's public hearings expressed two underlying concerns. The first involved the problems in addressing public records requests requiring additional formatting or reformatting, and the second was the inadequacy of the relatively negligible fees allowed for fulfilling large volume requests.¹⁷⁰ The problem of "special" requests is addressed by current law; the problem of large volume requests—for example, an agency's entire data base—may not be. The two concerns, however, are interconnected.

A records custodian is authorized to charge, in addition to the actual duplication cost, a reasonable fee for the extensive use of agency

166. See Metalitz testimony (Sept. 13, 1993), *supra* note 156; Bralow testimony (Sept. 13, 1993), *supra* note 92; see also *SUS Comments*, *supra* note 71, at 3.

167. Timothy B. Gassert, *Public Information at Crossroads: Freedom of Information v. Freedom of Enterprise*, *COMPUTER L. STRATEGIST*, Feb. 1991, at 1, 4.

168. *Id.*

169. 77-125 Op. Fla. Att'y Gen. 4 (1977) (emphasis added) (citing *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905)). In *McMillan*, 38 So. at 668, the Supreme Court of Florida held that access to public records and the fees to be charged could not be based on the commercial motivation of a requester.

170. See, e.g., Cross testimony (Sept. 9, 1993), *supra* note 123; Dale Friedley, Dir. of Land Information Servs., Manatee County, Testimony at JCITR Public Hearing in Tampa, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Friedley testimony (Sept. 9, 1993)].

resources, including information technology and agency personnel.¹⁷¹ "Information technology resources" is defined as "data processing hardware and software and services, supplies, personnel, facility resources, maintenance, and training."¹⁷² Before 1985, the extensive use provision permitted the special service charge only for extensive use of agency personnel. In direct response to the increasing number of requests for copies of entire computerized data bases—which, at the time, may have required substantial computer resources—the Joint Committee recommended that the Legislature amend the statute to include extensive use of information technology resources.¹⁷³ The Senate Committee on Governmental Operations amended Senate Bill 208, implementing the Joint Committee's recommendation allowing county constitutional officers to "include a reasonable charge for the labor and overhead associated with" duplication of county maps and aerial photographs.¹⁷⁴

Due to recent advances in information technology, however, a copy of an agency's entire data base (a data dump) rarely triggers the extensive use provision, because the cost of duplication, which sometimes requires substantial computing resources to develop and maintain, is minimal.¹⁷⁵ Paradoxically, the concern over special requests—a problem not intentionally addressed by the 1985 amendment—is addressed by the extensive use provision in section 119.07(1)(b). Thus, the very problem the amendment was meant to address, requests for copies of entire data bases, is once again an issue for many records custodians.

2. Statutory Exemption

Another alternative is to provide a statutory exemption from the inspection and copying requirements of chapter 119 for specific types of technology—for example, all records maintained on a geographic information system—or for the commercial use of certain, specified public records.

The Joint Committee received limited testimony on statutory exemptions during the public hearings. Those who did address the issue

171. FLA. STAT. § 119.07(1)(b) (1993).

172. *Id.* § 282.303(13).

173. See REMOTE COMPUTER ACCESS, *supra* note 13; PROBLEMS AND ISSUES, *supra* note 3, at 36.

174. See Ch. 85-86 1985 Fla. Laws 583 (amending FLA. STAT. § 119.07(1)(a) (1993)).

175. See Friedley testimony (Sept. 9, 1993), *supra* note 170; Paul Verkuil et al., *supra* note 137.

of providing an exemption for a particular type of technology either rejected it outright or thought it too difficult to implement.¹⁷⁶

There are a number of problems with statutory exemptions. At the most basic level, the access requirements of any public records law could be easily circumvented by utilizing the exempt technology. Predicting the path of technological advances is an even more difficult problem. Experts in the field generally agree that within ten years most, if not all, information technology systems will be based on GIS technology. Thus, under this approach an exemption for GIS technology today may exempt all future public records.¹⁷⁷

Ostensibly, there are two possible rationales for exempting the commercial use of certain public records.¹⁷⁸ Firstly, by exempting the commercial use of GIS records, agencies can charge commercial users more for GIS records than for other records. Secondly, exemptions may be made to protect the subjects of certain public records from commercial exploitation.

In a recent opinion, the U.S. District Court for the Northern District of Texas stated that the "[United States] Supreme Court has repeatedly held that states may not prohibit the commercial publication of matters of public record."¹⁷⁹ The Court held that a wholesale ban on the commercial use of lawfully obtained public records, "with no regard for the truth of the information," was an unconstitutional restriction of commercial speech under the First Amendment.¹⁸⁰ Under the *Innovative Database Systems* rationale, any statute placing a restriction on the commercial use of public records would engender close scrutiny, both in terms of the newly enacted constitutional right to access in Florida, and the United States Constitution's First Amendment right to commercial free speech.

176. See Bahn testimony (Sept. 9, 1993), *supra* note 70 (rejecting said exemption outright); Metalitz testimony (Sept. 10, 1993), *supra* note 156 (rejecting exemption as too difficult).

177. See PRLS FINAL REPORT, *supra* note 3, at 41.

178. Actually, there may be a third rationale for restricting the commercial use of public records—the desire to protect the commercial value of a public record for exploitation by the state. This, seemingly, was the rationale for the New York statute at issue in *Legi-Tech v. Keiper*, 766 F.2d 728 (2d Cir. 1985). See *supra* notes 157-59.

179. *Innovative Database Sys. v. Morales*, No. 3:91-CV-1663-T (N.D. Tex. Jun. 24, 1992), *aff'd and reprinted in* 990 F.2d 217, 221-22 (5th Cir. 1993) (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Smith v. Daily Mail Publishing*, 443 U.S. 97 (1979)).

180. *Id.* at 222. Noting that some restrictions on commercial speech are permissible under the First Amendment, the District Court stated that "Commercial free speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest." *Id.* at 220 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985)).

3. Statutory Fee

A third approach is to recoup some of the overhead costs associated with providing access by charging a flat statutory fee for certain records. Under Florida's Public Records Law, without specific statutory authority, the custodian of a public record may not charge more than the actual cost of duplicating the record plus any applicable extensive use charge.¹⁸¹ Some agencies, however, have statutory authority to charge a flat rate for certain records. For example, the Department of Highway Safety and Motor Vehicles (DHSMV) is authorized to charge \$3.00 for a copy of an individual's driver history record,¹⁸² while clerks of the circuit courts may charge \$1.00 per page for a photocopied public record,¹⁸³ and \$4.00 per page "[f]or copying any instrument in the public records by other than photographic process."¹⁸⁴

This approach is problematic because of the difficulties in determining what factors are to be considered in setting the fee. Additionally, allowing a flat fee *per record* may become unreasonable if a requester is seeking an entire data base in an electronic format. This topic generated extensive testimony at the Joint Committee's public hearings, particularly as applied to the Department of Highway Safety and Motor Vehicles.¹⁸⁵ There are 12 million registered drivers in Florida. If one were required to pay the \$3.00 *per record* authorized in section 322.20(10)(a), *Florida Statutes*, it would cost \$36 million for a copy of the entire DHSMV driver history data base—a patently absurd fee, yet one which may be authorized by law. A Tallahassee public hearing respondent pointed out that the cost of delivering 1000 computerized

181. Section 119.07(1)(a), *Florida Statutes*, requires a records custodian to furnish a copy of a requested record upon payment of the legally prescribed fee. If there is no prescribed fee, the custodian may collect no more than 15 cents for a one-sided copy of copies 8.5 inches by 14 inches or less, and not more than an additional 5 cents for each two-sided duplicated copy. For copies other than paper—for example, magnetic tape or diskette—a government agency may recover both the actual duplicating cost and the cost of any extensive use of agency resources incurred in complying with the request. FLA. STAT. § 119.07(1) (1993).

182. FLA. STAT. § 322.20(10)(a)2 (1993).

183. *Id.* § 28.24(8)(a).

184. *Id.* § 28.24(10).

185. *See generally*, Krenzer testimony (Sept. 8, 1993), *supra* note 135; Scott Anderson, News Room Computer Resources Manager, FT. LAUDERDALE SUN SENTINEL, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Prewitt testimony (Sept. 9, 1993), *supra* note 124; *see also* Fred O. Dickinson, III, Exec. Dir., Dep't of High. Saf. & Motor Veh., Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Letter from Fred O. Dickinson, III, Exec. Dir., Dep't of High. Saf. & Motor Veh., to Karen Stolting, Staff Dir., Jt. Legis. Info. Tech'y Resource Comm. (Sept. 22, 1993) (on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) (responding to questions from Sen. Daryl Jones regarding the sale of an entire driver history data base by other states).

records is usually not 1000 times more expensive than the cost of providing one computerized record. Additionally, per-record access to an electronic data base may be inefficient and create administrative burdens for the custodial agency.¹⁸⁶

An alternative approach is exemplified in section 119.07(1)(a), authorizing "a reasonable charge for the labor and overhead associated with" the duplication of county maps or aerial photographs supplied by county constitutional officers.

C. *Barriers to Electronic Access*

The rapid emergence of computer and communications technologies during the past two decades has dramatically enhanced the ability to create, manipulate, and disseminate information. Ironically, these same technologies also threaten to diminish public access to government information.¹⁸⁷

In Florida, barriers to electronic access center around an agency's: (1) obligation to produce information in a particular form; (2) duty to provide public access and to segregate and release nonexempt portions of a public record; and (3) desire to control electronic records access through copyright or copyright-like measures. These issues are being examined and debated at the federal level and in nearly every state.

