

Fall 1985

## A Return to Sunshine: Florida Sunsets Open Government Exemptions

Barry Richard

Richard Grosso

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Legislation Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 Fla. St. U. L. Rev. 705 (2017).  
<http://ir.law.fsu.edu/lr/vol13/iss3/9>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# A RETURN TO SUNSHINE: FLORIDA SUNSETS OPEN GOVERNMENT EXEMPTIONS

BARRY RICHARD\* AND RICHARD GROSSO\*\*

## I. INTRODUCTION

The "Sunshine State" has consistently been a national leader in the area of open government. Throughout this century, Florida has set the pace for other states by enacting and refining its open records<sup>1</sup> and open meetings<sup>2</sup> laws, which are designed to enhance public faith in government. This pioneer image, however, has become tainted over the years by a preoccupation with finding exceptions to the rule.

During the 1985 Regular Session, the Florida Legislature put the finishing touches on an open government renaissance. In 1984, the decision had been made to review periodically and subsequently repeal all exceptions to the open government laws. The legislature refined this process with the passage of the Open Government Sunset Review Act of 1985.<sup>3</sup>

This Article summarizes the history of open government in Florida as well as the events which led to the decision to apply the sunset concept to open government exemptions. A detailed analysis of the 1984 and 1985 legislative enactments is provided. Finally, the authors offer some conclusions regarding the perceived effect of this legislation on the future of open government in Florida.

## II. HISTORY OF OPEN GOVERNMENT

Florida's "Government in the Sunshine" law was enacted by the 1967 legislature, the first to meet since "porkchop politics" went into decline as a result of reapportionment.<sup>4</sup> The statute mandated that all meetings of any state, county, or municipal board or com-

---

\*Senior partner, Roberts, Baggett, LaFace & Richard, Tallahassee, Florida. University of Miami, A.B., 1964; J.D., 1967. Member, Florida House of Representatives, 1974-78. Currently, representative for the Florida Press Association and the Florida Society of Newspaper Editors.

\*\*Candidate for the degree Juris Doctor, Florida State University College of Law.

1. FLA. STAT. §§ 119.01-.12 (1983).

2. FLA. STAT. § 286.011 (1983).

3. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. § 119.14).

4. Comment, *Exemptions To The Sunshine Law And The Public Records Law: Have They Impaired Open Government In Florida?*, 8 FLA. ST. U.L. REV. 265, 267 (1980). The term "porkchop politics" refers to the control of the Florida Legislature by legislators from the rural, conservative sections of Florida. A. MORRIS, *THE FLORIDA HANDBOOK* 133 (20th biennial ed. 1985-86).

mission be open to the public, and that any official action taken at a closed meeting not be binding.<sup>5</sup> Despite the sweeping language of the statute and strong judicial adherence to its underlying policy, particularly by the Florida Supreme Court,<sup>6</sup> the legislature has allowed numerous exceptions.

Florida's public records law was originally enacted in 1909 as an unconditional statement of public policy that "all [s]tate, county, and municipal records shall at all times be open for a personal inspection [by] any citizen of Florida."<sup>7</sup> Nevertheless, the Florida Supreme Court recognized judicial authority to grant exemptions from the law based upon public policy demands.<sup>8</sup> For a period of seventy years following its enactment, a series of decisions, attorney general's opinions, and statutory exemptions resulted in the steady erosion of the public policy embodied in the Act. In 1975, the legislature amended chapter 119, Florida Statutes, substituting the general exemption for records "deemed by law" to be exempt with an allowance for only those exemptions which were "provided by law."<sup>9</sup>

As a result of this change in language, in 1979, the Florida Supreme Court receded from its traditional position and held that no exemptions from the statute would be recognized unless expressly stated by the legislature. While the decision in *Wait v. Florida Power & Light Co.*<sup>10</sup> eliminated all exemptions based on judicial decisions and attorney general's opinions, it necessarily recognized the validity of all existing and future legislative exemptions. Indeed, the *Wait* decision engendered a virtual flood of bills seeking to create new loopholes in the law. By 1983, estimates of the number of statutory exceptions to the open government laws ranged between 200 and 800.<sup>11</sup>

---

5. Ch. 67-356, § 1, 1967 Fla. Laws 1147, 1148 (current version at FLA. STAT. § 286.011(1) (1983)).

6. See, e.g., *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *News-Press Publishing Co. v. Wisner*, 345 So. 2d 646 (Fla. 1977); *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

7. Ch. 5942, § 1, 1909 Fla. Laws 132, 132 (current version at FLA. STAT. § 119.07(1) (1983)).

8. *Lee v. Beach Publishing Co.*, 173 So. 440, 441 (Fla. 1937).

9. Ch. 75-225, § 4, 1975 Fla. Laws 637, 638 (current version at FLA. STAT. 119.07(3)(a) (Supp. 1984)).

10. 372 So. 2d 420 (Fla. 1979).

11. Due to the difficulty of identifying statutory exemptions, see *infra* notes 55-57 and accompanying text, an exact count of the number of them is impracticable, as evidenced by the wide range of estimates publicly circulated. Newspaper editorials, lamenting the proliferation of exemptions, have stated the highest estimate at 800. *Too many exceptions*

In 1983, with encouragement from the Florida Press Association and the Florida Society of Newspaper Editors and the support of the Speaker of the House, Representative H. Lee Moffitt,<sup>12</sup> the legislature placed the machinery in motion to begin a reversal of the trend toward an increasing erosion of Florida's open government laws. Speaker Moffitt created the Select Subcommittee on Open Government chaired by Representative Dexter Lehtinen,<sup>13</sup> and charged it with the responsibility of reviewing the open government laws and recommending legislation that would reverse the trend toward closure.

