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The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)- Let the Sunshine In

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The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine In!

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1. INTRODUCTION

Florida's reputation as the "Sunshine State" was established long ago by laws which provided the public with a right of access to the records and proceedings of governmental agencies. This tradition of an open government began with Florida's enactment of the Public Records Law in 1909,¹ and the Government in the Sunshine Law in 1967.² However, as these rights of access were primarily secured by statutory enactments, they were subject to the discretion of the Legislature and faced the continual threat of being weakened or dismantled by future legislatures. Nevertheless, the tradition has been reinforced by the Florida judiciary which, for the most part, has liberally construed the provisions of the open government laws, to give effect to the strong public interest in access to governmental meetings and records.³

This commitment to open government has been recently reaffirmed with the adoption of two amendments to the Florida Constitution: article III, section 4(e), in 1990, and article I, section 24, in 1992. These amendments grant constitutional status to the public's right of access to all levels of government. With the adoption of these amendments, the people of Florida have secured for the future their right to an open government.

II. HISTORY OF THE AMENDMENTS

The Sunshine Law establishes a right of access to meetings of "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision."⁴ The Public Records Law provides that records made or received by an "agency" in the course of its official business are available for inspection.⁵

1. Ch. 09-5942, § 1, 1909 Fla. Laws 132 (codified at FLA. STAT. § 119.01 (1991)) [hereinafter the Public Records Law].

2. Ch. 67-356, § 1, 1967 Fla. Laws 1147-48 (codified at FLA. STAT. § 286.011 (1991)) [hereinafter the Sunshine Law].

3. See *Board of Public Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th Dist. Ct. App. 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); see also *Lorei v. Smith*, 464 So. 2d 1330 (Fla. 2d Dist. Ct. App. 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (suggesting that public policy favoring open records should be given its broadest possible expression); *Blackford v. School Bd.*, 375 So. 2d 578 (Fla. 5th Dist. Ct. App. 1979) (stating that the Sunshine Law should be construed to frustrate all evasive devices).

4. FLA. STAT. § 286.011 (1991).

5. *Id.* § 119.01.

Florida courts have affirmed that the broad reach of these open government laws extends to the executive branch of the state government,⁶ counties,⁷ municipalities,⁸ and special districts.⁹

The independence of the judiciary with regard to court records and proceedings, however, has been recognized in several Florida Supreme Court decisions.¹⁰ In addition, the applicability of the open government statutes to the legislative branch has been disputed. While the Florida Attorney General's Office has considered the open government laws to be applicable to the state Legislature,¹¹ that view was not universally held.¹²

6. See, e.g., *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (stating that the advisory committee of a state university must comply with the Sunshine Law); *Florida Dep't of Law Enforcement v. Ortega*, 508 So. 2d 493, 494 (Fla. 3d Dist. Ct. App. 1987) (holding that department of law enforcement records are subject to release under the Public Records Law); *Turner v. Wainwright*, 379 So. 2d 148, 151-54 (Fla. 1st Dist. Ct. App. 1980), *aff'd and remanded* 389 So. 2d 1181 (Fla. 1980) (stating that the Sunshine Law is applicable to meetings of the Parole and Probation Commission).

7. See, e.g., *Seminole County*, 512 So. 2d at 1003; *Bland v. Jackson County*, 514 So. 2d 1115, 1116 (Fla. 1st Dist. Ct. App. 1984) (stating that the Sunshine Law is meant to protect the public from closed door politics); *Orange County v. Florida Land Co.*, 450 So. 2d 341, 343-44 (Fla. 5th Dist. Ct. App. 1984) (holding that the work product privilege does not take precedence over the disclosure requirement of the Public Records Act), *review denied*, 458 So. 2d 273 (Fla. 1984).

