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Patrick L. Imhof

Edwin A. Levine

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IMPACT OF THE INFORMATION AGE ON ACCESS AND DISSEMINATION OF GOVERNMENT INFORMATION IN FLORIDA

PATRICK L. IMHOF* AND EDWIN A. LEVINE**

Governments have always been driven by information, in both the legislative and regulatory spheres. The increase in the information available to governments because of the development of computer technology has created new problems of access and privacy that policy-makers are struggling to resolve. In this Article, the authors discuss the first steps in the Florida Legislature's response to these emerging problems.

Today, with the passing of the industrial era, a new consciousness is developing. Its impact on our art and literature and music is already apparent; its impact on our social behavior is already underway.¹

OUR SOCIETY is on the verge of an information revolution which, like the industrial revolution of the nineteenth century, will have far-reaching and unanticipated consequences. While it is evident that the new information society will dramatically change the way individuals, businesses, and governments collect, store, disseminate, and digest information, it is not clear how the law, education, and the economy will adapt. Although the information revolution represents significant advances, it presents inherent threats to fundamental assumptions about the relationship of citizens to government.² Information technology is already inspiring substantive legislation to control, regulate, or ameliorate the effects of the technology³ and the creation of scholarly journals specializing in computer law.⁴

* Staff Counsel, House Committee on Governmental Operations, Florida Legislature. B.A., 1972, University of Florida; J.D., 1978, South Texas College of Law.

** Staff Director, Joint Committee on Information Technology Resources, Florida Legislature. B.A., 1969, Florida State University; M.S., 1970, Florida State University.

1. Address by Secretary of State George Schultz, Stanford University Alumni Association First International Conference (Mar. 21, 1986) reprinted in BUREAU OF PUBLIC AFFAIRS, U.S. DEPT OF STATE, CURRENT POLICY NO. 811 (1986).

2. See B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 274 (1984).

3. E.g., Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (codified as amended at 5 U.S.C. § 552 (1982)); FLA. STAT. § 815.01-.07 (1985).

4. E.g., COMPUTER L.J.

Although governments have always used information systems, modern technology has dramatically enhanced their power and capability.⁵ Technology has facilitated the development of electronic systems that collect and disseminate government data, much of which is personal information.⁶ Modern information systems differ from those of the 1970's in several significant respects: access to data storage from remote terminals, sharing of data with other information systems or personal computers,⁷ integration of separate data files by using powerful data management programs, and geographically separated components that act as a single machine.⁸ These technological advances, coupled with the decreased costs of using such systems, have created unanticipated situations. Thus, in *Legi-Tech, Inc. v. Keiper*,⁹ the United States Court of Appeals for the Second Circuit noted: "This case arises out of advances in a developing technology and is governed neither by direct precedent nor by close analogue." The enhanced ability to process information significantly affects both public access to government data and the individual's right of privacy.

In this Article the authors consider some of the issues raised by increasing government use of computer technology and examine the Florida Legislature's response to the information revolution through discussion of two specific pieces of legislation: a 1985 law addressing access to computerized public records,¹⁰ and a 1986 bill dealing with fair information practices that failed to gain legislative approval.¹¹ Finally, the authors suggest a direction for future legislation.

I. REMOTE COMPUTER ACCESS TO PUBLIC RECORDS

Computerization of government can operate to obstruct the free flow of public information. Because of "the relative ease by which paper documents can be reproduced and used and the relative difficulty of supporting the reproduction and use of electronic data

5. See Soma & Wehmhoefer, *A Legal and Technical Assessment of the Effect of Computers on Privacy*, 60 DEN. L.J. 449 (1983).

6. HOUSE COMM. ON GOV'T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. NO. 560, 99th Cong., 2d Sess. 28 (1986).

7. *Id.* at 2 n.1.

8. See generally *Special Section: Systems Integration*, COMPUTERWORLD FOCUS, Sept. 17, 1986, at 31.

9. 766 F.2d 728, 732 (2d Cir. 1985).

10. Ch. 85-86, 1985 Fla. Laws 583 (codified at FLA. STAT. § 119.07-.085 (1985)).

11. Fla. HB 995 (1986).

bases,"¹² problems may arise. The Florida Legislature addressed these problems during the 1985 Regular Session.

A. Background

In Florida, questions concerning the format of computer data and copying charges have been the subject of court decisions and official attorney general opinions. In *Seigle v. Barry*,¹³ the Fourth District Court of Appeal addressed the obligation of computer records custodians to provide public records in a specific format. A group of economists, working for a public employee bargaining unit, had requested access to public records maintained on computer by the Broward County School Board. The Board agreed to permit access to the computer records, including copies of the computer tapes, but could not supply the records in the format preferred by the economists. The economists offered to design and pay for a program which would produce the information in the desired format or to reimburse the Board for obtaining and running such a program. The Board refused; the economists sued.¹⁴

The Fourth District stated that "information stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet."¹⁵ Moreover, "all of the information in the computer . . . should be available for examination and copying."¹⁶ Nevertheless, it upheld the Board's refusal, deciding 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."¹⁷ The court authorized access by a "specially designed program prepared by or at the expense of the applicant" only at the discretion of the record custodian pursuant to the provisions of chapter 119, Florida Statutes.¹⁸ Where a public record custodian refuses access through a specially designed program, the court may require such access 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

12. U.S. HOUSE COMM. ON GOV'T OPERATIONS, *supra* note 6, at 4.

13. 422 So. 2d 63 (Fla. 4th DCA 1982), *petition for review denied*, 431 So. 2d 988 (1983).