The result of the Subcommittee's work was the enactment of a series of major open government laws. Undoubtedly, the most significant was the Open Government Sunset Review Act of 1984.<sup>14</sup>

to *Sunshine attempt*, Pensacola J., Jan. 13, 1983, at 18A, col. 1. One press account reported "at least 400 exemptions. . . ." *Exemptions cast a cloud over Sunshine*, Tallahassee Democrat, Feb. 27, 1983, at 1E, col. 2. Official estimates are lower. The Office of the Attorney General has identified 287 exemptions. OFFICE OF THE ATTORNEY GENERAL, FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 76-115 (1985 ed.) (available at Office of the Attorney General) [hereinafter cited as SUNSHINE MANUAL]. The trend toward increasing exemptions continued during the 1985 Regular Session. The following 21 bills introduced in the House included proposed exemptions from either the Public Records Act or the Open Meetings Act: 306, 346 385, 393, 398, 447, 486, 537, 540, 553, 575, 739, 773, 853, 864, 883, 949, 1151, 1186, 1379, 1387. The following 26 bills introduced into the Senate also proposed exemptions: 109, 182, 208, 223, 233, 286, 290, 333, 346, 385, 388, 489, 504, 573, 574, 745, 808, 838, 872, 881, 952, 977, 1051, 1078, 1081, 1320.

12. Dem., Tampa, 1974-1984. Speaker Moffitt espoused his commitment to open government in his initial address to the House of Representatives:

Fifteen years ago this state began an unprecedented experiment in open government. Since that time other states and the federal government have followed Florida's lead. What a tragedy it would be if we were now to permit that experiment to fail. Florida's commitment to government in the sunshine has been threatened by the passage of far too many exceptions, many of them buried in large bills which have escaped the attention of most legislators. It is estimated that there are now hundreds of exceptions to the public records law alone. I will be appointing a subcommittee to review all current exceptions to the public records and government in the sunshine laws and will request that subcommittee to recommend measures to ensure that exceptions will not be passed in the future without a visible showing of overriding public necessity. The citizens of this state and nation generally have a low regard for politicians. They have a sense of right and wrong that we should remember and heed. All too frequently they feel helpless, and that government is not concerned with *their* concerns. If we ever hope to earn their respect we must, at the very least, conduct ourselves in a manner that will command their respect. They will forgive our mistakes, but only if they know that we are trying to serve them as best we can.

FLA. H.R. JOUR. 13 (Org. Sess. 1982).

13. At the time, Rep. Lehtinen was a Democrat from Miami.

14. Ch. 84-298, § 8, 1984 Fla. Laws 1398, 1404 (codified at FLA. STAT. § 119.14 (Supp. 1984)).

### III. THE 1984 ACT

The Act was a response to the haphazard proliferation of exemptions from chapters 119 and 286.<sup>15</sup> Borrowing the concept already being applied to state regulatory functions,<sup>16</sup> the Act provided for the periodic repeal of all exemptions from those chapters, but it also mandated a periodic review of the exemptions by the legislature prior to repeal. Unless this review demonstrated a compelling interest in retaining an exemption, it should be left undisturbed for automatic repeal.<sup>17</sup>

The Act established a ten-year cycle of reviews to begin in 1986. At the conclusion of the cycle in 1995, the process would begin again, thus ensuring that changes in circumstances would not result in the extended maintenance of unjustifiable exemptions. Under the schedule, exemptions contained in chapters 1 through 99 would be reviewed during the first year of reviews, those in chapters 100 through 199 in the second year, and so on until the tenth year when the 900 chapters would have been reviewed.<sup>18</sup>

In reviewing the exemptions in the year prior to their scheduled repeal, the legislature was to consider the following criteria:

1. The nature and scope of the exemption, in theory and in practice;
2. The rationale, purpose, or justification for the exemption;
3. The nature and weight of the alleged compelling interest, if any, in maintaining the exemption;
4. The balance between the policy of open government as a means of building public confidence and as a tool of accountability, and the alleged compelling justification, if any, in the existence of the exemption.<sup>19</sup>

If, after being judged against these criteria, the need for the exemption does not outweigh Florida's policy of open government, "the provisions of ss. 119.01, 119.07 [the Open Records law] and 286.011 [the Open Meetings law] shall fully apply."<sup>20</sup> This is the

15. *Id.*

16. *See infra* notes 77-93 and accompanying text.

17. Ch. 84-298, § 8, 1984 Fla. Laws 1398, 1404 (codified at FLA. STAT. § 119.14(4)(b) (Supp. 1984)).

18. *Id.* (amended by ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880) (to be codified at FLA. STAT. § 119.14(3)(a)).

19. *Id.* While the Act set out the criteria by which exemptions were to be judged, a legislature can not bind future legislatures to a course of action. *See Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985) (acts of one legislature cannot bind subsequent ones).

20. Ch. 84-298, § 8, 1984 Fla. Laws 1398, 1404 (codified at FLA. STAT. § 119.14 (Supp. 1984)).

actual repealing language.