8. See, e.g., *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971) (holding that municipal officials violate the Sunshine Law when they meet at a time or place designed to avoid the public); *City of Delray Beach v. Barfield*, 579 So. 2d 315, 318 (Fla. 4th Dist. Ct. App. 1991) (stating that the primary intent of the Public Records Law, with respect to complaints against police officers, is openness and availability of public records); *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1979) (holding that when a city manager appoints an advisory board to make recommendations, it is subject to the dictates of the Sunshine Law).

9. See, e.g., *Doran*, 224 So. 2d at 700 (holding that the Sunshine Law requires that meetings of public boards must be made public); *Hillsborough County Aviation Auth. v. Azzarelli Constr. Co.*, 436 So. 2d 153, 154 (Fla. 2d Dist. Ct. App. 1983) (holding that a county aviation authority's work product cannot be withheld from production under the Public Records Law); *Cape Coral Medical Ctr. v. News-Press Publishing Co.*, 390 So. 2d 1216, 1218 (Fla. 2d Dist. Ct. App. 1980) (holding that a public hospital must make its records available under the Public Records Law).

10. See *In re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes*, 398 So. 2d 446, 447 (Fla. 1981); *Johnson v. State*, 336 So. 2d 93 (Fla. 1976). The authority of the judiciary over access to court records flows from the separation of powers doctrine and from the Supreme Court's ability to adopt rules for practice and procedure in all courts pursuant to article V, section 2(a) of the Florida Constitution. *Id.* at 95.

11. See 1977 FLA. ATT'Y GEN. ANN. REP. 10 (stating that the Government in the Sunshine Law applies to the Legislature and Public Records Act extends to all "state officers," including members of the Legislature); 1972 FLA. ATT'Y GEN. ANN. REP. 16

Two circuit courts have held that the law was inapplicable to the Legislature.¹³ Thus, the full scope of the public's right of access to all branches of government was unclear.

In the late 1980's, increased public awareness, coupled with a growing dissatisfaction that key legislative decisions were being made by the legislative leadership behind closed doors, gave rise to renewed efforts to amend Florida's Constitution to subject the Legislature to an open meetings requirement.¹⁴ Of the thirteen constitutional amendments proposed on this issue in the twenty-two regular sessions between the enactment of the

(Legislature and its committees are subject to the Sunshine Law, and two or more members of the Legislature may not hold a secret meeting with the intention of excluding the public and the press, for the purpose of discussing their official actions respecting proposed or pending legislation without violating the Sunshine Law).

12. See Memorandum from Steven Kahn, Att'y for Fla. S. Rules and Calen. Comm., (May 19, 1976). Mr. Kahn stated that the Senate did not fall within the plain meaning of, and thus was not subject to, the Sunshine Law. *Id.* Memorandum from Staff, Fla. H. Gov. Op. Comm. (April 14, 1975). The staff noted two possible constitutional impediments to applying the Sunshine Law to the Legislature: Article III, section 4(a) of the Florida Constitution, authorizing the Legislature to determine its own rules, and article III, section 4(b) of the Florida Constitution, requiring that the sessions of each house be open. *Id.*

13. See *City of Safety Harbor v. City of Clearwater*, No. 40,269 (Fla. 6th Cir. Ct. May 14, 1974) (inasmuch as the Sunshine Law imposes criminal sanctions for violations of its terms, it should be strictly construed; therefore, as the statute does not clearly include the Legislature, the Legislature is not subject to its terms); *Miami Herald Publishing Co. v. Moffitt*, 6 Fla. Supp. 2d 13 (2d Cir. Ct. 1983). Although the *Moffitt* case went to the Florida Supreme Court, that court did not directly address the applicability of the open government laws to the Legislature. See *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984), in which court concluded that the only issue before it was the propriety and constitutionality of certain internal activities of members of the Legislature. The court stated, "[i]t is a legislative prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative." *Id.* at 1022. The rules of procedure of both houses required then, as they do now, that committee meetings be open to the public. Compare Fla. S. Rule 2.13 (1988-1990) with Fla. S. Rule 2.13 (1992-1994); and Fla. H.R. Rule 6.25 (1989) with Fla. H.R. Rule 6.25 (1992-1994). See also FLA. CONST. art III, § 4(b) (requiring the sessions of the House of Representatives and of the Senate to be open to the public except for Senate sessions relating to the appointment to or removal from public office).