14. *Id.* at 64-65.

15. *Id.* at 65.

16. *Id.*

17. *Id.* at 66.

18. *Id.*; FLA. STAT. ch. 119 (1976).

computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or (3) for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or (4) the court determines other exceptional circumstances exist warranting this special remedy.¹⁹

While computer access cases are relatively few,²⁰ the Department of Legal Affairs has been asked to answer several questions concerning computer access to public records. In opinion 076-34,²¹ the attorney general addressed the issue of whether the secretary of state could provide access to public records through the use of an existing computer terminal and if such access would violate either chapter 15 or chapter 119, Florida Statutes.²² The attorney general stated that the fees enumerated in section 15.09, Florida Statutes, are to be imposed only when the search is conducted by a departmental employee, and that there is no authorization for a fee "when a member of the public inspects and examines public documents" without requiring assistance of department personnel.²³ The mode of access to public records is within the "sound discretion of the agency head" responsible for ensuring that the mandatory duty of permitting access is carried out.²⁴

Unlike paper documents, public records maintained in electronic information systems can, with proper equipment, be accessed over long distances. A person at a computer terminal in Miami can access information stored in Tallahassee. The use of remote access equipment raises constitutional questions about who should pay the cost of such access.

For example, in 1982, appropriations were made to the Department of Highway Safety and Motor Vehicles for the purchase and installation of computers in tax collectors' offices to provide access to the Department's driver records. The attorney general was asked whether public funds could be expended to install these computer systems in tag agencies, which are not state agencies and

19. *Seigle*, 422 So. 2d at 67 (emphasis in original).

20. *Id.* at 65.

21. 1976 FLA. ATT'Y GEN. ANN. REP. 57.

22. FLA. STAT. ch. 15 (1976) defines the powers and duties of the secretary of state, in addition to the constitutional duties under FLA. CONST. art. IV, § 4. Specifically, FLA. STAT. § 15.09(1)(a) (1976) provides: "(1) The fees, except as provided by law, to be collected by the Department of State, are: (a) For searching of papers or records, \$2."

23. 1976 FLA. ATT'Y GEN. ANN. REP. at 58.

24. *Id.*

are not open to the public, and in tag agencies open to the public.²⁵ Article VII, section 10 of the Florida Constitution prohibits the state and its subdivisions from using its credit or taxing power to aid either corporations or individuals.²⁶

In opinion 082-81, the attorney general determined that the Florida Constitution does not prohibit an expenditure of public funds for installation of these computers. "The paramount consideration for the expenditure of public funds is that the proposed expenditure must serve a public, as opposed to a private, purpose."²⁷ The state and the public, not the individual agencies, received benefit from the computers. One purpose of the computer link is to permit license tag agents to determine the status of applicants' driver licenses, which serves the public by assuring compliance with Florida law.²⁸ No direct pecuniary benefit inures to the tag agency, and the public benefits by these expenditures.²⁹

Fees and the costs of remote access were addressed in a 1984 attorney general's opinion.³⁰ The Lee County attorney requested an opinion on the use of public funds for remote computer access, and asked whether fees could be charged for such access. Previous opinions had allowed the use of public funds for remote access to state data bases if such access was free. However, these prior opinions did not address fee-generating schemes or the use of public money to benefit only a small segment of the public. Although Attorney General Opinion 076-34 stated that chapter 119 establishes a mandatory duty to disclose public records, the manner of disclosure was left to the discretion of those responsible for the records.

25. 1982 FLA. ATT'Y GEN. ANN. REP. 192.

26. FLA. CONST. art. VII, § 10 provides:

Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person

27. 1982 FLA. ATT'Y GEN. ANN. REP. at 193 (citing *Burton v. Dade County*, 166 So. 2d 445 (Fla. 1964); *State v. Town of N. Miami*, 59 So. 2d 770 (Fla. 1952); *City of Daytona Beach v. King*, 181 So. 1 (Fla. 1938)).

28. *Id.* (citing FLA. STAT. §§ 320.03, 322.251 (1982)).

29. *Cf.* 1983 FLA. ATT'Y GEN. ANN. REP. 45:

[Section] 10, Art. VII, State Const., does not prohibit the Division of Workers' Compensation's expenditure of public funds for the leasing and installation of computer terminals and other necessary attendant equipment and services, when such terminals are to be placed in offices of several private insurance companies as a three-month pilot project to test the feasibility and cost effectiveness of a communication link between these companies and the division in carrying out the division's statutory duties under §§ 24.06, F.S. 1983 and 440.185(4), F.S.

30. 1984 FLA. ATT'Y GEN. ANN. REP. 5.

In opinion 084-3, however, the attorney general determined chapter 119 does not authorize a "specialized computer access system" or the charge of a service fee to "users for inspection or viewing of public records."³¹ Further, the provisions of the public records law "clearly and specifically prescribe the authority, duties and fees of the custodians of public records, and provide the *methods* by which public records may be inspected, examined and photographed and the charges the custodians may make in connection with such inspection, examination and photographing of the public records."³²

The attorney general further applied the doctrine of *expressio unius est exclusio alterius*, under which "the mention of one thing implies the exclusion of another."³³ The rest of the opinion dealt with subscription fees. The attorney general distinguished opinion 076-34 on the grounds that the agency there did not charge a fee. Further, although section 119.07(1)(a), Florida Statutes, would allow charging the actual cost of duplication, the attorney general determined that no fee could be charged where no "hard" copies were supplied because chapter 119 did not authorize a charge for special computer access to public records.³⁴

B. Legislative History, Chapter 85-86, Laws of Florida

As records are more frequently stored on computer disks or tapes, access to those records is increasingly at issue.³⁵ The legislature and the courts have applied chapter 119 to inspection of public records on computer at the site of the agency keeping those records.³⁶ During the 1984 Regular Session, several bills were intro-

31. *Id.* at 7.