Some indicia of legislative intent were provided by the inclusion in the same bill of two specific exemptions from chapter 119 and several provisions to strengthen requirements for openness. The first exemption provides that when a county, municipality, or school board seeks to purchase real property, the appraisals, offers, and counteroffers are exempt from the public records law until at least thirty days before the governmental body becomes contractually bound.<sup>21</sup> The Act expressly provided that it was not to be interpreted to create an exemption from chapter 286, the open meetings law.<sup>22</sup> The language adopted is much narrower than that which was included in the original bill and other bills then pending which did not include the thirty-day window or the proviso regarding chapter 286.<sup>23</sup>

The second exemption applies to documents that: (1) are prepared by government lawyers in anticipation of adversary proceedings, and (2) reflect a "mental impression, conclusion, litigation strategy, or legal theory of the attorney."<sup>24</sup> Again, the language adopted is much narrower than what was originally proposed. Earlier versions would have exempted all attorney "work product."<sup>25</sup> In addition, the legislature added provisions requiring that an agency asserting this exemption identify potential parties to the adversary proceedings, and authorized an award of attorney's fees against an agency that improperly withholds a record.<sup>26</sup>

Both exemptions exhibit a legislative resolve to streamline exemptions, allowing confidentiality only to the extent necessary.

The Act evidenced a commitment to openness in other ways as well. Certain amendments to chapter 119 reflected an intention that the right to inspect public records be almost absolute, subject only to the most necessary constraints.

First, the requirement in section 119.07(1) that custodians of

---

21. *Id.* § 1, 1984 Fla. Laws 1398, 1398 (current version at FLA. STAT. § 125.355 (Supp. 1984)); *id.* § 2, 1984 Fla. Laws at 1399 (current version at FLA. STAT. § 166.045 (Supp. 1984)); *id.* § 3, 1984 Fla. Laws at 1400 (current version at FLA. STAT. § 235.054 (Supp. 1984)). While the authors refer to this as one exemption, technically the Act creates three separate exemptions.

22. Ch. 84-298, §§ 1-3, 1984 Fla. Laws 1398, 1399-1400 (codified at FLA. STAT. §§ 125.355, 166.045, 235.054 (Supp. 1984)).

23. Compare *id.* with Fla. HB 687 (1984) and Fla. SB 1055 (1984)).

24. Ch. 84-298, § 5, 1984 Fla. Laws 1400 (codified at FLA. STAT. § 119.07(2)(o) (Supp. 1984)).

25. Fla. HB 687 (1984) proposed FLA. STAT. § 119.07(6)).

26. Ch. 84-298, § 5, 1984 Fla. Laws 1400 (codified at FLA. STAT. § 119.07(2)(o) (Supp. 1984)).

public records allow them to be examined "at reasonable times" was amended to allow for examination "at *any* reasonable time." This change seems to make clear that custodians of public records may not fix times at which records may be examined. Rather, the language suggests that inspection must be allowed at any time requested by the person seeking access to the documents as long as that time is a reasonable one.<sup>27</sup>

A second amendment cleared up an ambiguity in chapter 119 regarding the fees to be paid by persons requesting copies of documents. Section 119.07(1)(b) had provided that when the nature or the volume of a request required extensive supervisory or clerical help the cost charged for duplication could include a reasonable amount to compensate the complying agency for the hourly rate of the personnel providing the service.<sup>28</sup> The 1984 amendment provided that the phrase " 'actual cost of duplication' [includes] the cost of the material and supplies used to duplicate the record, but . . . not . . . the labor costs or overhead costs associated with such duplication."<sup>29</sup> The amendment made clear that the agency may charge a special fee only when the nature or volume of records requested to be inspected, examined, or copied, requires extensive and time-consuming assistance.<sup>30</sup> New language was also added which stated that these charges may be based only on "the labor costs actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required."<sup>31</sup>

In the event that the custodian of a record wishes to claim an exemption, the Act places strict requirements on such a claim. Consequently, when faced with a request for what he or she contends is in whole or in part a privileged document, the custodian must "state the basis of the exemption . . . including the statutory citation . . . and, if requested by the person seeking . . . to inspect, examine, or copy the record, [the custodian] shall state in writing and with particularity the reasons for his conclusion that the record is exempt."<sup>32</sup>

27. *Id.* (codified at FLA. STAT. § 119.07(1)(a) (Supp. 1984)). See *The Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984) (statute prohibits any delay except that necessary to retrieve the record and delete exempt portions).

28. FLA. STAT. § 119.07(1)(b) (1983).

29. Ch. 84-298, § 5, 1984 Fla. Laws 1398, 1400 (codified at FLA. STAT. § 119.07(1)(a) (Supp. 1984)).

30. See FLA. STAT. § 119.07(1)(b) (Supp. 1984).

31. Ch. 84-298, § 5, 1984 Fla. Laws 1398, 1400 (codified at FLA. STAT. § 119.07(1)(b) (Supp. 1984)).

32. *Id.* at 1401 (current version at FLA. STAT. § 119.07(2)(a) (Supp. 1984)).

A fourth amendment added a section to chapter 119 which requires a custodian who is asserting an exemption to refrain from disposing of the document for a period of thirty days from the request.<sup>33</sup> This delay would allow the requesting party the opportunity to test the sufficiency of the claim through the accelerated hearing procedure provided by section 119.11, Florida Statutes.<sup>34</sup> That section was also amended to reflect this prohibition on the disposal of contested documents even where the document is not a public record or enjoys an exemption from disclosure.<sup>35</sup>

Thus, with the adoption of chapter 84-298, Laws of Florida, the groundwork was laid for the systematic scrutiny of exceptions to the open meetings and public records laws. A strong policy in favor of openness and disclosure was established. The legislature had stated in no uncertain terms that sunshine was the rule and exemptions were to be maintained only under the most compelling of circumstances.