14. For a detailed analysis of the history surrounding the adoption of the open legislative meetings amendment, see Thomas R. McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U. L. REV. 307 (1991). McSwain attributes much of the impetus for a more open Legislature to the aftermath of the now-defunct services tax in which key legislators and gubernatorial aides met secretly at a pizza and beer party in a lobbyist's townhouse to work out the details of the tax. *Id.* at 307.

Sunshine Law in 1967 and the passage of article III, section 4(e) of the Florida Constitution in 1990, twelve were filed during the 1988-1990 legislative sessions.¹⁵

In 1990, Senate Joint Resolution 1990 & 1992 passed in both houses of the Florida Legislature.¹⁶ It was placed on the ballot for the November 1990 general election where it was overwhelmingly approved by the voters.¹⁷ The amendment, however, dealt only with legislative meetings. Still in dispute was the applicability of the Public Records Law to legislative records and the public's right of access to the judicial branch of government.

On November 7, 1991, the Florida Supreme Court's decision in *Locke v. Hawkes*¹⁸ forced a reexamination of this issue. The question before the court concerned the application of the public records law to the expenditure records of a state representative's district office.¹⁹ However, the opinion focused on far more than the simple question of whether the Public Records Law applied to the financial records sought in the case at bar.²⁰

After reviewing prior decisions which focused on the application of the Public Records Law and its possible interference with the separation of powers provision in the state constitution,²¹ the Florida Supreme Court ruled that the Public Records Law was inapplicable to the Governor, members of the cabinet, judicial officers and members of the Legislature.²² The court, however, did not expressly limit its holding to these officers; rather, it stated, somewhat ambiguously, that the Public Records Law did not apply to the "constitutional officers of the three branches of government

15. *Id.* at 328 n.155. In addition, efforts were undertaken by the Florida Sunshine Committee and Common Cause of Florida to amend the Florida Constitution by initiative petition pursuant to article XI, section 3 of the Florida Constitution. *Id.* at 336-37.

16. FLA. S. JOUR. 1397-1398 (Reg. Sess. 1990) (indicating passage of the joint resolution in the Senate was 36 yeas to 0 nays); FLA. H.R. JOUR. 1817 (Reg. Sess. 1990) (indicating passage of the joint resolution in the House of Representative was 109 yeas to 3 nays).

17. The amendment was approved 2,795,784 to 392,323. McSwain, *supra* note 14, at 365 n.448 (citing November 6, 1990 General Election Results, Florida Department of State, Division of Elections, at 5).

18. 1991 WL 231589 (Fla. Nov. 7, 1991), *vacated and superseded by* 595 So. 2d 32 (Fla. 1992).

19. *Id.*

20. *Id.*

21. FLA. CONST. art. II, § 3. This section states that "[t]he power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

22. *Locke*, 1991 WL 231589 at *1.

or to their functions."²³

The apparent grounding of the *Locke* decision on separation of powers principles, when coupled with the Florida Supreme Court's distinction between constitutional and statutory functions, insofar as the open government laws are concerned, generated a number of questions regarding the application of these laws to a variety of agencies. The Attorney General's Office reported receiving telephone inquiries from property appraisers, tax collectors and other officers.²⁴ Additionally, claims were made that school districts and the state attorney's offices were now exempt from statutory disclosure requirements.²⁵ Eventually, most of these contentions were retracted and the agencies agreed to abide by the open government laws. However, the uncertainty stemming from the *Locke* decision prompted the Attorney General and other parties to the decision to ask the court to clarify its ruling.