32. *Id.*

33. See Rhodes & Seereiter, *The Search for Intent: Aids to Statutory Construction in Florida—An Update*, 13 FLA. ST. U.L. REV. 485 n.4 (quoting *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976)).

34. 1984 FLA. ATT'Y GEN. ANN. REP. at 7.

35. STAFF OF FLA. JT. LEGIS. INFOR. TECH. RESOURCE COMM., *REMOTE COMPUTER ACCESS TO PUBLIC RECORDS IN FLORIDA* 16 (Jan. 1985) (on file with committee) [hereinafter cited as *REMOTE ACCESS*].

36. FLA. STAT. § 119.011(1) (1985) defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound 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." (emphasis added); see also *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633, 640 (Fla. 1980) (defining a public record as "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type"); *Seigle*, 422 So. 2d at 63.

duced authorizing remote access to public records through computers.³⁷ Because the Joint Legislative Information Technology Resources Committee was committed to conducting an interim project and preparing a bill on the issue, the sponsors did not actively lobby their bills,³⁸ and none passed.³⁹

Following the 1984 Regular Session, the staff of the Joint Committee conducted an interim study of public access to computer records, focusing on remote access. In a survey for the interim study, twenty-two public agencies at the city, county, or state level indicated that they provided remote electronic access to their data.⁴⁰ The Joint Committee also held public hearings in Tallahassee, Miami, and Tampa.⁴¹ Representatives of the Division of Corporations, Department of State, testified that the Department had received numerous requests for direct remote electronic access to records.⁴² The Department of Highway Safety and Motor Vehicles also reported requests for access to its data base.⁴³ In January 1985, the Joint Committee issued a report that: "1) examined how access to computer-stored information is currently provided by record custodians; 2) explore[d] the economic and technical feasibility of authorizing record custodians to provide computer access to public records; and 3) propose[d] policy to govern the provision of computer access to public records."⁴⁴

On the basis of Attorney General Opinion 084-3 and testimony at public hearings,⁴⁵ the Joint Committee recommended the introduction of House Bill 1151⁴⁶ and Senate Bill 208.⁴⁷ Because the Joint Committee is not authorized to introduce bills, legislation re-

37. Fla. HB 622 (1984); Fla. HB 705 (1984); Fla. SB 608 (1984); Fla. SB 914 (1984).

38. The Joint Committee on Information Technology Resources was established by ch. 83-92, 1983 Fla. Laws 316 (codified at FLA. STAT. § 11.39 (1985)), and consists of six members, three from the Senate and three from the House of Representatives. The Chairman, Sen. George Stuart, Dem., Orlando, was instrumental in establishing this compromise.

39. FLA. LEGIS., HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF HOUSE BILLS at 205, HB 622; *id.* at 231, HB 705; *id.*, HISTORY OF SENATE BILLS at 211, SB 608; *id.* at 309, SB 914.

40. REMOTE ACCESS, *supra* note 35, at 39.

41. *Id.* at 43.

42. Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1151 (1985) Staff Analysis 1 (Apr. 4, 1985) (on file with committee). The Division currently provides direct access to corporate records from its offices in Miami and Orlando. The Division's new computer system has been designed to receive remote access requests.

43. *Id.*

44. REMOTE ACCESS, *supra* note 35, at 1.

45. *Id.* at 56, 57.

46. Fla. HB 1151 (1985).

47. Fla. SB 208 (1985).

sulting from interim projects must be introduced by a legislator or a standing committee. House Bill 1151 was introduced by the House Governmental Operations Committee, and Senate Bill 208 was introduced by Senators Stuart,⁴⁸ Frank,⁴⁹ and Mann.⁵⁰ In the House, the bill was filed as a Proposed Committee Bill by the Governmental Operations Committee.⁵¹ The first drafts of Proposed Committee Bill 9 and Senate Bill 208 were identical.⁵² These bills proposed an amendment to section 119.07, Florida Statutes, to allow agencies to levy a special service charge, in addition to the cost of duplication, if the "nature or volume of public records requested to be inspected, examined, or copied pursuant to this subsection is such as to require extensive use of information technology resources."⁵³ The charge would be based on costs incurred by the agency.⁵⁴

The bills proposed a new exemption to public disclosure pursuant to section 119.07(1), Florida Statutes, and provided that software obtained by a county or municipal agency under a licensing agreement prohibiting disclosure as a trade secret would be exempt from disclosure under the public records law.⁵⁵ Software produced by a government agency that was determined to be "sensitive" by the agency head would also be exempt. A list of agency-produced "sensitive" software would have been submitted annually to a legislative committee.

48. Dem., Orlando.

49. Dem., Tampa.

50. Dem., Ft. Myers, 1982-1986.

51. Fla. H.R. PCB GO 85-9 (draft of Feb. 15, 1985).

52. Compare *id.* with Fla. SB 208 (1985).

53. *E.g.*, Fla. H.R. PCB GO 85-9, sec. 1 (draft of Feb. 15, 1985).