1. *Form of Record Requested*

In *Seigle v. Barry*, the Fourth District Court of Appeal, defining "public record" to include all of the information stored on a computer, held that a records custodian must make public records available "in some meaningful form."¹⁸⁸ The court did not define "meaningful," nor declare whether the records must be meaningful to the average requester or the requester seeking access to a record in a particular form.

The form of the record requested may be the most basic barrier to "meaningful" access. For example, a paper copy of a public record may be the only meaningful form for a requester without access to a computer. In comparison, a requester with the technological capability to process an entire data base would find a paper copy of that data inhibitive and useless. Whether an agency maintaining its records in a

186. See Metalitz testimony (Sept. 13, 1993), *supra* note 156.

187. Allen, *supra* note 135, at 68.

188. 422 So. 2d 63, 65-66 (Fla. 4th DCA 1982), *petition for review denied*, 431 So. 2d 988 (Fla. 1983).

particular electronic form must provide copies of those records in that form is an unanswered question.

The majority of those testifying at the Joint Committee's public hearings stated that an agency should be required to provide copies of public records in any form maintained within the agency. However, where a record is requested in a form not maintained by the agency, or requires something more than minimal processing, most believed that an agency should have the authority to recoup the costs incurred in fulfilling such a request.¹⁸⁹ One respondent suggested that a comparison be made between the form in which the record is *requested* and the form in which it is *maintained*. If the two forms are the same, then an agency should be authorized to charge only the actual cost of duplication. If the two forms are different, an agency should make a reasonable effort to satisfy the request and charge the requester for any costs incurred.¹⁹⁰

Florida case law supports this distinction. In holding that "access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records," the Fourth District Court of Appeal in *Seigle v. Barry* found that the intent of chapter 119 is "to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers."¹⁹¹ Declaring the policy "unassailable," the court noted that a records custodian has the *option* of complying with such special requests: "Access by the use of a specially designed program prepared by or *at the expense of the applicant* may . . . be permitted in the discretion of the public official and pursuant to section 119.07(1)."¹⁹²

The *Seigle* court also found that in the event a records custodian refuses to permit meaningful access, a court may permit access "where . . . for any reason *the form in which the information is proffered does not fairly and meaningfully represent the records*. . . ."¹⁹³

189. See generally George Aylesworth, Major, Metro-Dade Police Dep't, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) (public agencies should not be required to produce records in a form not necessary to an agency's public duties); Prewitt testimony (Sept. 9, 1993), *supra* note 124 (records must be made available in a variety of formats so that access is meaningful to the requestor); Allan Davies, Vice President, Dun & Bradstreet, Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) (government does not have a duty to massage information, but access should not be denied because of electronic form).

190. See Metalitz testimony, *supra* note 156.

191. 422 So. 2d 63, 66 (Fla. 4th DCA 1982), *petition for review denied*, 431 So. 2d 988 (Fla. 1983).

192. *Id.* (emphasis added).

193. *Id.* at 66-67 (emphasis added).

A federal court recently decided that a paper copy of an electronic record is not a meaningful representation of the record under the Federal Records Act. In *Armstrong v. Executive Office of the President*,¹⁹⁴ the Court of Appeals for the District of Columbia upheld a lower court finding that an electronic copy of a record is “*qualitatively different* than a copy printed out in paper form,” in that “[a] paper copy of the electronic material does not contain all of the information included in the electronic version.”¹⁹⁵

The Supreme Court of Ohio, in interpreting the access requirements of Ohio’s Public Records Law, analyzed whether a requester is entitled to a copy of a public record in computer-readable form in lieu of a paper copy. In holding that the agency must provide a magnetic tape copy, the court found the tape allowed greater ease of public access and a “public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.”¹⁹⁶

The court concluded that Ohio’s Public Records Act requires the *content* of a record be disclosed, and when the method of storing and maintaining the record enhances the record, government agencies must “disclose more than just a literal representation” of the record.¹⁹⁷ This conclusion is analogous to the *Seigle* holding: that the form in which information is provided by a public agency must “fairly and meaningfully” represent the records.¹⁹⁸ Opining on whether a records custodian could provide a typed transcript of a public record maintained on computer disk rather than the disk itself, Florida’s Attorney General relied on *Seigle* to find “the custodian of public records must provide a copy of the record requested in its original format.”¹⁹⁹

The Department of State rule on the long-term storage of electronic records is in accordance with the *Seigle* decision and the Attorney General opinion. Under the rule promulgated in 1992, all state and local agencies are required to provide a copy of archived public records in the form requested *if* the agency currently maintains the rec-

194. 1 F.3d 1274 (D.C. Cir. 1993).

195. *Id.* at 341. The lower court held that because the statutory language makes it clear that the law “was intended to include materials ‘regardless of physical form or characteristic,’” the law cannot be read “to exclude computer systems such as those at issue . . .” *Id.*

196. *State v. City of Cleveland*, 584 N.E.2d 665, 669 (Ohio 1992).

197. *See id.* at 670.

198. *See* 422 So. 2d at 66-67.

199. 1991 FLA. ATT’Y GEN. ANN. REP. 61.

ord in that form.²⁰⁰ Thus, if a requester seeks a copy of an archived public record on magnetic tape that is maintained by the agency in that form, the record must be provided in the form requested. However, if the record is maintained in some other form, the agency, under *Seigle*, has the option of converting the record to the form requested and charging the requester, or, under the Department of State rule, providing access "as otherwise required by chapter 119."²⁰¹ Additionally, the Public Records Law Subcommittee, after a series of public hearings, issued a Final Report which stated that "[s]tate and local agencies should allow access to public records in whatever media utilized by the custodial agency."²⁰²

While government agencies, when requested, should provide access to public records in the form maintained by the agency, whether the Florida Legislature needs to make this a statutory requirement, and whether a legal distinction should be made between "regular" and "special" requests, and the appropriate fees in each case, remain as topics of debate.

2. System Design and Development

Barriers to electronic access can be inadvertently created when government agencies develop or modify information technology systems without considering public access. This problem frequently occurs when agencies design new systems and begin the process of converting paper records to an electronic format.²⁰³

The redaction of exempt information can also create an inadvertent barrier to access if not considered before system design and development. Florida's Public Records Law states that if a record contains both exempt and nonexempt information, the person having custody

200. See FLA. ADMIN. CODE ANN. r. 1B-26.003(6)(f)(3) (1992).

201. *Id.*

202. PRLS FINAL REPORT, *supra* note 3, at 50.

203. For example, the Department of Natural Resources, Division of State Lands, spent considerable time and money converting massive paper and records to an electronic, digital form. See Dept. of Nat. Resources, Div. of State Lands, *Information Resource Management Modernization* (1991) (on file with the Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.). About halfway through the process, it was reported that the public would not be allowed access to the new system because it would then be possible for a requestor to alter the Division's digitized land records. See Pam Butler, Systems Project Administrator, Dept. of Nat. Resources, Div. of State Lands, Testimony before the Public Records Law Subcommittee of the Growth Management Data Network Coordinating Council (Oct. 24, 1991) (on file with GMDNCC, Tallahassee, Fla.). After the Division realized that public access was mandatory, the new system was modified to provide the public with a read-only access code, allowing direct, on-line access to modernized land records but prohibiting manipulation or alteration. Site visit by JCITR staff to the Dept. of Nat. Resources, Div. of State Lands (Mar. 1992).

of the record must redact the exempt or confidential information and allow inspection and copying of the remainder.²⁰⁴ The law does not state, however, who is to pay for the potentially expensive process of redacting the exempt information.²⁰⁵

Paper records are relatively easy to redact; a copy of the record is made, and the exempt information is simply blocked-out. Electronic records redaction should be even easier *if* the problem is considered before system development, since redacting information entered into specific fields is relatively simple.²⁰⁶ When a record with exempt information is requested, those fields are identified and deleted. Many agencies, however, are entering information into their computer systems without regard to *electronic* access, and retrofitting a computer system to redact information can be quite costly.

Those testifying at the Joint Committee's public hearings acknowledged the sometimes high cost of retrofitting existing information technology systems. In addition, there was general agreement about the need to consider public access, including redaction capability, in the future design and development of all information technology systems.²⁰⁷ One respondent challenged public agencies to make information technology systems "chapter 119 friendly."²⁰⁸

Starting in the fall of 1991, and after a year-long study and a series of public hearings, the Public Records Law Subcommittee (PRLS) of the GMDNCC concluded that the right of "free and open access"

204. See FLA. STAT. § 119.07(2)(a) (1993).

205. For example, on July 24, 1992, a reporter from the *St. Petersburg Times* requested access to the Pinellas County Medical Examiner's data base. See Letter from Dr. Joan E. Wood, District Medical Officer, Pinellas County, to J. Robert Port, Staff Writer, *St. Petersburg Times* (Aug. 21, 1992) (on file with the Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.). In response, the Medical Examiner agreed to the reporter's request, but explained, that because the system's software did not contain a provision for identifying those elements of data which the Medical Examiner must, by law, keep confidential, it would be necessary to hire a computer programmer to learn the system and perform the necessary task at a cost to the *St. Petersburg Times* of \$311,700. See *id.* at 3.

206. See Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 577 (1993) ("When records are stored in computers, the issue of segregability becomes more complex. In some cases, deletion of exempt information can be accomplished with the push of a button. *Ease of segregation, however, is dependent on how the agency computer system has been designed.*") (emphasis added).

207. See Rutherford testimony (Sept. 8, 1993), *supra* note 98; Chamberlin testimony (Sept. 9, 1993), *supra* note 161; Hagy testimony (Sept. 13, 1993), *supra* note 70.