Although the court subsequently agreed to rehear the case,²⁶ in light of the court's reliance on separation of powers principles in its analysis of the application of the open government statutes, it was clear that the only effective means to assure access to all three branches of government was to secure this right in the Florida Constitution. Accordingly, on November 13, 1991, Attorney General Butterworth proposed the adoption of a new "Open Government Constitutional Amendment" to be added to the Declaration of Rights of the Florida Constitution.²⁷

Following weeks of debate and consideration of various proposals,²⁸

23. *Id.*

24. Louis Lavelle, *Attorney Wants Records Law Clarified*, TAMPA TRIB., Nov. 9, 1991, at A1.

25. *Public Should React Strongly to Closing of Public Records*, FLORIDA TIMES-UNION, Nov. 29, 1991, at A10 (school board attorney advises that due to *Locke*, The Public Records Law no longer applies to school boards and personnel records should be closed to avoid liability); Stephanie Tripp, *A Cloud Over Sunshine Law*, TAMPA TRIB., Nov. 10, 1991, at A8. The author stated, "[o]n Friday, the State Attorney's Office in Hillsborough County, citing [*Locke*], initially refused to show a reporter the file of a closed investigation. Prosecutors handed over the file only after talking with an attorney for The Tampa Tribune." *Id.*

26. *Locke v. Hawkes*, 595 So. 2d 32, 33 (Fla. 1992).

27. The Attorney General stated that the Florida Supreme Court's decision in *Locke* "casts a tremendous shadow on the Sunshine in Florida Government . . . This constitutional amendment will get rid of the shadow." Mark Silva, *Attorney General Urges 'Sunshine' Amendment*, MIAMI HERALD, Nov. 13, 1991, at A1.

28. Speaker of the House, T.K. Wetherell, and Senate President Gwen Margolis initially claimed that they would support the amendment but wanted to see "the fine print." Associated Press, *Florida Seeking Amendment for Open Records*, FLORIDA TIMES UNION, Nov. 13, 1991, at B1. However, several different proposals were ultimately proposed and

the Legislature eventually enacted a joint resolution proposing a constitutional amendment entitled "Access to public records and meetings."²⁹ Shortly after this legislative action, the Florida Supreme Court, on February 27, 1992, withdrew its earlier decision in *Locke*, and in a substituted opinion, made it clear that the open government laws applied to the executive branch and to local governmental entities.³⁰ However, the final *Locke* ruling reaffirmed the court's previous conclusion that the Public Records Law did not apply to the courts or to the Legislature.³¹ Thus, the question of access to all three branches of government remained at issue and could be resolved only through passage of a constitutional amendment.

The proposed open government constitutional amendment was placed on the November 3, 1992, general election ballot and was overwhelmingly approved by the voters.³² The amendment took effect July 1, 1993. Prior to the effective date, both the judicial and legislative branches took steps to enact exemptions to the open government laws that would be "grandfathered in" prior to the amendment.

III. ANALYSIS OF THE CONSTITUTIONAL AMENDMENTS

A. *Legislative Open Meetings Amendment*

Article III, section 4(a) of the Florida Constitution authorizes each house of the Legislature to adopt its own rules of procedure.³³ The legislative open meetings amendment, which creates article III, section 4(e), requires these rules of procedure to provide for public access to certain legislative meetings.³⁴

debated during the 1992 legislative session. *See infra* note 29.

29. FLA. H.R. JOUR. 1727, 863, 2035 (Reg. Sess. 1992). The bill was passed by the Legislature on February 25, 1992, signed by the appropriate constitutional officers and filed with the Secretary of State on March 2, 1992. FLA. H.R. JOUR. 545, 547 (Reg. Sess. 1992). For a comprehensive discussion and analysis of the steps leading to the passage of the resolution see generally, Kara. M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525 (1992) [hereinafter Tollett].

30. *Locke*, 595 So. 2d at 36-37.

31. *Id.* at 32.

32. Tollett, *supra* note 29, at 525 (citing November 3, 1992 General Election Results, Florida Department of State, Division of Elections (unofficial)) (The amendment won 83.1%).