54. *Id.*

55. *Id.* at 3, line 18. FLA. STAT. § 812.081(c) (1985) defines a trade secret as:

[T]he whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be: 1. Secret; 2. Of value; 3. For use or in use by the business; and 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

These bills defined software as: "the programs and routines, including the specifications and documentation, used to employ and control the capabilities of data processing hardware."⁵⁶ Sensitive software was defined as those portions which, if disclosed, would risk "the health, safety, or welfare of the general public" so that "a compelling governmental interest is served" by preventing its public disclosure.⁵⁷ Sensitive software would include that used to retrieve nonpublic information, payroll records, or software that controls data security.

These bills specifically authorized remote electronic access to public records.⁵⁸ They also addressed issues raised in the 1984 attorney general opinion by allowing a fee for such access. The fee could include both direct and indirect costs of providing the access. Access by the public would be governed by section 119.07, Florida Statutes, which permits inspection and examination of public records at no charge.⁵⁹ The remote access provision would be repealed on October 1, 1990, after prior legislative review determining the feasibility of providing remote access—including the need for such access, data security, adequacy of fee charged, and "[t]he impact of remote electronic access to public records on the public's ability to know about government."⁶⁰

Proposed Committee Bill 9 was heard by the Subcommittee on Policy and Procedure of the House Governmental Operations Committee.⁶¹ Representative Shackelford⁶² moved nine amendments which the Subcommittee unanimously adopted.⁶³ The first amendment clarified that exempted software was software obtained or produced by an agency as defined in the public records law, not just the state, a county, or a municipality.⁶⁴ Amendment number two required only state agencies to submit a list of desig-

56. Fla. H.R. PCB GO 85-9, sec. 1, at 4, line 1 (draft of Feb. 15, 1985).

57. *Id.*, line 7.

58. *Id.*, sec. 2.

59. *Id.*

60. *Id.*

61. Fla. H.R., Comm. Govtl. Ops., Subcomm. on Policy and Procedure, tape recording of proceedings (Mar. 5, 1985) (on file with committee) [hereinafter cited as Govtl. Ops. Subcomm. Mar. 5, 1985, tape].

62. Dem., Palmetto, 1978-1986.

63. Govtl. Ops. Subcomm. Mar. 5, 1985, tape, *supra* note 61.

64. "Agency" is defined in FLA. STAT. § 119.011(2) (1985) as:

[A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

nated software to the Joint Committee. The third amendment was a conforming amendment. Amendments four and five clarified that only remote electronic access was being regulated by the bill, not all types of electronic access. Amendment six authorized record custodians to enter into contracts for providing remote electronic access to their data base. The existing Proposed Committee Bill allowed fees to be charged for on-site or remote electronic access.⁶⁵ However, amendment six made clear that no fee was authorized for providing electronic access (remote or otherwise) to the general public. Remote access for the general public would be free and governed by the provisions of section 119.07, Florida Statutes.⁶⁶ The last substantive amendment adopted by the Subcommittee, amendment seven, allowed an agency to designate existing software as "sensitive"; the draft of Proposed Committee Bill 9 allowed only new software obtained or produced by an agency to be designated "sensitive."⁶⁷

These amendments were incorporated into Proposed Committee Bill 9,⁶⁸ which was heard by the full committee.⁶⁹ The bill was adopted with an amendment offered by Representatives Kutun⁷⁰ and Shackelford authorizing county constitutional officers to include reasonable labor and overhead charges for duplication of county maps and aerial photographs.⁷¹ Proposed Committee Bill 9 was introduced by the Committee,⁷² and as House Bill 1151 was referred to the House Appropriations Committee.⁷³ It was reported favorably by that committee, placed on the calendar, and then placed on the consent calendar.⁷⁴

Senate Bill 208 was introduced and referred to the Senate Governmental Operations Committee and the Rules and Calendar Committee.⁷⁵ The Governmental Operations Committee recommended Senate Bill 208 pass as a committee substitute.⁷⁶ The pro-

65. Fla. H.R. PCB GO 85-9, sec. 2 (draft of Feb. 15, 1985).

66. Govtl. Ops. Subcomm. Mar. 5, 1985, tape, *supra* note 61.

67. Fla. H.R. PCB GO 85-9, sec. 1 (draft of Feb. 15, 1985).

68. Fla. H.R. PCB GO 85-9 (draft of Apr. 3, 1985).

69. Fla. H.R., Comm. Govtl. Ops., tape recording of proceedings (Apr. 3, 1985) (on file with committee).

70. Dem., Miami Beach, 1972-1986.

71. Fla. H.R. PCB GO 85-9, sec. 1 (draft of Apr. 3, 1985).

72. Fla. HB 1151 (1985).

73. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF HOUSE BILLS at 156, HB 1151.

74. *Id.*

75. *Id.*, HISTORY OF SENATE BILLS at 30, SB 208.