In the months following enactment of the Open Government Sunset Review Act, legislative committees scrutinized the Act before implementing it. A number of problems were perceived. Some were of practical consequence, adversely affecting the legislature's ability to administer the Act in the future. Others were seen as interpretive difficulties. The adoption of the Sunset Act of 1985<sup>36</sup> was the response to these problems.

#### IV. THE 1985 ACT

On the issue of open government exemptions, 1985 was a house-keeping year for the legislature. The decision to subject exemptions to sunset review had been made the year before. To complete the process, all that was left was to correct the technical and interpretive flaws in the existing statute.

To this end, virtually identical bills were introduced in the House<sup>37</sup> and the Senate,<sup>38</sup> with an amended version of the Senate bill eventually passing both houses to become the Open Govern-

---

33. *Id.* (current version at FLA. STAT. § 119.07(2)(c) (Supp. 1984)).

34. FLA. STAT. § 119.11(1) (1983) provides: "Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases."

35. Ch. 84-298, § 6, 1984 Fla. Laws 1398, 1404 (codified at FLA. STAT. § 119.11(4) (Supp. 1984)).

36. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. § 119.14).

37. Fla. HB 1379 (1985).

38. Fla. SB 1320 (1985).



ment Sunset Review Act of 1985. Adopted with virtually no debate, the 1985 Act addressed all of the questions and problems that had hovered over the 1984 Act.

As a prefatory matter, a statement of legislative purpose was adopted. The lack of expression of intent in the 1984 Act had been seen as a weakness.<sup>39</sup> The 1985 Act made up for this perceived deficiency in a number of ways. First, a presumption of openness was articulated by the requirement that the public's "right to have access" prevail unless the need for an exemption is found to be "significant enough to override the strong public policy of open government."<sup>40</sup> It was also stated that "exemptions . . . shall be maintained only if the exempted record or meeting is of a sensitive, personal nature concerning individuals, or the exemption is necessary for the effective and efficient administration of a governmental program, or the exemption affects confidential information concerning an entity."<sup>41</sup>

The intent of the legislature was further revealed by the guidelines set forth to aid future lawmakers in their review of the exemptions. A pragmatic assessment of a particular exemption's purposes and effects was contemplated by the following suggested<sup>42</sup> inquiries:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?<sup>43</sup>

In addition, the Act provides that an exemption should be maintained only if it serves an identifiable public purpose to such a degree as to override the strong presumption of openness. An "identifiable public purpose" was defined as one that fell within any of three enumerated categories. Thus, a public purpose worthy of an

39. Staff of Fla. H.R. Comm. on Gov't Ops., HB 1379 (1985) Staff Analysis 3 (final June 12, 1985) (on file with committee) [hereinafter cited as Staff Analysis].

40. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. § 119.14(2)).

41. *Id.*

42. Although the Act is phrased in terms of a mandate—"The Legislature . . . shall consider . . ."—it is axiomatic that the acts of one legislature are not binding upon future legislatures. *Neu*, 462 So. 2d at 824.

43. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1882 (to be codified at FLA. STAT. § 119.14(4)(a)).

exemption would be one that:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption, or
2. Protects information of a confidential nature concerning individuals, and its release would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals, or its release would jeopardize the safety of such individuals, or
3. Protects information of a confidential nature concerning entities; including but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, and its disclosure would injure the affected entity in the marketplace.<sup>44</sup>

Under this scheme, an exemption under review would have to clear two hurdles. First, it would have to fit into one of the three categories of identifiable public purposes. If it did, it then would have to be seen as compelling enough to override the strong presumption of openness. The disfavor with which exemptions are viewed has thus been clearly expressed.

The criteria were designed to be preemptive as well, as future lawmakers are directed to consider them "before enacting future exemptions."<sup>45</sup> With the adoption of these guidelines, the legislature replaced those set forth in the 1984 Act. Consequently, the requirement that an exemption be repealed unless the legislative review demonstrated a "compelling interest" in its existence was stricken. Concern was expressed that the new terminology—that an "identifiable public purpose," rather than a "compelling interest" be served by an exemption—could be construed as an attempt to lessen the burden on the proponents of an exemption.<sup>46</sup> This interpretation, however, was rejected by both the staff and membership of the Governmental Operations Committees of both houses.<sup>47</sup> The new criteria were simply seen as being more specific

---

44. *Id.* (to be codified at FLA. STAT. § 119.14(4)(b)).

45. *Id.* (to be codified at FLA. STAT. § 119.14(2)).

46. Fla. H.R., Comm. on Gov't Ops., tape recording of proceedings (May 18, 1985) (on file with committee) (discussion of Fla. H.R. PCB GO 25 (1985)).

47. *Id.*; see also Memorandum from Clint Smalley, Staff Attorney, Fla. S. Comm. on Gov't Ops., to Betty Swindel, Staff Director, Fla. S. Comm. on Gov't Ops. 7 (May 27, 1985)

and thus less likely to present interpretive difficulties.<sup>48</sup> Moreover, the preamble to the 1985 Act states that "the maintenance or creation of an exemption must be compelled as measured by these criteria."<sup>49</sup>

Having expressed the intent and purposes behind the Act, the legislature then removed several obstacles to its effective administration. Perhaps of greatest significance was the alteration of the schedule of repeals.