33. FLA. CONST. art. II, § 4(a).

34. FLA. S. JOUR. S1990 (1990) (proposed FLA. CONST. art III, §§ (4)(c), (4)(e)). As amended, article III, section 4 of the Florida Constitution provides in part:

Article III, section 4(e) requires that the rules provide for all legislative committee and subcommittee meetings of each house and joint conference committee meetings to be open and noticed.³⁵ While such a requirement is now a constitutional mandate, it did not significantly impact on existing House and Senate rules which already required legislative committee and conference committee meetings to be open and noticed.³⁶

Of perhaps greater significance is the requirement in article III, section 4(e) that all prearranged meetings between *three or more* legislators, or between the Governor, the Senate, President or the Speaker of the House of Representatives, for the purpose of agreeing upon formal legislative action, which is or will be taken on pending legislation, or amendments, must be reasonably open to the public.³⁷ However, section 4(e) also recognizes that where it is reasonably necessary for security purposes, or to protect a

Section 4. Quorum and Procedure.—

(c) Each house shall keep and publish a journal of its proceedings; and upon the request of five members present, the vote of each member voting on any question shall be entered on the journal. In any legislative committee or subcommittee, the vote of each member voting on the final passage of any legislation pending before the committee, and upon the request of any two members of the committee or subcommittee, the vote of each member on any other question, shall be recorded.

(e) The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

FLA. CONST. art III, § 4.

35. *Id.* § 4(e).

36. *See* FLA. S. RULE 2.13 (1988-1990); FLA. H.R. RULE 6.25 (1989); FLA. S. RULE 2.19 (1989); FLA. H.R. RULE 6.57 (1989); *see also* FLA. S. RULES 2.6, 2.8-2.10 (1988-1990); FLA. H.R. RULES 6.14, 6.17-6.20 (1989) (relating to notice).

37. FLA. CONST. art. III, § 4(c).

witness appearing before a committee, the rules may provide for closure of committee meetings. All open meetings are subject to order and decorum.³⁸

Senate Joint Resolution 1990 also amended the existing provisions of article III, section 4(c). Article III, section 4(c) required, among other things, that the vote of each member voting on a question be entered into the House or Senate's journal, upon the request of five members present.³⁹ The open legislative meetings amendment expands this requirement. Article III, section 4(c) now also requires that in any legislative committee or subcommittee, the votes of the members during the final passage of legislation pending before a committee, or on any other question when requested by two members of a committee or subcommittee, be recorded.⁴⁰

The amendment, while requiring a new openness in proceedings of the Legislature, is not as broad as the Sunshine Law. While the Sunshine Law has been interpreted to apply to two or more members of a public collegial body,⁴¹ article III, section 4(e) refers to meetings of "more than two," or in other words, at least three members.⁴² In addition, the Sunshine Law has been held to encompass all deliberations and discussions of public board members on a matter which foreseeably will come before that board.⁴³ Conversely, the constitutional amendment limits its application to committee or subcommittee meetings and to prearranged meetings between three or more legislators for the purpose of agreeing upon formal legislative action which is or will be taken on *pending* legislation or amendments.⁴⁴

The constitutional amendment also specifically protects the authority of the Legislature to interpret and implement its own rules.⁴⁵ Seeking to foreclose judicial interpretations which might expand its interpretation, article III, section 4(e) states:

This section shall be implemented and defined by the rules of each

38. *Id.*

39. *Id.*

40. *Id.*

41. *See, e.g.,* Hough v. Stembridge, 278 So. 2d 288, 289 (Fla. 3d Dist. Ct. App. 1973).

42. FLA. CONST. art III, § 4(e).

43. *Id.* *See also* Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Wolfson v. State, 344 So. 2d 611 (Fla. 2d Dist. Ct. App. 1977); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969) ("it is the entire decision-making process that the legislature intended to affect by the enactment of [section 286.011 of the Florida Statutes]").