208. See Ann Noble, Att'y, Rahdert & Anderson, Testimony at JCITR Public Hearing in Tampa, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Times Comments, *supra* note 70, at 14-15.

may be lost if information systems are not designed to provide redaction capability, and that there is little incentive to design such systems "if the cost of . . . redaction may be passed on to the requester."²⁰⁹ The PRLS recommended that the Florida Legislature amend the Public Records Law to require that all future information technology systems be designed with redaction capability, and that all existing systems be retrofitted to add redaction capability within a reasonable period of time. If a public records request is made before the system is redesigned, a records custodian would be required to either negotiate the reasonable cost of redaction or allow the requester to provide an agency-approved software program capable of redacting the exempt information.²¹⁰

During the study, the PRLS paid particular attention to the Department of State rule on the long-term storage of electronic records,²¹¹ requiring all state and local agencies to assure that any proposed acquisition or major modification of any computer system, equipment, or software used to store or retrieve such public records adequately provides for the rights of the public to access those records under chapter 119.²¹² The Department of State rule also precludes agencies from entering into any contract or agreement impairing the right of the public "to inspect or copy the agency's nonexempt public records existing on-line in, or stored on a device or media used in connection with, a computer system or optical imaging system owned, leased or otherwise used by an agency in the course of its governmental functions."²¹³ The ability to redact exempt information from public records requiring long-term storage is governed by this rule; however, systems and software designed to process and maintain all other public records are not.

209. See PRLS FINAL REPORT, *supra* note 3, at E-3.

210. See Stage Memo, *supra* note 134. As amended by the Growth Management Council, the PRLS recommended that:

The Legislature create a new section in chapter 119 to require all government agencies to (1) design future electronic record information systems capable of redacting confidential or exempt information; (2) within two years develop a plan to add redaction capability to existing electronic records systems and fully implement stated plan within a reasonable time based on the type, size, complexity, number of systems and the volume of exempt information and [sic] such plans will be reviewed and approved by an appropriate body; and, in the interim, (3) if a chapter 119 request is made, negotiate the reasonable cost of redacting confidential or exempt information from existing electronic records or allow the requestor to provide an agency-approved software program capable of redacting the confidential or exempt information.

Id.

211. See PRLS FINAL REPORT, *supra* note 3, at 34-35.

212. See FLA. ADMIN. CODE ANN. r. 1B-26.003(6)(f)(5) (1992).

213. *Id.* r. 1B-26.003(6)(f)(4) (1992).

The Attorney General has opined that a government agency cannot impose "rules or conditions of inspection which restrict a person's right of access," and has interpreted the reasonable conditions requirement of Florida's Public Records Law as precluding "anything which would hamper or frustrate, *directly or indirectly*, a person's right of inspection and copying of public records."²¹⁴ A system designed and developed without considering the public's right to access the records could, rather easily, hamper or frustrate the right to inspect and copy public records.

3. Copyright

Another possible barrier to access concerns the complex copyright issue. The Federal Copyright Act of 1976 allows copyright protection for all original works of authorship, including computer software and electronic data bases, while prohibiting such protection for any work in the public domain.²¹⁵ Federal copyright law allows each state to copyright its products. Other than this basic right, however, the Act preempts any state-created rights within the general scope of copyright.²¹⁶ Florida does not have a general copyright law, but instead has made allowance for copyright in very limited instances, for example, permitting a governmental agency to copyright agency-developed software.²¹⁷

The purpose of the federal copyright law is "[t]o promote the Progress of Science and useful Arts."²¹⁸ By stimulating the creation of intellectual works through economic incentive, copyright seeks to balance an author's intellectual property rights with the public's interest in the ideas expressed in the author's works. To this end, federal copyright law protects an author's economic interests by a grant of exclusive—but limited—controls over the work, including the right to reproduce and distribute the copyrighted work, prepare derivative

214. 1992 FLA. ATT'Y. GEN. ANN. REP. 38 (emphasis added) (discussing FLA. STAT. § 119.07(1) (1993)).

215. See 17 U.S.C. § 102 (1988). For a more detailed analysis of federal copyright law, see JCITR SOFTWARE REPORT, *supra* note 21, at 21.

216. See 17 U.S.C. § 301 (1988).

217. FLA. STAT. § 119.083 (1993). Florida's Attorney General has opined that a governmental agency or officer may not seek copyright protection without specific statutory authority. See 1986 FLA. ATT'Y GEN. ANN. REP. 94 (citing *Gessner v. Del-Air Corp.*, 17 So. 2d 522 (Fla. 1944)). Some state agencies have specific authority to hold copyright. See, e.g., FLA. STAT. § 24.105(11) (Dep't of Lottery); § 601.101 (Dep't of Citrus); § 240.229 (State Universities); § 618.07(9) (Agricultural Co-op. Marketing Assoc.).

218. U.S. CONST. art. I, § 8, cl. 8.

works based on the original, and display or perform the work publicly.²¹⁹

To qualify for federal copyright protection, a work must be independently created by the author. The amount of originality required, though, is minimal, and there is no requirement of novelty or uniqueness.²²⁰ The 1976 Act offers examples of the types of original work that may be protected by copyright.²²¹

Copyright protection is limited to original expression, and does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of its form.²²² Thus, the fact that a work is copyrighted does *not* mean every element of the work may be protected.²²³ Using computer programs as an example, copyright protects only the expressive elements of the program, not the ideas, processes, and methods embodied in the program.²²⁴ Although the distinction between idea and expression is a requisite threshold in nearly all copyright litigation, determining the elusive line between "idea" and "expression" is difficult, particularly as applied to computer software.²²⁵

Furthermore, not all expression is subject to copyright. In addition to originality, federal copyright law mandates that the expression of an idea be separable from the idea itself. If there are only a limited number of ways one may express a particular idea, then the expression

219. 17 U.S.C. § 106 (1988); see *Mazer v. Stein*, 347 U.S. 201, 219 (1954). These exclusive rights are qualified by limitations specified in the 1976 Act as amended. 17 U.S.C. §§ 107-120 (West 1977 & Supp. 1994).

220. See *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

221. See 17 U.S.C. § 102(a) (1988).

222. 17 U.S.C. § 102(b) (1988); see also *Mazer*, 347 U.S. at 217 ("copyright . . . protection is given only to the expression of the idea—not the idea itself") (citation omitted). Ideas are "dedicated by the author to the public domain upon publication." Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 707.

223. See *Feist*, 499 U.S. at 348.

224. *Lotus Dev. Corp. v. Paperback Software, Int'l*, 740 F. Supp. 37, 53 (D. Mass. 1990) (citation omitted).

225. See Pamela Samuelson, *Reflections on the State of American Software Copyright Law and the Perils of Teaching It*, 13 COLUM.-VLA J.L. & ARTS 61, 63 (1988); see also National Commission on New Technological Uses of Copyrighted Works (CONTU), *Final Report and Recommendations* 44 (1978), reprinted in 5 *Copyright, Congress and Technology: The Public Record* (N. Henry, ed. 1980) ("[i]t is difficult, either as a matter of legal interpretation or technological determination, to draw the line between the copyrightable element of style and expression in a computer program and the process [or idea] which underlies it"). The idea/expression distinction in more traditional subjects of copyright is no less troublesome. According to Judge Learned Hand, "[n]obody has ever been able to fix that boundary [between idea and expression], and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.), cert. denied, 282 U.S. 902 (1931).

of that idea merges with the idea itself and cannot be copyrighted.²²⁶ The rationale for the merger doctrine is rather simple: copyright protection for the expression of an idea so inextricably tied to the idea itself as to be inseparable would, in effect, extend protection to the underlying idea—a direct violation of the 1976 Copyright Act.²²⁷

There was considerable testimony on the copyrighting of both software and data bases at the Joint Committee's public hearings. Although there was general agreement that copyright of electronic data bases should not be permitted, there was little consensus on software copyrighting other than the recognition that agency-created software is a public record. The two issues are discussed separately for the sake of clarity.

a. Software

The copyright of computer software, whether agency-created or third party-created, has raised concerns about access to the data processed by that software, since by controlling software access one may control access to software-processed data.²²⁸ Those opposed to the provision in Florida's Public Records Law authorizing the copyright of agency-created software²²⁹ believe government should not copyright public records, particularly in light of the historical purposes of both copyright protection and the Public Records Law. Although many recognize that copyrights are a potential revenue source, many expressed concern that the copyright and marketing of agency-created software not only distorts the mission of government agencies, but more importantly, inflates the cost of and restricts access to public records.²³⁰ Respondents testifying in support of government copyrights cite the legal provision requiring agencies to provide copies of

226. See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971); *Lotus Dev. Corp.*, 740 F. Supp. at 59.

227. See 17 U.S.C. § 102(b) (1988). See also *Kalpakian*, 446 F.2d at 742 (protecting expression "in such circumstances would confer a monopoly of the 'idea' upon the copyright owner"); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967) (an idea "would be appropriated by permitting the copyrighting of its expression") (citations omitted).

228. See Fla. SB 562 (1993). For example, Florida's software copyright provision stipulates that an agency must provide a copy of agency-copyrighted software for the actual cost of duplication if the software is necessary to access that agency's data. FLA. STAT. § 119.083(3) (1993). Yet according to a survey conducted by the Joint Committee intended to examine the impact and use of section 119.083, *Florida Statutes*, the majority of agencies holding copyrights admittedly failed to comply with the law. See JCITR SOFTWARE REPORT, *supra* note 21, at 73.