The grouping of the repeals by chapters of the statutes would have resulted in a maldistribution of the workload of reviewing exemptions and, in many instances, an incomplete review of a particular subject area in any one year. This would have been due to the fact that the Florida Statutes are grouped by subject according to titles, not chapters. Thus, exemptions relating to the same subject matter would often be reviewed in different years.<sup>50</sup> For example, electors and elections are governed by chapters 97 through 107 of the statutes. The first year of reviews would cover chapters 97 through 99 but chapters 100 through 107 would not be reviewed until the following year.<sup>51</sup> This problem would have occurred in seven out of the ten years under the Act's review schedule.<sup>52</sup>

To avoid this problem, the Act was amended to employ the titles of the statutes, rather than the chapters, as the focus of the repeal schedule. A complete review of the exemptions in any given area of the law should now always be accomplished in one year. This change will allow lawmakers to take a more comprehensive view of the entire statutory scheme within which a particular exemption lies.

The switch from chapters to titles also results, at least theoretically, in the complete review of the entire Florida Statutes in nine years, as opposed to ten. Under the new schedule, the final year of reviews will address any exemptions which escaped review due to being generic in character, and therefore, contained in more than one statute.<sup>53</sup>

---

(on file with committee) (response to *A Critique of the Senate Committee on Governmental Operations Staff Report on Implementation of the Open Government Sunset Review Act*.)

48. STAFF OF FLA. S. COMM. ON GOV'T OPS., *THE IMPLEMENTATION OF THE OPEN GOVERNMENT SUNSET REVIEW ACT 17-19* (Apr. 1985) [hereinafter cited as *IMPLEMENTATION REP.*]; see also *supra* note 46.

49. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. § 119.14(2)).

50. *IMPLEMENTATION REP.*, *supra* note 48, at 4.

51. *Id.* at 16.

52. *Id.* at 4.

53. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1881 (to be codified at FLA. STAT. §

Another problem relating to the review of exemptions was that it was difficult for lawmakers and staff to recognize exemptions. The enactment of exemptions, especially those from chapter 119, has occurred over the years often as parts of larger bills. Consequently, lawmakers were often unaware that they had passed exemptions.<sup>54</sup> Moreover, the word "exemption" had no statutory definition; therefore, no uniform language was used when exemptions were created.<sup>55</sup> This being so, even a computer-based search of the statutes would likely fail to identify all the exemptions.<sup>56</sup> It is for this reason that estimates of the number of exemptions have varied to such a large degree.<sup>57</sup>

This problem of identifying exemptions raised a serious question: "[W]hat would become of an existing exemption which was not identified and reenacted in the year of its scheduled repeal?"<sup>58</sup> On its face, the 1984 Act seemed to require the repeal of the exemption.<sup>59</sup> Legislators were thus confronted with the prospect that they might allow the repeal of exemptions they did not even know existed.

The second major amendment was designed to avoid an inadvertent repeal. The Act as amended requires that during the year before an exemption would be repealed, "the Division of Statutory Revision of the Joint Legislative Management Committee shall certify to the President of the Senate and the Speaker of the House of Representatives . . . the language and statutory citation of each exemption scheduled for repeal the following year . . ." <sup>60</sup> Any exemption not so certified will not be repealed. If it is later determined that an exemption erroneously escaped certification, it will be reviewed in the following year rather than await completion of the ten-year cycle.<sup>61</sup>

The task of identifying exemptions in the future has also been made easier by the Act's definition of exemption. Exemptions which are created, reenacted, or revived in the future must contain

---

119.14(3)(a)10. 1985)).

54. See *Exemptions cast a cloud over Sunshine*, Tallahassee Democrat, Feb. 27, 1983, at 7E, col. 1.

55. IMPLEMENTATION REP., *supra* note 48, at 13.

56. *Id.* at 14.

57. See *supra* note 11 and accompanying text.

58. IMPLEMENTATION REP., *supra* note 48, at 14.

59. *Id.*

60. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1881 (to be codified at FLA. STAT. § 119.14(3)(b)).

61. *Id.*

uniform language stating that the provisions of chapter 119 or section 286.011 do not apply.<sup>62</sup> Provisions must also be made "for the maximum public access to the meetings and records as is consistent with the purpose of the exemption."<sup>63</sup> Furthermore, each exemption must contain the statement: "This exemption is subject to the 'Open Government Sunset Review Act.'"<sup>64</sup>

With these requirements three purposes are served. First, the past practice of adopting exemptions as riders to bills, giving little notice that an exemption is included, is made more difficult. The uniform language will allow legislators who are committed to open government to recognize and bring attention to any attempt to pass exemptions.

The second result of the requirement is that the uniform language will greatly aid in the process of identifying exemptions so that they may be certified for review. As noted in the economic analysis of the Act, great expenditures for staff time will be needed for its implementation.<sup>65</sup> The uniform language should mitigate this cost. The required language also serves to remind future legislators that exemptions should be as streamlined as possible; the extent of an exemption should be commensurate with its necessity.