76. *Id.*

visions of Committee Substitute for Senate Bill 208 replaced the term "software" with "data processing software,"⁷⁷ which was given the same meaning as section 282.303(5), Florida Statutes.⁷⁸ The definition of "software" in Senate Bill 208 included "specifications and documentation"; these terms were not included in the definition of "data processing software."⁷⁹ Instead that language was included under the definition of "sensitive." Otherwise, the definition of "sensitive software" in the committee substitute remained the same. Committee Substitute for Senate Bill 208 exempted data processing software produced or obtained by an agency pursuant to a licensing agreement. The committee substitute also provided that by January 1 of each year state agencies would have to submit their list of sensitive designations with written justifications to the Joint Committee.⁸⁰ The committee substitute further provided that the designation of agency-produced software as sensitive would still permit an agency head to share the software with another "public agency."⁸¹ Both Committee Substitute for Senate Bill 208 and the final version of House Bill 1151 eliminated the requirement that to be designated as "sensitive," software must deal with matters that put the health, safety, or welfare of the general public at risk.⁸²

The Committee on Rules and Calendar reported the Committee Substitute for Senate Bill 208 favorably with three amendments.⁸³ The first deleted requirements that agencies submit a list of "sensitive" software with written justifications to the Joint Committee. The second clarified that all public records are included in remote access provisions. The third changed the title from "public records" to "certain public records."⁸⁴ Two amendments by Senator Stuart were adopted on the Senate floor.⁸⁵ These amendments inserted "remote" before "electronic access." The intent of the Senate version was then identical to the House version. Committee

77. Fla. CS for SB 208, sec. 1 (1985).

78. FLA. STAT. § 282.303(5) (1985) provides:

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

79. Compare Fla. SB 208, sec. 1 (1985) with Fla. CS for SB 208, sec. 1 (1985).

80. Fla. CS for SB 208, sec. 1 (1985).

81. *Id.*, line 4-5.

82. Fla. SB 208, sec. 1 (1985).

83. FLA. S. JOUR. 166 (Reg. Sess. 1985).

84. *Id.*

85. *Id.*

Substitute for Senate Bill 208 was placed on the House Calendar⁸⁶ and considered in lieu of House Bill 1151.⁸⁷ The bill passed unanimously.⁸⁸

II. FAIR INFORMATION PRACTICES ACT

All governments collect and use "information in order to govern. Democratic governments moderate this need with the requirements to be open to the people and accountable to the legislature, as well as to protect the privacy of individuals."⁸⁹ The State of Florida maintains many records, most of which are public under chapter 119, the public records law.⁹⁰ Various exemptions to the public records law have been enacted and are included in section 119.07(3) and other sections of the Florida Statutes.⁹¹ The Florida Supreme Court has developed the doctrine that unless a record is explicitly excluded from chapter 119, it is public.⁹²

While the Florida Constitution recognizes the right to privacy, that right "shall not be construed to limit the public's right of access to public records and meetings as provided by law."⁹³ Florida has thus elevated the public's right to know over the individual's right of privacy. During the 1986 Regular Session, the Florida Legislature considered a proposed Fair Information Practices Act to give individuals more control over personal information kept by the government.

A. Background

"Disclosural privacy" is the term for an individual's ability to control the use of personal data collected by a government or pri-

86. FLA. H. JOUR. 609 (Reg. Sess. 1985).

87. *Id.*

88. *Id.*

89. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ELECTRONIC RECORD SYSTEMS AND INDIVIDUAL PRIVACY 3 (June 1986) [hereinafter cited as TECHNOLOGY ASSESSMENT].

90. FLA. STAT. ch. 119 (1985). "It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." *Id.* § 119.011(1).

91. FLA. STAT. § 119.07(3) (1985). It has been estimated that there are approximately 287-800 other exemptions. See Richard & Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U.L. REV. 705, 706 n.11 (1985).

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

93. FLA. CONST. art. I, § 23. For a good discussion of the right of privacy in the context of Florida's public records law see generally Woodson & Tannen, *Federal Constitutional Privacy and the Florida Public Records Law: Resolving the Conflict*, 33 U. FLA. L. REV. 313 (1981); Comment, *Disclosural Privacy and the Florida Public Records Act: Open Government or Sanctioned Snooping?*, 12 STETSON L. REV. 420 (1983).

vate agency.⁹⁴ Courts which have recognized disclosural privacy generally employ a balancing approach to determine what information may be disclosed.⁹⁵ The Florida Supreme Court has refused to recognize a constitutional right to disclosural privacy, absent specific United States Supreme Court approval of that concept.⁹⁶

A related privacy issue involves the accuracy of computerized government data, an issue often referred to as "fair information practices." Fair information practices limit government use of information, provide for disclosure of how governments maintain information, and establish mechanisms for individuals to use, monitor, and correct personal data.⁹⁷ These procedures are the basis for the federal Privacy Act of 1974.⁹⁸ Underlying the concept of fair information practices are certain assumptions about information technology and citizen involvement. Fair information practices require that government inform citizens what information is maintained, who has that information, and who can gain access to the information. In addition, an explicit administrative process for correcting errors is generally established. These practices are effective only to the extent that the public is informed, interested, and capable of participating in the correction process.⁹⁹ To be successful, fair information practices laws require an involved citizenry actively monitoring government information practices. Finally, technology has made these practices virtually obsolete by drastically changing the manner by which government processes, stores, and disseminates information.¹⁰⁰

Ten states now have fair information practices laws.¹⁰¹ Nine of these states have statutes based loosely on the federal law.¹⁰² Prior to enactment of the federal law, the tenth state, Minnesota, had

94. See R. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* 12-5 (1985).

95. Woodson & Tannen, *supra* note 93, at 317.

96. Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 638-39 (Fla. 1980).

97. See generally *TECHNOLOGY ASSESSMENT*, *supra* note 89.

98. Pub. L. No. 93-579, 88 Stat. 1897 (codified as amended at 5 U.S.C. § 552 (1982)).

99. *TECHNOLOGY ASSESSMENT*, *supra* note 89, at 16-17.

100. *Id.* at 3.