229. See FLA. STAT. § 119.083 (1993).

230. See, e.g., Gerald Yung, Vice President of Government Affairs, Mead Data Central, Testimony at JCITR Public Hearing in Miami, Fla. (Sept. 8, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.) [hereinafter Yung testimony (Sept. 8, 1993)]; Metalitz testimony (Sept. 13, 1993), *supra* note 156.

the protected software, if necessary to access agency data, as support for their contention that access is not inhibited. Government copyright proponents view software copyrighting as both protection from commercial vendors and a negotiating tool in software developer relations.²³¹

The status of agency-created software as a public record was addressed during the 1993 Legislative Session in Senate Bill 562, which would have repealed the software copyright provision. While deliberating, the legislators discussed the apparent conflict between the status of agency-created software as a public record under Florida law, and the provision in federal copyright law precluding copyright protection for anything in the public domain.²³² Because agency-created software is considered a public record in Florida, it may not be copyrightable under the federal Copyright Act of 1976.²³³

The use of proprietary software (software copyrighted by a third party and licensed to a government agency) may also create barriers to *meaningful* access.²³⁴ Federal copyright law prohibits the owner of a copyrighted software program from making copies of the program without specific authority from the copyright owner.²³⁵ In addition, a large number of Florida government public records and data bases are controlled by proprietary programs.

231. See, e.g., Jim Smith, Property Appraiser, Pinellas County, Testimony at JCITR Public Hearing in Tampa, Fla. (Sept. 9, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Hagy testimony (Sept. 13, 1993), *supra* note 70. A representative from the Department of Transportation testified that the Department's main concern was protecting the integrity of the software's source code, and that the Department allows access to the executable program but not to its source code. See Thornton Williams, General Counsel, Dep't of Transp., Testimony at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

232. See Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (Feb. 10 & 18, 1993) (on file with comm.) (debate on SB 562). See also JCITR SOFTWARE REPORT, *supra* note 19, at 55-57; Staff of Fla. Jt. Comm. on Legis. Info. Tech'y Resources, PCB 2 (1993) Staff Analysis 2 (Jan. 27, 1993) (on file with the comm.).

233. See 1992 FLA. ATT'Y GEN. ANN. REP. 38.

234. The ST. PETERSBURG TIMES, for example, requested a copy of a county government data base maintained using a Hewlett Packard software program condensing the data, making it virtually unintelligible without that specific software program. See Letter from J. Robert Port, Staff Writer, ST. PETERSBURG TIMES, to Richard Ake, Clerk of the Circuit Court, Hillsborough County (Mar. 12, 1992) (on file with Jt. Legis. Info. Tech'y Resources Comm., Tallahassee, Fla.). The custodian refused to convert the program into a universally machine-readable form, even though the software contained a utility allowing for such conversion. The custodian instead offered a paper copy of the entire data base. The newspaper refused. *Id.*

235. See 17 U.S.C. § 106 (1988). The 1976 Copyright Act makes a clear distinction between "ownership of a copyright" and "ownership of any material object in which the work is embodied." *Id.* § 202. But see § 108 (allowing a library or archive to make one copy under certain specified conditions).

Florida's Public Records Law exempts proprietary software which, in addition to being a trade secret, is "obtained by an agency under a licensing agreement which prohibits its disclosure" from the inspection and copying requirements of chapter 119.²³⁶ Arguably, all other proprietary software is public record.²³⁷ Unless the proprietary software license allows an agency to provide requesters with copies of the software, this may create a conflict between Florida's Public Records Law and federal copyright law.²³⁸ Because such licenses may be prohibitively expensive, other alternatives ensuring public access to data bases controlled by proprietary software should be identified.

b. Data Bases

The copyright of data bases has only recently begun to prompt debate in Florida.²³⁹ Although federal copyright law prohibits copyright protection for the facts contained in a data base, there may be some protection for any of the data base's creative elements—the arrangement or format, for example.²⁴⁰ Additionally, copyright will become an issue if agencies are allowed to assess fees based on the commercial value of the public record requested—the only way to control the downstream use of the record is copyright or copyright-like control. Third-party copyright of public record data bases may also create barriers to access.²⁴¹

236. FLA. STAT. § 119.07(3)(q) (1993).

237. See JCITR SOFTWARE REPORT, *supra* note 21, at 56-57 (setting out statutory arguments for the conclusion that, because of specific statutory exemptions, all software not exempt is a public record).

238. The Hillsborough County Administrator has obtained such a license for its electronic mail software. See Bahn testimony (Sept. 9, 1993), *supra* note 70.

239. See PRLS Final Report, *supra* note 3, at 43-47; Memorandum from Al Rutherford, Legislative Liaison, Fla. Local Gov't Info. Sys. Assn., to Karen Stolting, Staff Director, Jt. Legis. Info. Tech'y Resources Comm. (June 8, 1993) (on file with comm.).

240. The 1976 Copyright Act protects *original* works of authorship, 17 U.S.C. § 102 (1988); to qualify for copyright protection "a work must be original to the author." Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). In *Feist*, the Supreme Court stated that "[n]o one may claim originality as to facts," and made a clear distinction between "creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Id.* at 347. The Court then used census takers as an example of those who do not "create" the records they produce, but rather simply "copy" facts "from the world around them," concluding "[c]ensus data, therefore, do not trigger copyright because these data are not 'original' in the constitutional sense. The same is true of all facts—scientific, historical, biographical, and news of the day. They may not be copyrighted and are part of the public domain available to every person." *Id.* at 347-48 (citations omitted).

241. For instance, a county recently entered into a \$3 million contract with Florida Power & Light, a private corporation. Under the terms of the contract, the county turned over a number of records to Florida Power & Light, which compiled and digitized the records and then copyrighted the compilation. In return, the county received a copy of the compiled data base for use

Those testifying at the Joint Committee's public hearings agreed that electronic data bases should not be copyrighted.²⁴² Even though all opposed such protection, the Legislature may want to consider making a definitive statement about the inappropriateness of copyrighting electronic data bases, particularly in response to the overwhelming support for public access, as evidenced by the recent passage of the constitutional amendment.

D. Privacy and Data Protection

In Florida, as elsewhere, new computer-based information technologies permit rapid accumulation and exchange of personal information concerning large numbers of individuals. Computers are increasingly used to certify the accuracy and completeness of personal information before an individual receives government benefits or services. According to one court,

It is not seriously debated that the pervasiveness of computer technology has resulted in an ever-increasing erosion of personal privacy. There is available a larger storehouse of information about each of us than ever before. Computer information is readily accessible and easily manipulated.

....

Form, not just content, affects the nature of information. Seemingly benign data in an intrusive form takes on quite different characteristics than if it were merely printed.²⁴³

Florida differs from many states in that the vast majority of this personal information becomes a readily accessible public record. For

in its GIS. Anyone wanting access to the county's data bases can obtain copies in their original form from the individual offices within the county; however, copies of the copyrighted compilation can be obtained only from Florida Power & Light, as the county is not authorized under the terms of the contract to provide access to the digitized data. See Al Rutherford, Marketing Dir., Metropolitan Dade County, Testimony at the Department of State, Bureau of Archives and Records Management Public Workshop on the Proposed Rules for Electronic and Optical Imaging Systems (Mar. 26, 1992) (transcript on file with the Bureau of Archives and Records Management, Tallahassee, Fla.).

Problems with this arrangement did not arise until after Hurricane Andrew caused massive destruction, and the Department of Natural Resources (DNR) sought a copy of the digitized data base to help in the relief effort. Florida Power & Light eventually complied with DNR's request, but the two parties spent nearly three months negotiating a binding agreement strictly limiting the Department's use of the data. Telephone Interviews with David Stage, Staff Dir., Growth Management Data Network Coordinating Council, and JCITR staff (Mar.-Apr. 1993).

242. See, e.g., Weitzel testimony (Sept. 8, 1993), *supra* note 145; Bahn testimony (Sept. 9, 1993), *supra* note 70.

243. *Kestenbaum v. Michigan St. Univ.*, 327 N.W.2d 783, 789 (Mich. 1982).

example, although Florida does not place social security numbers on drivers licenses, the Department of Highway Safety & Motor Vehicles requires specific information—personal in nature—before issuing a driver's license.²⁴⁴ Not only does the public have access to the driver's history, including the personal information compelled by the agency, but the Department routinely provides these records to direct marketing organizations and insurance companies.

Furthermore, to ease the burden of routine record requests on over-worked agency staff, and in response to private sector demand, a growing number of state agencies and local governments are providing on-line, remote electronic access to a variety of government data bases, including driver history records, motor vehicle registration, public utility information, property records, tax rolls, and criminal history documentation.²⁴⁵ This access allows comparison of massive amounts of personal information in an unlimited number of public and private settings using direct on-line linkages. As a result, Florida citizens have difficulty discovering where personal information is stored, knowing who has access, and making sure that the information is correct.

The increased collection and use of personal information made possible by advances in information technology has resulted in more public support for legislative protection of personal information,²⁴⁶ and statistics show that citizens are concerned about privacy due to the increasing use of computerized records.²⁴⁷ Basically, "[p]eople want to be assured that personal information collected or compiled by government organizations will be accurate and relevant, and will not be misused or inappropriately disclosed to others."²⁴⁸

Although the right to privacy is generally considered "one of those fundamental rights that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed,'"²⁴⁹ the parameters of an individual's right to privacy are only vaguely defined. Further complicating the issue, there are three distinct aspects of the right.

244. See FLA. STAT. § 322.08 (1993) (requiring a social security number and brief applicant description before issuing a drivers license).