A third issue which required legislative attention was whether sunset review applied to those exemptions contained in local or special acts.<sup>66</sup> While the language of chapter 119 appeared to include such exemptions within its ambit, the staff of the House Committee on Governmental Operations pointed out that to include them would require a manual examination of all such laws dating from the original enactment of section 119.01, Florida Statutes, a period of nearly eighty years.<sup>67</sup>

An additional question unanswered in the 1984 Act was what to

62. *Id.* (to be codified at FLA. STAT. § 119.14(4)(e)).

63. *Id.*

64. *Id.*

65. Staff Analysis, *supra* note 39, at 3.

66. IMPLEMENTATION REP., *supra* note 48, at 21. A "special" law is defined as "one relating to, or designed to operate upon, particular persons or things, or in a specifically indicated part of the state." 49 FLA. JUR. 2D *Statutes*, § 12. On the other hand, a statute relating to particular subdivisions or portions of the state, or to particular places of classified localities, is a local law. A statute relating to particular persons or things or other particular subjects of a class is a special law. A statute may be both a special law because it relates to a particular person in connection with a specific situation in which that person was involved and a local law because it affects only one municipality.

*Id.* § 13 (footnotes omitted).

67. IMPLEMENTATION REP., *supra* note 48, at 24.

do with records collected prior to the repeal of an exemption protecting them from disclosure. The purpose of that Act was to make previously exempted information public. On the other hand, there was concern by some legislators that certain information had been supplied in reliance on the current exemption.<sup>68</sup>

The 1985 Act answered these questions. Exemptions required by federal law<sup>69</sup> as well as those contained in special laws were allowed to retain their privileged status.<sup>70</sup> Those records in the hands of government which are covered by an exemption at the time of its repeal will not automatically become public. If disclosure is desired, the repealing legislature will have to authorize it.<sup>71</sup> The Act directs that when deciding whether to make such records public, the legislature should consider whether the affected persons or entities would suffer harm to their reputations, safety, or market competitiveness.<sup>72</sup> Legislative determinations to repeal exemptions, however, will be final; the State of Florida, its political subdivisions, and all other public bodies are granted immunity from suits based on actions taken pursuant to the Act.<sup>73</sup>

In addition to resolving those questions pertaining to the Act's scope and implementation, the legislature in 1985 cleared up a worrisome ambiguity in the Act's provisions. A technical flaw in the actual repealing language of the 1984 Act needed correction. As stated by a Florida Senate staff report:

The phrase, "the provisions of ss. 119.01, 119.07, and 286.011, shall fully apply," is the actual repealing language of the act.

---

68. *Id.* at 17.

69. Actually, this provision is superfluous. Federal laws supersede state laws where the two are in conflict due to the supremacy clause. U.S. CONST. art. VI, § 2. SUNSHINE MANUAL, *supra* note 11, at 54.

70. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1882 (to be codified at FLA. STAT. § 119.14(3)(c)).

71. *Id.* (to be codified at FLA. STAT. § 119.14(4)(c)). This was the only point on which the Senate bill, which eventually passed, and its House companion differed. The House bill had provided that all records made prior to the date of a repeal of an exemption would become public unless lawmakers specifically decided otherwise. *Compare* Fla. HB 1379 (1985), sec. 1, at 6, line 19, with Fla. CS for SB 1320 (1985), sec. 1, at 6, line 27.

72. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1883 (to be codified at FLA. STAT. § 119.14(4)(c)).

Specifically, future legislators are directed to consider: "[W]hether the damage or loss to persons or entities uniquely affected by the exemption, of the type specified in subparagraph (b)2 or subparagraph (b)3, would occur if the records were made public." *Id.* These subparagraphs are the last two categories of "identifiable public purposes" which exemptions are required to serve.

73. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1883 (to be codified at FLA. STAT. § 119.14(4)(g)).

There is an ambiguity at this point, however, because s. 119.07(3)(a)-(3)(n), F.S., contains a general adoption of exemptions contained in the law and the chapters of the Florida Statutes, as well as containing specific exemptions to the public records law. Thus, by saying that the provisions of s. 119.07, F.S., "shall fully apply" to the exemptions contained in the chapters under review, the act would appear not to contemplate a review of the exemptions contained in s. 119.07(3)(a)-(3)(n), F.S. Accordingly, if all of the provisions of s. 119.07, F.S., "shall fully apply," then the act does not repeal any of the Sunshine Law exemptions.<sup>74</sup>

A literal reading of the 1984 Act might have resulted in the ratification of current exemptions rather than in their repeal. To correct this flaw, the 1985 Act altered the repealing language to state that "the provisions of ss. 119.01, 119.07(1), and 286.011 shall fully apply" to exemptions.<sup>75</sup> It is subsection 119.07(1) that provides the requirement that all public records be open for inspection.

Finally, the 1985 Act provides that upon the completion of the ten-year review cycle, in 1995, "the Legislature shall consider the necessity of conducting further review of exemptions."<sup>76</sup>

## V. ANALYSIS

### A. Regulatory Sunset

The concept of sunset review in Florida had its genesis in the Regulatory Reform Act of 1976<sup>77</sup> after which the Open Government Sunset Review Act of 1985 is patterned. Commonly referred to as the "Regulatory Sunset Act," that legislation provided for the "periodic and systematic review" of all governmental regulatory mechanisms to assess the present need for governmental regulation.<sup>78</sup> Pursuant to such review the subject program or function is either terminated, modified, or reestablished.<sup>79</sup> Codified as section 11.61, Florida Statutes, and supplemented by section 11.611, Florida Statutes,<sup>80</sup> the Regulatory Sunset Act operates to ensure that

74. IMPLEMENTATION REP., *supra* note 48, at 20.

75. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. § 119.14(3)(a)).