101. **Arkansas:** ARK. STAT. ANN. §§ 16-801 to -810 (1979); **California:** CAL. CIVIL CODE § 1798 (West 1986); **Connecticut:** CONN. GEN. STAT. ANN. §§ 4-190 to -197 (West Supp. 1986); **Indiana:** IND. CODE ANN. §§ 4-1-6-1 to -8.6 (Burns Supp. 1986); **Massachusetts:** MASS. GEN. LAWS ANN. ch. 66A (West Supp. 1986); **Minnesota:** MINN. STAT. ANN. § 13.04 (West Supp. 1986); **New York:** N.Y. PUB. OFF. LAW § 96 (McKinney Supp. 1986); **Ohio:** OHIO REV. CODE ANN. §§ 1347.01-.99 (Page 1979); **Utah:** UTAH CODE ANN. § 63-2-85.2 (1985); **Virginia:** VA. CODE §§ 2.1-377 to -386 (Supp. 1986).

102. Staff of Fla. Jt. Legis. Infor. Tech. Resource Comm. Report 13 (1986) (unpublished report) (on file with committee).

enacted fair information practices legislation based on concepts found in Swedish law.¹⁰³ All of these states have basic features in their legislation which are found in the federal Privacy Act. The laws govern personal information on individuals gathered by government entities, and place limits on the disclosure of this information to third parties. Governments are required to seek this information directly from the individual whenever possible and notify the individuals of the uses to which the information will be put. Individuals have the right of access to much of this information. They may contest the accuracy, completeness, or timeliness of any personal information and request an amendment. The government entity must accept or reject the amendment within a specific time period; if the amendment is rejected, the individual may file a statement of disagreement that becomes a part of the record and may appeal the denial.¹⁰⁴ As will be seen, the bills introduced during the 1986 Regular Session were more limited in scope than many of the provisions in these other jurisdictions.¹⁰⁵

B. Legislative History

Although the Florida Legislature has generally resolved conflicts between the right of privacy and the public records law in favor of access to records, the legislature is aware of the tension between these competing interests. Prior to the 1985 Regular Session, the Senate Governmental Operations Committee made an extensive study of the newly enacted Open Government Sunset Review Act¹⁰⁶ and delineated needed changes.¹⁰⁷ The committee staff acknowledged competing concerns between the individual's right to privacy and the Florida public records law,¹⁰⁸ and pointed out that in "sunsetting" public record exemptions, the legislature must take care "lest the right to privacy be unwittingly violated."¹⁰⁹ During interim hearings on remote computer access,¹¹⁰ the Joint Commit-

103. *Id.* at 13-14.

104. *Id.* at 14-15.

105. *Id.* at 16.

106. Ch. 84-298, 1984 Fla. Laws 1398 (codified at FLA. STAT. § 119.14 and § 286.011 (1985)).

107. STAFF OF FLA. S. COMM. ON GOVTL. OPS., THE IMPLEMENTATION OF THE OPEN GOVERNMENT SUNSET REVIEW ACT (Apr. 1985) (on file with committee).

108. *Id.* at 28-47.

109. *Id.* at 47.

110. See *supra* text accompanying notes 40-41.

tee also took testimony on the need for statutory protection for personal information.¹¹¹

During the 1986 Regular Session, House Bill 995¹¹² was introduced by Representatives Mackenzie¹¹³ and Messersmith¹¹⁴ to establish the "Florida Fair Information Practices Act." An identical bill, Senate Bill 482,¹¹⁵ was introduced in the Senate by Senator Stuart. The sponsors of both bills were members of the Joint Committee.¹¹⁶ House Bill 995 was referred to both the House Committee on Governmental Operations (subsequently subreferred to the Subcommittee on Policy and Procedure) and the House Appropriations Committee;¹¹⁷ Senate Bill 482 was referred to the Governmental Operations and Appropriations Committees in the Senate.¹¹⁸

Each bill included the following definitions:

- (1) "Agency" has the same meaning as in s. 20.03(11), Florida Statutes.
- (2) "Individual" means a natural person.
- (3) "Person" has the same meaning as in s. 1.01, Florida Statutes.
- (4) "Personal information" means data pertaining to an individual which identifies and relates specifically to that individual or which allows the identification of an individual within a group or class.¹¹⁹

The purpose of the bills was to "enhance the rights of individuals" concerning personal information collected, used, stored, and maintained by the executive agencies of the State of Florida.¹²⁰

The bills would have allowed any individual to contest the completeness or accuracy of personal information about him main-

111. REMOTE ACCESS, *supra* note 34, at 69-70.

112. Fla. HB 995 (1986).

113. Dem., Ft. Lauderdale.

114. Repub., Lake Worth.

115. Fla. SB 482 (1986). Although the Judiciary and Governmental Operations Committees in both houses were requested to examine governmental information practices, they were unable to do so because of prior work commitments.

116. FLA. H.R., OFFICE OF THE CLERK, CLERK'S MANUAL 1984-1986, at 42, 222.

117. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS at 339, HB 995.

118. *Id.*, HISTORY OF SENATE BILLS at 96, SB 482.