44. FLA. CONST. art. III, § 4(e).

45. *Id.*

house Each house shall be the *sole* judge for the interpretation, implementation, and enforcement of this section.⁴⁶

B. *Open Government Constitutional Amendment*

Article I, section 24 of the Florida Constitution provides that “every person” has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except as otherwise authorized by section 24, or as provided elsewhere in the constitution.⁴⁷

46. *Id.* (emphasis added).

47. *Id.* art. I, § 24. The full text of article I, section 24 of the Florida Constitution provides:

Section 24. Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in article III, section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are

This language incorporates key terms contained in the statutory definition of “public record” found in section 119.011(1) of the Florida Statutes.⁴⁸ The scope of the constitutional guarantee of access to public records extends to all three branches of government; Executive, Legislative, and Judicial, as well as to state and local agencies and agencies created under the Florida Constitution.⁴⁹

The right of access to meetings of public agencies extends to collegial bodies in the executive branch of state government as well as to those of local governmental entities and special districts. Legislative proceedings are controlled by the terms of article III, section (4)(e) of the Florida Constitution, containing express provisions governing legislative meetings. Meetings within the judicial branch are not encompassed by the amendment.⁵⁰

The Legislature is authorized to enact general laws providing for exemptions from the access requirements. However, any law creating an exemption must expressly state the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law.⁵¹

Additionally, the Legislature is required to adopt laws governing enforcement, maintenance, control of destruction, disposal and disposition of records made public by this section. However, each house of the Legislature has the authority to adopt rules governing enforcement regarding records of the legislative branch. Any law creating an exemption of governing enforcement must relate to one subject and shall contain only exemptions and provisions relating to enforcement.⁵²

All laws in effect on July 1, 1993 that limit public access to records or meetings “shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed.”⁵³ Thus, existing exemptions are “grandfathered in” and need not be reenacted. Additionally, the Legislature was provided with an entire legislative session between the

in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

Id.

48. The term “public records” is defined to mean “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.” FLA. STAT. § 119.011(1) (1991).

49. FLA. CONST. art. I, § 24(a).

50. *Id.* § 24(b).

51. *Id.* § 24(c).

52. *Id.*

53. *Id.* § 24(d).

passage of the amendment in November 1992 and the July 1, 1993 effective date to enact new exemptions without complying with the new constitutional requirements. Court rules in effect on the date of adoption of the amendment that limit access to records remain in effect until repealed.⁵⁴

IV. AFTER THE AMENDMENTS

A. *Open Legislative Meetings Amendment—Reactions by the Legislature*

1. The House of Representatives Response

The House quickly moved to meet the constitutional amendment's mandate by adopting several rules during its 1990 organizational meeting. Under the new rules, each member of the House is required to provide the public with reasonable access to any prearranged meeting between the representative and two or more other legislators for the purposes of agreeing upon formal legislative action on pending legislation or amendments. However, admission to the meeting is conditioned upon request by members of the public.⁵⁵ The rules, therefore, do not automatically open such meetings but require the meetings to be open if a member of the public seeks admission.

Such meetings may not be conducted in the members' lounge, any location which is closed to the public, or which the representative knows to prohibit admission on the basis of race, religion, gender, national origin, physical handicap, or similar classification.⁵⁶ The rule specifies, however, that meetings conducted in either chamber while that body is in session are considered to be held at a location which is reasonably accessible and open to the public. Where the number of persons that may attend is limited because of space considerations or in order to maintain order or decorum, at least one representative of the print media, radio, and television must be

54. FLA. CONST. art. I, § 24(d).

55. FLA. H.R. RULE 5.25 (1993). The rule provides, as the constitutional amendment does, that such meetings are subject to order and decorum. *Id.*

56. *Id.* Compare FLA. STAT. § 286.011(6) (1991) (stating that all persons subject to the open meetings requirement set forth in subsection (1) are prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict access to such a facility).