76. *Id.* at 1883 (to be codified at FLA. STAT. § 119.14(4)(f)).

77. Ch. 76-168, 1976 Fla. Laws 295 (current version at FLA. STAT. § 11.61 (Supp. 1984)).

78. *Id.* § 2, 1976 Fla. Laws at 295 (current version at FLA. STAT. § 11.61(2)(c) (Supp. 1984)).

79. *Id.*

80. Enacted as ch. 78-323, 1978 Fla. Laws 899, the Sundown Act was declared by the

only those regulatory devices which serve a valid, public purpose remain in effect.<sup>81</sup> As amended, the Act established a ten-year schedule over which the entire Florida Statutes would be reviewed under the criteria set out in the Act.<sup>82</sup> Its similarity to the Open Government Sunset Review Act makes relevant a short discussion of its nine-year history.

Regulatory sunset was generally met with favor by both regulated interests<sup>83</sup> and legislative observers.<sup>84</sup> As Florida was the first state to enact sunset legislation, the Act's adoption was seen as the inauguration of a new era of regulatory oversight by state legislatures.<sup>85</sup> Indeed, by early 1980, thirty-four states had adopted the sunset concept in one form or another.<sup>86</sup>

Not only was the passage of regulatory sunset in Florida a bellwether for other states, but subsequent legislative action pursuant to it provides a basis for confident predictions about the future effectiveness of open government sunset review.

Regulatory sunset has proven to be no paper tiger. Between 1978 and 1984, 30 out of 166 regulatory programs and 72 out of 222 councils, commissions, and boards subjected to review were found to have outlived their usefulness and were abolished as a result of sunset or sundown oversight.<sup>87</sup> Perhaps most notable among the

legislature to be "supplemental to the Regulatory Sunset Act." FLA. STAT. § 11.611(2) (1983). As opposed to "sunsetting" specific licensing or regulatory programs and functions, which is the purpose of FLA. STAT. § 11.61, the Sundown Act caused all advisory bodies, commissions, and boards of trustees adjunct to executive agencies to be reviewed for a determination of their necessity. *Id.* § 11.61(2) (Supp. 1984).

The difference between sunset and sundown is described this way:

Sunset provides the mechanism for repeal and legislative review of statutes relating to regulatory functions and programs. Sundown, on the other hand, is the mechanism whereby the need for and benefits derived from statutorily created boards, commissions, committees, and councils adjunct to executive agencies are reviewed by the Legislature systematically and periodically. Like Sunset, Sundown is based on the repeal of statutes.

STAFF OF FLA. S. COMM. ON GOV'T OPS., 1984 SUNSET/SUNDOWN HANDBOOK AND OTHER LEGISLATIVE REPEALS 3 [hereinafter cited as SUNSET HANDBOOK].

81. FLA. STAT. § 11.61(2) (Supp. 1984).

82. *Id.* 11.61 n.1.

83. When Florida's Blue Sky laws were changed in 1978 as a result of sunset review, the securities industry was pleased that for the first time in history such laws had been "amended by a legislature which looked to the economic impact of regulation." Bernstein & Joseph, *The Florida Securities Act of 1978*, 33 U. MIAMI L. REV. 1223, 1233 (1979).

84. Rubin, *A Preface to Regulatory Reform*, 32 U. FLA. L. REV. 843 (1980).

85. *Id.*

86. Ranson & Sheldon, *Advancing Competition Policy in the Legislative Arena—Florida's Experience In Sunset Review Of Surface Transportation Regulation*, 32 U. FLA. L. REV. 877, 878 (1980).

87. SUNSET HANDBOOK, *supra* note 80, at 75-112 (1984).



repeals was the deregulation of Florida's intrastate trucking industry in 1980 due to the legislature's decision not to re-adopt certain sections of chapter 330, Florida Statutes.<sup>88</sup> As the regulatory sunset experience has illustrated, the legislature's response to sunset review has not been simply to rubber-stamp reenactments. The sunset process has had a significant impact. Through this process, certain statutory provisions can be scrutinized to "determine the degree to which [they are serving] the public, as opposed to the private, interest."<sup>89</sup>

One contribution made by the regulatory sunset experience takes the form of a Florida appellate court decision. In *Alterman Transport Lines, Inc. v. State*,<sup>90</sup> the Regulatory Reform Act was upheld against various constitutional attacks. One of these was the assertion that the Act was an impermissible attempt by the legislature in 1976 to bind future legislatures. The court quickly disposed of this challenge to the repeal dates in the Act by noting that a subsequent legislature can always repeal the statute should it desire.<sup>91</sup> The existence of this precedent is obviously a formidable obstacle to any challenge to the repeal dates and review guidelines set out in the 1985 Act.

As a check against private interest group control,<sup>92</sup> sunset may prove even more valuable in the area of open government than in the area of regulation. The adoption of a business or professional regulation usually has as its objective the goal of consumer protection. When this goal is realized a valid public purpose is served. While regulated entities sometimes acquire influence and control over the regulatory body, many years must elapse for this to occur. If it does, the regulation is rendered counterproductive; the private, not the public, interest is being served. This is the "capture theory of regulation."<sup>93</sup>

Exemptions from the open government laws, on the other hand, are typically adopted at the urging of the groups they favor.<sup>94</sup> In most cases the purpose of the exemption is not to further the public interest, but rather, to accommodate the needs of the exemp-

88. *Id.* at 78.