119. Fla. HB 995, sec. 3, at 2, line 7-15 (1986); Fla. SB 482, sec. 3, at 2, line 7-15 (1986). FLA. STAT. § 20.03(11) (1985) defines agency to be "an official, officer, commission, authority, council, committee, department, division, bureau, board, section, or another unit or entity of government." FLA. STAT. § 1.01(3) (1985) defines person to include "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

120. *E.g.*, Fla. HB 995, sec. 2 (1986).

tained by an agency and subject to disclosure pursuant to section 119.07(1), Florida Statutes. They would have required those affected to give the agency written notice describing the type of personal information believed inaccurate or incomplete. The agency would have had thirty days to act on the notice by correcting the information if inaccurate or incomplete, or by notifying the complainant that the information was correct. Even if the agency believed the information was correct, the complaint would have been included whenever that information was disclosed.¹²¹ An individual could also have "appealed" an agency determination of accuracy,¹²² under chapter 20, Florida Statutes.¹²³

The bills would have imposed an affirmative duty on an agency to inform those from whom personal information was collected that the information would become a public record subject to disclosure.¹²⁴ The agency would have to explain the purpose of collecting, maintaining, and using the personal information; whether the person was legally required to supply the information; consequences to the individual for withholding the information; and that the information would be subject to disclosure under section 119.07(1), Florida Statutes. The bill provided that the agency could not collect any personal information subject to disclosure without complying with the provisions of this section.¹²⁵

Finally, the Administration Commission¹²⁶ would be required to promulgate rules to implement the measure and establish agency guidelines for collecting personal information subject to disclosure under chapter 119.¹²⁷ The bill provided that it would not limit the public's right to know under chapter 119 or "any other law relating to access to information."¹²⁸ A severability clause was also included in case any of the provisions were declared invalid.¹²⁹

121. *E.g., id.*, sec. 4.

122. *E.g., id.*

123. FLA. STAT. § 120.57 (1985) provides the procedures for formal and informal adjudication of facts and problems with state agencies.

124. *E.g.*, Fla. HB 995, sec. 5 (1986).

125. *Id.*

126. The Administration Commission was established by FLA. STAT. § 14.202 (1985) as part of the Executive Office of the Governor. It is composed of the governor and the Cabinet. *Id.*

127. Fla. HB 995, sec. 6 (1986).

128. *Id.*, sec. 7.

129. *Id.*, sec. 8.

Even before House Bill 995 was heard in committee, several state agencies expressed concerns.¹³⁰ In response, the main sponsor of the House bill, Representative Mackenzie, prepared a proposed committee substitute which she recommended to the Subcommittee on Policy and Procedure.¹³¹ That proposal and subsequent changes by the Subcommittee and full Committee severely limited the proposal's scope and effect.

To limit the scope of the bill, the term "agency" was deleted and "department," as defined by section 20.03(2), Florida Statutes, was substituted.¹³² This change substantially limited the impact of the bill. For example, local governments, water management districts, the Parole and Probation Commission, and the Executive Office of the Governor would have been excluded.¹³³

The committee substitute also included changes suggested by the Department of Legal Affairs and the Department of Law Enforcement. These provisions allowed an individual to contest the accuracy and completeness of personal information but would

not alter or affect any other statutory, judicial, or administrative provisions for correcting personal information in public records, including, but not limited to, criminal intelligence or investigation records of the Department of Law Enforcement, records of the Public Employees Relations Commission, complaint investigation records of the Department of Professional Regulation, workers' compensation records, personnel records of state employees, criminal history records, crimes compensation records, student records, or records of traffic accidents or violations.¹³⁴

The Subcommittee took testimony from several state agencies on the proposed committee substitute.¹³⁵ The sponsor testified that the intent of the bill was to create a uniform policy on personal information maintained in public records.¹³⁶ Four amendments to

130. Conversation with Pat Griffith, Legislative Liaison, Department of Legal Affairs, and Janet Ferris, General Counsel, Department of Law Enforcement (Apr. 21, 1986).

131. Fla. H.R., Comm. on Govtl. Ops., Subcomm. on Policy & Procedure, tape recording of proceedings (Apr. 21, 1986) (on file with committee) [hereinafter cited as Govtl. Ops. Subcomm. Apr. 21, 1986, tape].

132. Fla. CS for HB 995, sec. 3 (1986). FLA. STAT. § 20.03(2) (1985) defines "department" as "the principal administrative unit within the executive branch of state government."

133. See *supra* note 64 for the definition of "agency" in FLA. STAT. ch. 119 (1985).

134. Fla. CS for HB 995, sec. 4 (1986).

135. Govtl. Ops. Subcomm. Apr. 21, 1986, tape, *supra* note 131.

136. *Id.*

the proposed committee substitute were adopted and recommended to the full Committee.¹³⁷

The first amendment, by Representative Combee,¹³⁸ clarified that the hearing provisions of chapter 120, not just the "appeal" provisions, would be applicable to departmental decisions.¹³⁹ Amendment two, also by Representative Combee, specified that only factual data, as opposed to opinion, would be subject to correction. Amendments three and four, by Representative Shackelford provided that section four, authorizing the contesting and correction of personal information, would not apply to criminal intelligence or criminal investigative records.¹⁴⁰ According to the General Counsel for the Department of Law Enforcement, Janet Ferris, such records are corrected through a system established within the Department and also through the judicial system during hearings on criminal cases.¹⁴¹

The Committee adopted the Combee amendments but not amendments three and four, because Representative Silver¹⁴² stated those provisions were included in amendments he would propose.¹⁴³ Representative Silver proposed seven substantive amendments which were adopted by the Committee.¹⁴⁴ These amendments had been discussed with the sponsor, the staff of the Joint Committee, the Department of Legal Affairs, and the Department of Law Enforcement.¹⁴⁵

The first amendment provided that the bill would not create certain rights or interests. Namely, it would not create any substantive right for any person.¹⁴⁶ This measure was requested by the Department of Legal Affairs to foreclose lawsuits seeking money damages from noncomplying agencies.¹⁴⁷ It is unclear whether this amendment was necessary because the bill did not appear to create

137. *Id.*

138. Repub., Clearwater, 1982-1986.

139. Govtl. Ops. Subcomm. Apr. 21, 1986, tape, *supra* note 131.

140. *Id.*

141. *Id.*

142. Dem., North Miami Beach.

143. Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 23, 1986) (on file with committee) [hereinafter cited as Govtl. Op. Apr. 23, 1986, tape].