245. See PROBLEMS AND ISSUES, *supra* note 3, at 123-25. Section 119.085, *Florida Statutes*, authorizes state and local agencies to offer remote electronic access as an additional means of providing public access.

246. See U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy* 28 (OTA-CIT-296) (June 1986).

247. According to a national survey conducted in January, 1993, nearly 80% of those polled are concerned or very concerned about the threat to their privacy due to the increasing use of computerized records. EQUIFAX, CONSUMER INFORMATION AND PRIVACY 10 (1993).

248. PROBLEMS AND ISSUES, *supra* note 3, at 114.

249. *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 535 (Fla. 1987) (citing *Bowers v. Hardwick*, 478 U.S.186 (1986)).

First, there is a right under state tort law to bring an action for damages for invasion of privacy by private citizens or businesses.²⁵⁰ The tort for invasion of privacy, or "the right to be let alone," was first developed in the late nineteenth century²⁵¹ and has been largely refined by state law.

The second aspect of the right to privacy, defined as the right of "individuals . . . to determine for themselves, when, how, and to what extent information about them is communicated to others,"²⁵² is rooted in the United States Constitution and involves an individual's right to be free from governmental intrusion into his or her private life.²⁵³ A number of states have built upon this constitutional guarantee by including a more specific right to privacy in their respective state constitutions. Florida's Constitution, for example, guarantees that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life"²⁵⁴ This right is limited, however, in that it "shall not be construed to limit the public's right of access to public records and meetings as provided by law."²⁵⁵

Third, statutory rights to privacy have been created by the federal government and some states. The majority of these statutes are, in reality, data protection laws including standard fair information practices.²⁵⁶ Generally, fair information practice acts govern the collection, use, disclosure, retention, and disposal of personal information by government, and, at a minimum, require all government agencies to: (1) justify the need for personal information collected from individuals; (2) notify individuals of any secondary use of the personal information collected; and (3) provide individuals with the opportunity to verify the accuracy of the personal information maintained by the agency.²⁵⁷

250. See Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 678 (1978) [hereinafter *To Be Let Alone*].

251. The "right to be left alone" was first articulated by Thomas M. Cooley in his *Treatise on the Law of Torts*, published in 1880. Samuel Warren and Louis Brandeis, however, are credited with having created the right to privacy in their seminal law review article, *The Right to Privacy*; see 4 HARV. L. REV. 193 (1890). The Warren-Brandeis article was the basis of "'an action of tort for damages' in cases of invasion of privacy," and "became the fountainhead of later law and social policy in the U.S." Robert E. Smith, *THE LAW OF PRIVACY IN A NUTSHELL* 6-7 (1993) (hereinafter *PRIVACY IN A NUTSHELL*).

252. See A. Westin, *PRIVACY AND FREEDOM* 7 (1967).

253. See *To Be Let Alone*, *supra* note 250, at 678.

254. FLA. CONST. art. I, § 23.

255. *Id.*

256. See, e.g., *PRIVACY IN A NUTSHELL*, *supra* note 251; Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707 (1987); *PROBLEMS AND ISSUES*, *supra* note 3, at 110-21.

257. See *PROBLEMS AND ISSUES*, *supra* note 3, at 112-13.

The distinction between *privacy* protection and *data* protection is not particularly clear or commonly understood. Data protection laws are "especially concerned with controlling the collection, use, and dissemination of personal information" by government agencies.²⁵⁸ Data protection focuses on the individual's right to know what personal information is collected and maintained by government, and provides an opportunity to verify the informational accuracy. This minimal protection is important, particularly in Florida, because ultimately we cannot absolutely protect privacy while providing for public access. Thus,

we must assure that people have access to the databases they are in and that the information is available. We must also provide the means by which they can correct, or at least challenge, the data. And if they can't challenge the data and have it changed then at least make the records contain the notation that someone disagreed with it.²⁵⁹

Because Florida has one of the country's strongest policies favoring public records disclosure, the conflict between an individual's right to privacy and public access to government records is unavoidable. Article I, section 24 of the *Florida Constitution* guarantees public access to the records of all three branches of State government. In apparent contrast, article I, section 23 guarantees a person's "right to be let alone and free from governmental intrusion into his private life." Article I, section 23, however, is specifically secondary to the public's right to access.²⁶⁰

An individual's right to privacy may be partly protected by legislative exemptions to the inspection and copying requirements of chapter 119—under Florida law, there are over 500 specific exemptions for confidential or sensitive information which would otherwise be a matter of public record.²⁶¹ Currently, however, publicly accessible personal information is unprotected, even though the need for a data

258. David H. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831, 834 (1991).

259. Edwin A. Levine, *Access and Protection*, Address Before Chief Officers of State Library Agencies, Gateways to Comprehensive State Information Policy: A Conference for State Government Stakeholders (Oct. 15-17, 1988) (transcript on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.).

260. See FLA. CONST. art. I, § 23.

261. Some of the exemptions to the public access requirements of chapter 119 are contained in sections 119.07(3)-.07(7), *Florida Statutes*. A list of over 500 additional exemptions, scattered throughout the statutes, can be found in the 1992 edition of the Government-in-the-Sunshine Manual.

protection law incorporating basic fair information practices was first identified by the Joint Committee in 1984.²⁶²

At the Joint Committee's public hearings, other than the two speakers invited by the Joint Committee to specifically address the issue,²⁶³ those testifying recognized the need for data protection, but were concerned that whole classes of public records would be closed because public access may somehow be abused or misused.²⁶⁴ There is some merit to these concerns. For example, in 1992 the Florida Senate considered legislation providing an exemption for information identifying Florida public utilities customers. Although the Senate bill was amended to narrow the exemption and conform with the committee substitute for the companion House bill, the Governor vetoed the bill.²⁶⁵ The Senate and the House also considered legislation that session designed to exempt the home address of any titleholder, registered owner, or licensed driver from public records maintained by the Department of Highway Safety & Motor Vehicles.²⁶⁶

Such personally identifiable information may potentially be used for an abusive or illicit purpose. However, as was made clear at the Joint Committee's public hearings, the misuse of public access is not a question of privacy, but rather of unlawful conduct, and closing public records in the name of privacy because of the criminal behavior of specific individuals is an inappropriate response.²⁶⁷ The *appropriate* response is to prohibit and punish the criminal—for instance, Florida's recently enacted law which makes stalking a crime,²⁶⁸—and to of-

262. See STAFF OF JT. LEGIS. INFO. TECH'Y RESOURCES COMM., FAIR INFORMATION PRACTICES 4 (Feb. 1984); PROBLEMS AND ISSUES, *supra* note 3, at 110.

263. The Joint Committee invited Robert Ellis Smith, Editor, PRIVACY JOURNAL, and Prof. Paul Schwartz, U. of Ark., Robt. A. Leflar Law Center, to testify on the issue of privacy and data protection at the JCITR's Tallahassee hearing.

264. See, e.g., Yung testimony (Sept. 8, 1993), *supra* note 230; Chamberlin testimony (Sept. 9, 1993), *supra* note 161; Bralow testimony (Sept. 13, 1993), *supra* note 92; see also Jane E. Kirtley, *A Reflection on the News Media, Personal Privacy, and the First Amendment*, 26 VAL. U. L. REV. 89, 93 (1991) (many "initiatives limiting access to information are based on misguided or opportunistic exploitation of privacy concerns").

265. See Fla. SB 1644 (1992); Fla. CS for HB 413 (1992).

266. See Fla. CS for SB 1000 (1992); *id.* CS for HB 1361 (1992). Although such information would be considered confidential and exempt from public disclosure under chapter 119, the legislation authorized the DHSMV to continue to provide such information to direct marketers and insurance companies. There was, however, a penalty for the redistribution of the information. In 1994, Congress enacted legislation similarly restricting access to state motor vehicle information. 18 U.S.C.A. § 2721 (West Supp. 1994).

267. See Dan Stengle, Staff Dir., Sen. Govtl. Ops. Comm., Statements at JCITR Public Hearing in Tallahassee, Fla. (Sept. 13, 1993) (tape on file with Jt. Legis. Info. Tech'y Resource Comm., Tallahassee, Fla.); Bralow testimony (Sept. 13, 1993), *supra* note 92.

268. FLA. STAT. § 784.048 (1993).

fer at least minimal data protection to public records subjects. This is the only feasible means of balancing the two constitutional interests, particularly since Florida's Constitution stipulates that the individual's right to privacy is subordinate to the public's right of access.

Nearly every year since 1985, the Florida Legislature has considered but failed to pass data protection legislation, usually in the form of a Fair Information Practices Act.²⁶⁹ In general terms, such legislation has recognized that

[e]very citizen has the right to know what kind of information is being gathered about him or her. And if that information is part of a public record as the result of a publicly recorded transaction, then the individual should have the right to view, and, if necessary, to correct or contest that information.²⁷⁰

Due to the recently enacted constitutional guarantee of access to public records, and the potential impact on the Florida economy of the European Community's Draft Directive on data protection, data protection is a vital issue. In light of these recent developments and the ever-increasing computerization of public records, Florida should revisit the issues of data protection and fair information practices.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Defining Key Words

1. **"Record"**: The Joint Committee found that an electronic record is as much a public record as its printed counterpart, and that the current definition is generally sufficient. The definition should be amended to explicitly recognize that "agency-created data processing software and electronic mail are public records for the purposes of Florida's Public Records Law."²⁷¹

2. **"Custodian"**: Finding the terms "custodian" and "any person who has custody" synonymous, the Joint Committee concluded that creating a statutory distinction between the custodian of a public record and the agent or steward of that record for maintenance and dissemination may inadvertently create barriers to public access. In

269. See, e.g., Fla. HB 1260 (1989); Fla. SB 483 (1989). Historically, FIPA-type legislation has passed the House, but not the Senate. See Fla. HB 2073 (1992).