89. Rubin, *supra* note 84, at 879.

90. 405 So. 2d 456 (Fla. 1st DCA 1981).

91. *Id.* at 460.

92. For a discussion regarding the application of sunset review to regulatory functions as a check on interest-group control, see generally Ranson & Sheldon, *supra* note 86, at 877.

93. Ranson & Sheldon, *supra* note 86, at 879.

94. See generally *Exemptions cast a cloud over Sunshine*, Tallahassee Democrat, Feb. 27, 1983, at 1E.

tion's proponent. When this occurs, the exemption fails to ever serve a public purpose. Consequently, a greater percentage of open government exemptions should be vulnerable to sunset review.

### B. *Open Government Sunset Review*

A discussion of the probable future affects of the Open Government Sunset Review Act must begin with recognition of the inherent limitations on predicting legislative behavior. There is no legislative *stare decisis*. A legislature cannot bind future legislatures by statute.<sup>95</sup> So long as constitutional requirements for enactment of a bill are met, a reenactment of an exemption subject to repeal will be valid regardless of whether or not the procedural requirements of the Act are met.<sup>96</sup> By the same token, an exemption which is scheduled for repeal and which is not reenacted will not remain valid simply because the legislature has failed to abide by the review provisions of the Act. Since the automatic repeal is the last constitutional act of the legislature, it will take effect in the absence of a later constitutional act which, in effect, repeals the repealer. Whether or not a future legislature abides by the review procedures is a political question with which the courts will not interfere. Thus, the review procedures in the Act are not judicially enforceable and judicial relief cannot be sought to invalidate either a repeal or a reenactment under sunset for failure to abide by the review procedures.

The foregoing analysis is not intended to suggest that the Act is without substance. It is likely that the Act will have a major positive influence on open government for at least two reasons.

The sunset concept itself reflects a recognition by the legislature of the limitations on its ability to bind future legislatures to specific policies. The sunset procedure by its nature indirectly, but effectively, furthers those policy considerations in future years. By making repeal automatic, sunset shifts to those favoring retention of an exemption the burden of accomplishing the passage of a bill through the legislative labyrinth. This creates a constant, built-in pressure for elimination of exemptions.

The guidelines themselves, while not judicially enforceable, are

---

95. *Neu*, 462 So. 2d at 824.

96. The 1985 revision of the Act recognized this principle by stating, "The failure of the Legislature to comply strictly with this section shall not invalidate an otherwise valid reenactment." Ch. 85-301, § 1, 1985 Fla Laws 1879, 1883 (to be codified at FLA. STAT. § 119.14(4)(g)). The language is superfluous since the principle applies in any case.

nevertheless meaningful. The 1984 Review Act, as amended in 1985, requires that, in order for an exemption to be created or retained, it must fall into any of three stated categories. The categories are sufficiently broad so that they are likely to encompass most, if not all, proposed exemptions. More importantly, an exemption must meet two other tests in order to be created or retained. First, it must "be significant enough to override the strong public policy of open government."<sup>97</sup> Second, the exemption must "provide for the maximum public access to the meetings and records as is consistent with the purpose of the exemption."<sup>98</sup> Due to the strong public demand for open government in Florida, legislators are likely to be reluctant to be identified with a retrenchment from open government policy. Consequently, it is probable that the criteria set out in the Act will serve as a basic standard against which proposals to create or retain exemptions will be measured in the future.

## VI. CONCLUSION

With the adoption of the Open Government Sunset Review Acts of 1984 and 1985, Florida reestablished itself as the vanguard state in the area of open government. It is likely that in the next few years, this state will be followed by states throughout the nation. Florida continues to demonstrate that the effectiveness and responsiveness of state government is enhanced when meetings and records are, as a rule, open to the public.

One of the clearest implications of open government sunset review is the legislative desire for a consistent approach to exemptions. What is envisioned is a rational, deliberative analysis, rather than abstract, rhetorical arguments for or against a particular exemption. When an exemption is either compelled or rejected by the criteria in the Act, similar exemptions should be judged by the same standards. The strength of lobbying skills should be irrelevant where the public's right to know is involved.

It is also clear that the guidelines promulgated by the legislature in its 1985 Regular Session are designed to limit, rather than expand the number of exceptions to the open government laws. Exemptions are to be created or reenacted only where absolutely necessary for "[t]he law is fragile and exemptions require fine

---

97. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880 (to be codified at FLA. STAT. §§ 119.14(2), 119.14(4)(b)).

98. *Id.* (to be codified at FLA. STAT. § 119.14(4)(e)).

distinctions difficult to draw.”<sup>99</sup>

Whether open government sunset review will prove effective is uncertain. There is, however, reason for optimism. The legislature has already demonstrated its ability to carry out such reviews in the area of state regulation. Given Florida’s longstanding commitment to governmental accountability, it is likely that open government sunset reviews will be carried out with at least as much vigor.

---

99. CENTER FOR GOVERNMENTAL RESPONSIBILITY, U. OF FLA., FLORIDA’S “GOVERNMENT IN THE SUNSHINE” LAW: A SUMMARY REPORT 7 (not dated) (on file, *Florida State University Law Review*).