included if they request admission.⁵⁷

Similar requirements are imposed for prearranged meetings between the Speaker of the House of Representatives, and either the Governor or the Senate President, for the purpose of agreeing upon formal legislative action to be taken on pending legislation or amendments at the meeting or at a subsequent time.⁵⁸ The Speaker is required to provide reasonable access to members of the public at such meetings, subject to order and decorum. At least one representative, who requests admission, of the print media and the radio and television news media must be included.⁵⁹

“Pending legislation” is defined by rule to mean legislation filed with the clerk of the House of Representatives. On the other hand, an amendment is considered pending if it has been delivered to the secretary of a committee in which the legislation is pending or to the clerk of the House if the amendment is to a bill that has been reported favorably by each committee of reference.⁶⁰ “Formal legislative action” includes any vote of the House or Senate or of a committee or subcommittee, on final passage or on a motion, other than a motion to adjourn or recess.⁶¹

The rules continue to provide, as they did prior to the adoption of the constitutional amendment, that committee meetings and conference committee meetings are open.⁶² Committee meetings remain subject to the presiding officer’s authority to maintain order and decorum. However, where necessary for the witness’ protection, the meeting may be closed by the committee chairman with the concurrence of the Speaker.⁶³

2. The Senate Response

The Senate also sought to implement the new constitutional mandate by the adoption of a new rule. Like its counterpart in the House,⁶⁴ Senate Rule 1.441 requires that all legislative committee, subcommittee, and joint

57. FLA. H.R. RULE 5.25 (1993).

58. *Id.* RULE 2.7. This rule also provides that “[s]uch meetings shall be reasonably open to the public and shall be governed by, and conducted in accordance with, the requirements of Rule 5.25, as if such meeting were a meeting between three or more legislators.” *Id.*

59. *Id.*

60. *Id.*

61. FLA. H.R. RULE 5.25 (1993).

62. *Id.* Rule 6.25, 6.57.

63. *Id.* RULE 6.25.

64. *Id.* RULE 5.25.

conference committee meetings be open and noticed to the public.⁶⁵ In addition, the rule reiterates the constitutional amendment's requirement of open meetings between "more than two" legislators or between the Governor, the Senate President or Speaker of the House, when such meetings are prearranged for the purpose of agreeing upon formal legislative action on pending legislation or amendments.⁶⁶

In the event of a conflict with another rule, Senate Rule 1.441 states that the rule allowing greater access will prevail. This provision is significant when considering other Senate rules which, although adopted before the constitutional amendment, continue to be effective. For example, the language of Senate Rule 1.43, adopted in 1989,⁶⁷ is more aligned to the language the courts used in interpreting section 286.011 of the Florida Statutes, than it is to the constitutional amendment. The rule requires that all meetings at which "legislative business" is discussed between *two or more* senators be open to the public.⁶⁸ The term "legislative business" is defined by the rule as "issues pending before, or upon which foreseeable action is reasonably expected to be taken by the Senate, a Senate Committee or Senate Subcommittee."⁶⁹

The rule recognizes a limited exception for meetings between two senators to exchange information, provided the purpose of the meeting is not to agree upon final action that will be taken at a later meeting.⁷⁰ Discussions on the floor while the Senate is in session and discussions between senators in a committee room during committee meetings are in compliance with the rule.⁷¹

65. FLA. S. RULE 1.441 (1993). Earlier Senate Rules had required legislative committee and subcommittee meetings and conference committee meetings to be open and noticed. See FLA. S. RULES 2.6, 2.13, and 2.19 *supra* note 36.

66. FLA. S. RULE 1.441 (1993).

67. FLA. S. JOUR. 92, 93 (Reg. Sess. 1989).

68. FLA. S. RULE 1.43(a) (1993). See *supra* note 43 and accompanying text, discussing the applicability of the Sunshine Law to gatherings of two or more members of the same board or commission.