270. See Patricia Seybold, *Government Involvement in the Information Age*, 4 PARADIGM SHIFT 1, 15 (1992) (paraphrasing Ed Levine, Information Technology Senior Policy Coordinator, Office of Financial Management, Washington).

271. See ELECTRONIC RECORDS REPORT, *supra* note 5, at 145.

addition, the Committee found that because the Legislature has the sole power to create exemptions to Florida's Public Records Law, distinguishing between custodian and agent or steward is unnecessary.²⁷²

3. "Extensive": The Joint Committee determined that the word "extensive," as used in Florida's Public Records Law, is like "reasonable," a common term subject to multiple interpretations. Therefore, agencies will construe "extensive use of agency resources" differently. The Committee recommended that each agency should define the term "extensive" in its public records access policy, and provide written justification for such definition.²⁷³

B. Cost of Access and Fees to Be Charged

The Joint Committee found practical difficulties in attempting to question and verify the identity of public record requesters. Additionally, public policy concerns and constitutional issues arise in distinguishing between users of public records and assessing public records access fees based on commercial motivation. The Committee concluded, however, that agencies may need to collect more than the actual duplication cost for large volume requests not requiring extensive agency resources.²⁷⁴ Based on this conclusion, the Joint Committee recommended that Florida's Public Records Law be amended "to allow agencies to assess a reasonable charge for the labor and overhead associated with the duplication of large volume requests."²⁷⁵

Due to the challenge of predicting the path of rapid advances in information technology and the potential for avoidance of Florida's Public Records Law access requirements, the Joint Committee concluded that allowing an exemption for particular types of information technology is impracticable and exempting the commercial use of public records raises serious constitutional issues.²⁷⁶ The Committee also concluded that determining the appropriate statutory fee for public records with a commercial value would be extremely difficult, and recommended that those statutory provisions currently allowing assessment of a flat fee for a copy of a particular public record be evaluated to determine whether such charges act as a constructive denial of public access when the per-record charge is applied to a large data base.²⁷⁷

272. *Id.* at 145-46.

273. *Id.* at 146.

274. *Id.* at 148.

275. *Id.* at 146-47 (discussing FLA. STAT. § 119.07(1)(a) (1993)).

276. *Id.* at 147.

277. *Id.* at 148-49.

C. Barriers to Electronic Access

1. **Format:** The Joint Committee determined that agencies should provide access to electronic records in the format requested *if* the agency maintains the record in that format.²⁷⁸ The Committee recommended a statutory distinction between regular requests and other, "special" requests, defined as "those requests for records (1) not routinely developed or maintained by an agency; (2) requiring a substantial amount of manipulation or programming by the record custodian; or (3) in a form not utilized by the agency."²⁷⁹

2. **System Design and Development:** The Joint Committee found the rapid emergence of information technology during the past two decades has dramatically enhanced the ability of Florida public agencies to create, manipulate, and disseminate public information.²⁸⁰ However, failing to consider access when designing and developing new information technology systems, including the redaction of exempt information, has created barriers to public access.²⁸¹ Importantly, the Committee also found that access to public information should not depend upon the form the public records are received, compiled, stored, accessed, or disseminated, and technology and computer adaptation should not frustrate the purpose of Florida's Public Records Law. Based on these findings, the Joint Committee recommended that chapter 119 be amended to require all state and local agencies to consider public access and the redaction of exempt information when designing and developing new and modifying existing information technology systems.²⁸² Furthermore, agencies should be statutorily precluded from entering into any contract or agreement impairing the right to inspect or copy any nonexempt public record.²⁸³

3. **Copyright:** Based on Florida case law and an interpretation of chapter 119, the Joint Committee found agency-created data processing software is a public record under Florida's Public Records Law. Whether the classification of such software as a public record places it in the public domain—and not subject to copyright—is a question of federal law answerable only by the courts.²⁸⁴

The Joint Committee, finding that the increasing utilization of proprietary software by Florida public agencies has created barriers to

278. *Id.*

279. *Id.* at 149.

280. *Id.*

281. *Id.*

282. *Id.* at 149-50.

283. *Id.* at 150.

284. *Id.*

access of public records, recommended that the Legislature amend chapter 119 to require all state and local agencies utilizing proprietary software or software copyrighted by a third party to either obtain a software license, allowing copies to be provided if necessary to process a public record, or to assure that such software is capable of translating the data into some universally machine-readable form.²⁸⁵ The Committee also concluded that "in light of public policy concerns and the spirit and intent of Florida's Public Records Law, the copyright of public record data bases should not be authorized under Florida Law."²⁸⁶

D. Privacy and Data Protection

The Joint Committee found that an individual's privacy right may be protected by more than 500 exemptions to the access requirements of Florida's Public Records Law. However, because the right to privacy is specifically subject to the public's right to access under the *Florida Constitution*, Florida law cannot absolutely protect the right to privacy.²⁸⁷ Based on these conclusions, the Joint Committee recommended that the Legislature enact a Fair Information Practices Act to "enhance the rights of individuals about whom personal information is collected or maintained" by a state agency.²⁸⁸

E. Other Conclusions and Recommendations

The Joint Committee also concluded that many of the problems involving electronic records access stem from a misunderstanding of the requirements of Florida's Public Records Law. Therefore, the Committee recommended that the Department of State be statutorily required to develop a model access policy through formal rulemaking procedures, and to establish a training program for records custodians on the requirements of chapter 119. The Committee also recommended that all state and local agencies be required to develop written access policies based on the Department of State's model policy.²⁸⁹

Since computerizing public records frequently frustrates public records access, the Joint Committee recommended the creation of an independent Public Records Advocate. Under the Joint Committee's

285. *Id.* at 150-51.

286. *Id.* at 151.

287. *See supra* notes 258-68 and accompanying text.

288. *Id.* at 152; Fla. SB 1418, § 2, at 6, line 3 (1994).

289. *See* ELECTRONIC RECORDS REPORT, *supra* note 5, at 152-53.

recommendation, the Advocate would act as the public's representative to the Florida Legislature.²⁹⁰

Finally, and perhaps most importantly, the Joint Committee recognized that providing access to public records is an inherent part of the public function of all state and local agencies. The Joint Committee recommended the Legislature create a section of intent in chapter 119 to stipulate that providing access to public records is a function of all public agencies and that information technology enhance rather than frustrate public access.²⁹¹

V. THE ELECTRONIC RECORDS BILL

In response to the Joint Committee's report and recommendations, two bills were filed during the 1994 Regular Session: Senate Bill 1418, sponsored by Senator Daryl Jones,²⁹² and an identical House companion, House Bill 1343, sponsored by Representative Charlie Roberts. The amended Committee Substitute for House Bill 1343 was passed by a vote of ninety-five to fourteen.²⁹³ Although passed by the Senate Governmental Operations Committee, this bill was not considered by the full Senate. Having received greater consideration, the House Bill is discussed here in greater detail than the Senate companion, Senate Bill 1418.

1. The Public Records Mediation Program: As originally filed, section 1 of House Bill 1343 would have created the Office of the Public Records Advocate, to be housed within the legislative branch, for representing the public in all matters relating to public records access.²⁹⁴ The Office was to be initially staffed by an attorney and an administrative assistant, and carried an appropriation of \$120,000.²⁹⁵ In contrast, section 1 of the Committee Substitute for House Bill 1343 would have created the Public Records Mediation Program within the Office of the Attorney General.²⁹⁶ This voluntary program, designed to help parties involved in disputes over public records access reach agreement, is run by the Attorney General without specific statutory authorization.²⁹⁷ The Committee Substitute for House Bill 1343 would

290. *Id.* at 153-54.

291. *Id.* at 154.

292. Dem., Miami.

293. FLA. H.R. JOUR. 251 (Reg. Sess. 1994) (CS for HB 1343).

294. See Fla. HB 1343, § 1 (1994).

295. See Staff of Fla. Jt. Legis. Info. Tech'y Resource Comm., PCB 1 (1994) Staff Analysis 10 (Jan. 3, 1994) (on file with comm.).

296. See Fla. CS for HB 1343, § 1 (1994).

297. FLA. S. COMM. ON GOVTL. OPS., A REPORT ON PUBLIC ACCESS TO RECORDS STORED ELECTRONICALLY 97 (Feb. 1994) [hereinafter SGO PUBLIC ACCESS REPORT].

have expanded the program by requiring that recommendations be made to the Legislature regarding needed public records access legislation, and also that assistance be given to the Department of State in promulgating model rules governing access to public records and developing training programs for records custodians on the Public Records Law requirements.²⁹⁸

2. Legislative Findings and Intent: Section 12 of House Bill 1343 contained a strong statement of public policy, in the form of legislative findings, recognizing that providing access to public records "is an inherent governmental function of each agency. . . ." ²⁹⁹ This language was amended by the House Committee on Governmental Operations, finding "that providing access to public records is a *duty*" of each agency.³⁰⁰ Both versions of the bill stipulated "that automation of public records must not erode the right of access to those records," and that, as government agencies increase their use of and dependence on automation for the development and maintenance of public records, they "must ensure adequate and prompt access to those records."³⁰¹

Representative Paul Hawkes³⁰² offered an amendment to the intent section of Proposed Committee Substitute for HB 1343 which was adopted by the House Committee on Governmental Operations.³⁰³ The amendment, which articulated current public policy, stated that Florida's Public Records Law is not a vehicle for raising revenue, and recognized "that as the cost for public records increases, availability of the public records decreases."³⁰⁴

3. The Definition of Public Record: Consistent with the Joint Committee's recommendation,³⁰⁵ House Bill 1343 amended the definition of "public record" to specifically include agency-created data-processing software. Additionally, the phrase, "regardless of physical form or characteristics," was amended to read, "regardless of the physical form, or characteristics, *or means of transmission*," ensuring that electronic mail would be included within the definition.³⁰⁶ The

298. See Fla. CS for HB 1343, § 1 (1994).

299. Fla. HB 1343, § 12 (1994) (proposed amendment to FLA. STAT. § 119.01, regarding general state policy on public records).