144. *Id.*

145. Conversation with Janet Ferris, General Counsel, Department of Law Enforcement, and Patricia Griffith, Legislative Liaison, Department of Legal Affairs (Apr. 23, 1986) [hereinafter cited as Conversation with Ferris and Griffith].

146. Govtl. Ops. Apr. 23, 1986, tape, *supra* note 143.

147. Conversation with Patricia Griffith, Legislative Liaison, Department of Legal Affairs (Apr. 23, 1986).

any new cause of action. However, clear, specific statutory language would aid the courts if anyone attempted to establish a cause of action under the measure.

Neither would the bill have created any substantive or procedural right for prisoners as defined in section 944.02(5), Florida Statutes.¹⁴⁸ This provision was proposed to bar prisoners from attempting to change their records and to prevent federal civil rights lawsuits; it was requested by the Department of Legal Affairs and by the Department of Law Enforcement.¹⁴⁹ Finally, the Department of Legal Affairs requested provisions specifying that the measure would not create any property or liberty interests subject to the protection of the United States Constitution.¹⁵⁰ Of course, this provision would not preclude a court finding such interests. Indeed, just that occurred in *Fadjo v. Coon*,¹⁵¹ where the court found that "it is clear that the legislature cannot authorize by statute an unconstitutional invasion of privacy."

The Committee adopted five additional amendments proposed by Representative Silver and supported by the Department of Legal Affairs.¹⁵² The amendments provided that if the accuracy or completeness of any personal information had been adjudicated, either administratively or judicially, or a case had been filed for such adjudication, then the individual involved must use those procedures to contest the records. The bill was also amended to authorize any department to require verification of any record change requested.¹⁵³

The last two Silver amendments changed major portions of Committee Substitute for House Bill 995. The first deleted all language setting forth procedures for correcting information already in existence.¹⁵⁴ Instead of specifying records not affected by the bill, the amendment simply provided that section four, dealing with correction of personal records, "shall not supersede or provide an additional remedy to any other statutory, judicial, or adminis-

148. FLA. STAT. § 944.02(5) (1985) defines a "prisoner" as:

[A]ny person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the department, as provided by law.

149. Conversation with Ferris and Griffith, *supra* note 145.

150. *Id.*

151. 633 F.2d 1172, 1176 n.3 (5th Cir. 1981).

152. Govtl. Ops. Apr. 23, 1986, tape, *supra* note 143.

153. *Id.*

154. *Id.*

trative provisions for correcting personal information in public records."¹⁵⁵ This language assured that existing procedures for correcting personal information would be left intact and reflected the Department of Law Enforcement's concern that Committee Substitute for House Bill 995 would supersede its present extensive correction procedures.¹⁵⁶

The final amendment adopted by the committee was extensive, striking all provisions of the bill dealing with agency notification of persons concerning personal information.¹⁵⁷ It modified or eliminated all notification requirements; notification would be necessary only if the information were subject to public disclosure when requested. Thus, if the personal information were exempt from public disclosure when requested, and subsequently became available to the public, no notification would be required. Violation of this notification section would not create a cause of action against the state, its officers, and employees. Nor would the section apply to information being transferred among state agencies. This amendment not only precluded an action for damages, but also one for an injunction to enforce the provisions against a recalcitrant agency.

The Committee reported the bill favorably,¹⁵⁸ but Representative Harris¹⁵⁹ moved to reconsider, and the Chairman, Representative Kelly,¹⁶⁰ allowed additional testimony.¹⁶¹ After a representative of the Department of Highway Safety and Motor Vehicles testified that the bill would have a significant fiscal impact, the Committee reported the bill unfavorably.¹⁶²

III. CONCLUSION

The Florida Legislature has actively responded to the impacts of technology on the public records law. While legislators have been willing to provide and protect access to computerized records, there has not been a corresponding recognition of the need to cre-

155. *Id.*

156. *See* Govtl. Ops. Subcomm. Apr. 21, 1986, tape, *supra* note 131 (testimony of Janet Ferris).

157. Govtl. Ops. Apr. 23, 1986, tape, *supra* note 143.

158. *Id.*

159. Dem., Lake Placid.

160. Dem., Tavares.

161. Govtl. Ops. Apr. 23, 1986, tape, *supra* note 143.

162. *Id.* Rep. Silver then moved that the bill be reconsidered and left pending. The motion was adopted, but because it was the last meeting of the Committee, the bill was effectively dead. *Id.*

ate a personal information policy and a grievance procedure for enforcement of that policy.

The failure of House Bill 995 may lead to a stonger personal information policy. The bill was based on the premise that active citizens, given the means to control information, would, individually, use the mechanisms for correction. The bill recognized that the Florida public records law does not require the balancing of privacy interests against the public's right to know, and provided an individual remedy only after misuse or error. It may well be that the limitations inherent in an individual protecting his privacy interests in the information age will lead to the development of more comprehensive protections to ensure that information technology does not place personal privacy at greater risk.