300. See Fla. CS for HB 1343, § 2 (1994) (emphasis added).

301. See Fla. HB 1343, § 12 (1994); see also Fla. CS for HB 1343, § 2 (1994).

302. Repub., Crystal River.

303. See Fla. H.R. Comm. on Govtl. Ops., tape recording of proceedings (Mar. 29, 1994) (on file with comm.) (comments of Rep. John Hawkes, amending PCS 1343, § 2 (1994)).

304. Fla. CS for HB 1343, § 2 (1994) (proposed FLA. STAT. § 119.01(3)).

305. See ELECTRONIC RECORDS REPORT, *supra* note 5, at 145.

306. See Fla. HB 1343, § 13 (1994) (proposed amendment to FLA. STAT. § 119.07(1)(a)).

Committee Substitute for House Bill 1343 contained identical language.³⁰⁷

4. **Fees:** Under Florida's Public Records Law, a records custodian may recoup only the actual cost of duplicating a public record, plus any applicable extensive use fee. However, county constitutional officers may charge a reasonable fee for the labor and overhead associated with duplicating county maps and aerial photographs.³⁰⁸ As originally filed, House Bill 1343 deleted the county constitutional officer limitation, and expanded the fee provision to include electronic copies of computer data bases.³⁰⁹ Thus, the bill would have authorized all records custodians to charge a reasonable fee for the labor and overhead associated with duplicating or copying maps, aerial photographs, and computer data bases. By allowing labor and overhead costs for electronic copies of computer data bases, the consideration of this alternative to the current approach signified a notable change in public policy.

A number of records custodians felt that the fee provision in House Bill 1343 did not adequately recover costs.³¹⁰ Proposed Committee Substitute for House Bill 1343 contained a provision which tracked the fee scheme used in Orlando and Orange County for providing GIS records.³¹¹ Under the Proposed Committee Substitute, as adopted by the Subcommittee on Governmental Accountability, an agency would have been allowed to charge one cent per byte, on a sliding scale and with a cap of \$3000, for copying information in a computer data base to an electronic format.³¹²

307. See Fla. CS for HB 1343, § 3 (1994).

308. FLA. STAT. § 119.07(1)(a) (1993).

309. See Fla. HB 1343, § 14 (1994) (proposed amendment to FLA. STAT. § 119.07(1)(a) (1993)).

310. See, e.g., Letter from Franklin R. Hagy, Dir. of Information Systems, Orlando, Fla., to Karen Stolting, Staff Dir., Jt. Legis. Info. Tech'y Resource Comm. (Feb. 24, 1994) (on file with comm.); see also Letter from Carol Marchner, Dir. of Labor Relations, Fla. League of Cities, to Rep. Charlie Roberts, Chairman, Jt. Legis. Info. Tech'y Resource Comm. (Apr. 6, 1994) (on file with comm.) [hereinafter Marchner Letter]. Mr. Hagy's letter dealt with the fee language in PCS for SB 2524. However, the language in section 13 of PCS for SB 2524 which would have amended section 119.07(1)(a), *Florida Statutes*, was identical to that in section 14 of HB 1343. See Fla. S. Comm. on Govtl. Ops., PCS for SB 2524, § 13 (1994); see also Fla. HB 1343, § 13 (1994).

311. See Fla. H.R. Comm. on Govtl. Ops., Amendment 001 to HB 1343, at 4 (Mar. 28, 1994) (on file with comm.); see also Letter from Franklin R. Hagy, Dir. of Information Systems, Orlando, Fla., to Karen Stolting, Staff Dir., Jt. Legis. Info. Tech'y Resource Comm. (Feb. 28, 1994) [hereinafter Hagy Letter of Feb. 28] (enclosing copy of City of Orlando price list for GIS Base Map Digital Data) (on file with comm.).

312. Specifically, the proposed scheme allowed 1 cent per 1000 bytes for the first 3 million bytes, 1 cent per 2000 bytes for the next 7 million bytes, 1 cent per 10,000 bytes for the next 1 billion bytes, and 1 cent per 100,000 bytes for anything thereafter. See Fla. H.R. Comm. on

The per-byte fee provision, which was a radical departure from current law and policy, spawned controversy. Supporters viewed the provision as a simple and reasonable means of recouping revenue; opponents argued that the provision violated the constitutional guarantee of access as well as the spirit and intent of Florida's Public Records Law.³¹³

Uniformity was the major benefit of the per-byte fee provision contained in the Proposed Committee Substitute: Because the per-byte fee, similar in structure to the fee of fifteen cents now authorized for providing one-sided paper copies,³¹⁴ would apply to every state agency and local government in Florida, a requester would pay the same fee for the same amount of public record information anywhere in the state. Under the expanded fee provision contained in House Bill 1343, each records custodian would determine the labor and overhead costs associated with copying a data base in an electronic format. This means that fees could vary widely from agency to agency, and even from office to office within a given agency.³¹⁵ Conversely, most regular public records requesters were opposed to the arbitrariness of the per-byte fee provision. They argued that no correlation exists between the one-cent fee and the actual cost of providing public record information in an electronic format.³¹⁶

Govtl. Ops., Amendment 001 to HB 1343, at 4 (1994).

The per-byte fee provision in PCS for HB 1343 was similar in structure to an amendment offered by Senator Buddy Dyer, Dem., Orlando, during debate of the PCS for SB 2524 in the Senate Governmental Operations Committee. See Fla. S. Comm. on Govtl. Ops., Dyer Amendment to PCS for SB 2524 (1994) (on file with comm.). The Dyer Amendment would have allowed a fee of 17 cents per 10,000 bytes for the first 3 million bytes, 10 cents per 10,000 bytes for more than 3 million bytes through 10 million bytes, and 5 cents per 10,000 bytes for more than 10 million bytes. The amendment was defeated by a substitute amendment offered by Senator Daryl Jones, which allowed a fee for electronic copies of computer data bases that included the labor and overhead associated with duplication or copying, and required that the fee be established by rule or ordinance. See Fla. S. Comm. on Govtl. Ops., Jones Amendment to PCS for SB 2524 (1994) (on file with comm.).

313. See, e.g., Larry Rochter, *Florida Weighs Fees for Its Computer Data: Some See Profits; Others, Too High a Price*, N.Y. TIMES, Mar. 31, 1994, at 3B (hereinafter Rohter, *Florida Weighs Fees*).

314. See FLA. STAT. § 119.07(1)(a) (1993) (allowing a fee of 15 cents per one-sided copy for duplicated copies of public records). According to Frank Hagy, Director of Information Systems for the City of Orlando, the City's per-byte pricing scheme for GIS records is based on this provision in the Public Records Law. See Hagy Letter of Feb. 28, *supra* note 310.

315. However, Representative Vernon Peoples, Dem., Punta Gorda, offered an amendment to the PCS for HB 1343 which stated that the fee for electronic copies of public record data bases be set by rule or ordinance, and be based on the model rule developed by the Department of State. See Fla. H.R. Comm. on Govtl. Ops., Peoples Amendment to HB 1343 (Mar. 29, 1994); see also *infra* notes 304-06. The amendment was adopted by the House Committee on Governmental Operations. See Fla. CS for HB 1343, § 4 (1994).

316. See, e.g., Fla. H.R. Comm. on Govtl. Ops. (Mar. 29, 1994) (on file with comm.) (testimony of David Bralow, Atty, representing the Tampa Tribune); see also Rochter, *Florida Weighs Fees*, *supra* note 312.

Representative Vernon Peoples offered an amendment to the fee provision which was adopted by the Committee. The Peoples Amendment, tracking the language in section 13 of the Committee Substitute for Senate Bill 2524, allowed the fee for an electronic copy of a computer database to include a reasonable charge, established by rule or ordinance, for the labor and overhead costs associated with the duplication or copying of the database.³¹⁷

The Peoples Amendment also struck language in the Proposed Committee Substitute allowing agencies with specific statutory fee authority to charge either the per-record fee or the per-byte fee "when copying information to an electronic medium. . . ."³¹⁸ The struck language contradicted the recommendations made by the Joint Committee and various sections of House Bill 1343, which would have required agencies with per-record authority to charge a reasonable fee for an electronic copy of a computer database.³¹⁹ However, after strident protests from the Department of Highway Safety & Motor Vehicles,³²⁰ an amendment was added during floor deliberations allowing DHSMV and the other affected agencies to charge the per-record fee for an entire database.³²¹

5. Record Format: House Bill 1343 distinguished between routine public records requests and special requests—those requests for records in a particular medium or form. As originally drafted, House Bill 1343 required an agency to provide a copy of a public record "in the medium requested if the agency maintains the record in that medium." If an agency maintained the record in an alternative medium, the agency would be required to either convert the record to the medium requested, or to provide a copy of the record in some other

317. See Fla. H.R. Comm. on Gov't. Ops., Peoples Amendment to HB 1343 (Mar. 28, 1994) (on file with comm.); see also Fla. CS for HB 1343, § 4 (1994).

318. See Fla. H.R. Comm. on Gov't. Ops., Peoples Amendment to PCS for HB 1343 (1994) (on file with comm.); see also *id.* Amendment 001, at 5.

319. See ELECTRONIC RECORDS REPORT, *supra* note 5, at 147-48; see also Fla. HB 1343, §§ 3, 8 (1994). The agencies with statutory authority to charge a per record fee are the Department of State, Department of Health & Rehabilitative Services, Department of Highway Safety & Motor Vehicles, and the Clerks of the Court. The Florida Department of Law Enforcement has similar authority, but was not included within the scope of HB 1343.

320. See Memorandum from Randolph A. Esser, Information Systems Dir., Dep't of High. Saf. & Motor Veh., to Karen Stolting, Staff Dir., Jt. Legis. Info. Tech'y Resource Comm. (Mar. 7, 1994) (on file with comm.). According to Mr. Esser, the Department's driver history database could be duplicated for approximately \$9,720. If the Department's regular 14 requesters sought a copy of the entire data base each month of the year, the revenue generated would be a little over \$1.6 million. However, under the Department's practice of charging for records on a per-record basis, the Department anticipates revenue in the amount of \$16.8 million for fiscal year 1993-94. *Id.*

321. See FLA. H.R. JOUR. 1251 (Reg. Sess. 1994).

meaningful medium.³²² In distinguishing between regular and special requests, House Bill 1343 further stipulated that requests for records in a medium or form routinely used by an agency allowed recovery only of the actual duplication cost unless otherwise provided by law.³²³ House Bill 1343 required the fee for special requests—those requests for records (1) in a medium not routinely used by an agency, (2) not routinely developed or maintained by agency, or (3) requiring a substantial amount of manipulation or programming—to be in accordance with section 119.07(1)(b), *Florida Statutes*, thus allowing an extensive use charge.³²⁴ The bill stipulated that an agency had the option of complying with special requests, in effect codifying *Seigle v. Barry*.³²⁵

The companion provision in Committee Substitute for House Bill 1343 retained the requirement that a records custodian provide a copy of a public record in the medium requested if the record is maintained in that medium.³²⁶ However, the Committee Substitute stipulated that the fee for such regular requests “shall be in accordance with chapter 119,”³²⁷ rather than section 119.07(1)(a), as allowed under the House Bill.³²⁸ The effect of this change could be significant for a requester—House Bill 1343 would have allowed only the actual cost of duplication for records requests in a medium routinely used by an agency.³²⁹ In contrast, the committee substitute would allow both the actual cost of duplication *and* an extensive use fee. The House Bill allowed the fee only for special requests.³³⁰ The provisions addressing special requests were effectively identical in both the House Bill and the committee substitute.³³¹

322. See Fla. HB 1343, § 15, at 18 (1994) (proposed amendment to FLA. STAT. § 119.083).

323. See FLA. STAT. § 119.07(1)(a) (1993).

324. See Fla. HB 1343, § 15, at 18 (1994); see also FLA. STAT. § 119.07(1)(b) (1993).

325. See Fla. HB 1343, § 15, at 18 (1994); *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *petition for review denied*, 431 So. 2d 988 (Fla. 1983). In finding that the intent of Florida's Public Records Law is to make public records available in some meaningful form but not necessarily that which the requester prefers, the Fourth District Court of Appeal noted that a records custodian has the option of complying with such special requests. *Seigle* at 65; see also *supra* notes 188-95 and accompanying text.

326. See Fla. CS for HB 1343, § 5, at 8 (1994).

327. *Id.* (emphasis added).

328. See Fla. HB 1343, § 15, at 18 (1994); see also *supra* text accompanying note 321.

329. A records custodian may charge 15 cents per one-sided copy for copies of duplicated records; for all other copies, the custodian may charge “the actual cost of duplication” unless some other fee has been set by law. FLA. STAT. § 119.07(1)(a) (1993).

330. See Fla. CS for HB 1343, § 5, at 8 (1994); see also Fla. HB 1343, § 15, at 18 (1994). Section 119.07(1)(b) states that if the nature or volume of a public records request requires the extensive use of agency resources, a records custodian “may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost[s] incurred. . . .” FLA. STAT. § 119.07(1)(b) (1993).

331. Compare Fla. CS for HB 1343, § 5, at 8 (1994) (allowing both the actual cost of duplication and an extensive use fee) with Fla. HB 1343, § 15, at 18 (1994) (same).

6. Data Processing Software and Systems: Both House Bill 1343 and Committee Substitute for House Bill 1343 would have made a number of substantive changes to the Public Records Law regarding proprietary software and system design and development.³³²

Each bill contained the same definition of "proprietary software" and stipulated that the use of such software "must not diminish the right of the public to inspect and copy a public record."³³³ House Bill 1343 would have required all agencies using proprietary software to either obtain a site license for the software—which would allow a copy to be used to process the public records—or to ensure that the proprietary software had the capacity to create a "universally machine-readable copy of each public record stored, manipulated, or retrieved by the proprietary software."³³⁴ The language in this second option was modified in Committee Substitute for House Bill 1343, requiring agencies to: "[e]nsure . . . that the proprietary software has the capacity to create an electronic copy of each public record stored, manipulated, or retrieved by the proprietary software *in some standard format* such as, but not limited to, the American Standard Code for Information Interchange."³³⁵

Consistent with the recommendations of the Joint Committee, House Bill 1343 tracked the language in the Department of State's rule on the long-term storage of public records,³³⁶ requiring agencies to assure, before acquiring or modifying any computer or optical imaging system, that such system "adequately provides for public access to public records and allows the redaction of exempt or confidential information."³³⁷ In response to a suggestion by Franklin R. Hagy, Director of Information Systems for the City of Orlando, this language in the committee substitute was modified to clarify that an agency

332. See Fla. HB 1343, § 15 (1994) (proposed amendment to FLA. STAT. § 119.083); Fla. CS for HB 1343, § 5 (1994) (proposed amendment to FLA. STAT. § 119.083).

333. See Fla. HB 1343, § 15, at 16, 17 (1994) (proposed amendment to FLA. STAT. § 119.083); Fla. CS for HB 1343, § 5, at 6, 8 (1994) (proposed amendment to FLA. STAT. § 119.083).

334. Fla. HB 1343, § 15 (1994) at 17-18. A technical amendment was offered on the House Floor to delete the word "site", as in "site license." The amendment was adopted. See FLA. H.R. JOUR. 1251 (Reg. Sess. 1994).

335. Fla. CS for HB 1343, § 5, at 7-8 (1994) (emphasis added). During the final days of debate on the bill, there was confusion regarding the requirements of House Bill 1343. See, e.g., Marchner Letter, *supra* note 309 ("We understand that the bill was *amended* to include an 'or' to lessen the impact of this section . . .") (emphasis added). Yet the only difference between House Bill 1343, section 15, and Committee Substitute for House Bill 1343, section 5, was the clarification of the term, "universally machine-readable form" in the committee substitute.

336. See ELECTRONIC RECORDS REPORT, *supra* note 5, at 150; see also FLA. ADMIN. CODE ANN. r. 1B-26 (1992).

337. Fla. HB 1343, § 15, at 18 (1994).

would not be required to ensure access and redaction capability in *all* electronic recordkeeping systems, but rather would provide such capability if necessary.³³⁸

Additionally, House Bill 1343 would have precluded an agency from entering into any contract or obligation that would impair the ability of the public to inspect or copy that agency's public records, "including public records that are on-line or stored in a computer or optical imaging system. . . ." ³³⁹ The comparable provision in the Committee Substitute was more specific, precluding agencies from entering into contracts "for the creation or maintenance of a public records database. . . ." ³⁴⁰

7. Model Rules: In response to complaints from records custodians concerning the lack of a public access model rule, the Joint Committee recommended that the Department of State promulgate and adopt a model rule in accordance with chapter 119.³⁴¹ Section 16 of House Bill 1343 implemented this recommendation and also required that the Department institute and maintain a training and information program on public access requirements.³⁴² In slight contrast, the Committee Substitute for House Bill 1343, also requiring implementation of a public access training program, ordered the Department of State to develop the model rule in consultation with the Attorney General and the Public Records Mediation Program.³⁴³ However, under the Committee Substitute the model rule would be the applicable rule for each agency subject to chapter 119, unless an agency adopted "a specific rule or ordinance covering any subject matter contained in the model rules. . . ." ³⁴⁴

338. According to Mr. Hagy, the modification was an attempt to "clarify that an agency must plan for public access but does not have to incur the expense unless a request is made." Hagy Letter of Feb. 28, *supra* note 310, at 2.

339. See Fla. HB 1343, § 15, at 18-19 (1994).

340. See Fla. CS for HB 1343, § 5, at 8 (1994).

341. See ELECTRONIC RECORDS REPORT, *supra* note 5 at 153. The Joint Committee made a similar recommendation in its 1992 report, A CRITICAL ANALYSIS OF PROPOSED AMENDMENTS TO FLORIDA'S PUBLIC RECORDS LAW. See CRITICAL ANALYSIS, *supra* note 3, at 41.

342. See Fla. HB 1343, § 16, at 19 (1994) (proposed amendment to FLA. STAT. § 257.36).

343. See Fla. CS for HB 1343, § 6, at 9 (1994).

344. *Id.*