69. FLA. S. RULE 1.43(c) (1993). Compare FLA. S. RULE 1.43(c) (1993) with cases cited *supra* note 43, discussing the applicability of the Sunshine Law to gatherings of two or more board members to discuss some matter which will foreseeably come before that board.

70. FLA. S. RULE 1.43(a) (1993).

71. *Id.* Other existing rules were amended. See McSwain, *supra* note 14, at 367 (noting that minor refinements were made to the time periods for notice specified for certain meetings of the Senate President and that an exemption from the notice and access requirements for political caucuses in Florida Senate Rule 1.44(c) was adopted when such caucuses are held to designate Senate leaders).

B. *Open Government Amendment—Reactions by the Executive, Legislative and Judicial Branches*

1. The Executive Response

In its initial decision in *Locke*,⁷² the Florida Supreme Court stated that the open records law did not apply to “constitutional officers or to their functions.”⁷³ Immediately, there was concern that the Governor and members of the Florida Cabinet, whose offices are established under the Florida Constitution,⁷⁴ could exempt themselves from the Public Records Law, or even the Government in the Sunshine Law.⁷⁵

However, the Governor and the six cabinet officers stated that they would continue to abide by the open government laws despite the *Locke* decision.⁷⁶ This determination eventually proved to be the position taken by the Florida Supreme Court when it revisited *Locke* in February 1992 and held that the Public Records Law applied to the executive branch.⁷⁷

Accordingly, it was apparent that the adoption of a constitutional right of access would probably impact the executive branch far less than the legislative and judicial branches.⁷⁸ With regard to the executive branch, the Florida Supreme Court essentially preserved the pre-amendment status quo by holding that the records and proceedings of this part of government, as opposed to the legislative and judicial branches, were subject to statutory

72. *Locke v. Hawkes*, 1991 WL 231589 (Fla. Nov. 7, 1991), *vacated and superseded* by 595 So. 2d 32 (Fla. 1992).

73. *Id.*

74. The Florida Constitution vests supreme executive power in the Governor. FLA. CONST. art. IV, § 1. The Cabinet, consisting of the Attorney General, Secretary of State, Comptroller, Treasurer, Commissioner of Agriculture, and Commissioner of Education, is created by article IV, section 4 of the Florida Constitution. FLA. CONST. art IV, § 4.

75. See Lavelle *supra* note 24, at A6. Bill Jones, executive director of Common Cause is quoted as expressing concern that the *Locke* ruling could permit meetings between Cabinet members, Cabinet aides, task force members and search committee members to occur behind closed doors: “They could close that door tomorrow if the supreme court reads the open meetings law the same way they read the public records law. The way they’re interpreting separation of powers, there’s a real possibility the [sunshine law] could go as well.” *Id.*

76. Bill Cotterell, *Butterworth Wants More Sunshine*, TALLAHASSEE DEMOCRAT, Nov. 13, 1991, at 5B.

77. *Locke*, 595 So. 2d at 37.

78. *Id.* The court stated that it granted the rehearing petitions filed after the initial *Locke* decision “to clarify our opinion and avoid improper interpretation by government entities not involved in this cause.” *Id.* The court thus limited its ruling to the legislative and judicial branches.

regulation under the Public Records Law.⁷⁹

In light of the fact that the right of access to public records and meetings in the executive branch is specifically recognized in article I, section 24, the major impact of the amendment on that branch is to secure as a constitutional right that which had previously been merely a statutory guarantee, subject to the absolute discretion of the Legislature.⁸⁰

However, early in the 1993 legislative session, the Governor's office recognized that once effective in July, the constitutional amendment would serve to open clemency records and proceedings. The Legislature was asked to create an exemption to these proceedings that would be "grandfathered in" prior to the July 1, 1993 effective date.⁸¹

The clemency power is derived directly from the Florida Constitution. Pursuant to article IV, section 8(a), the Governor, with the concurrence of three members of the Cabinet, may "grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses."⁸² Because the exercise of the clemency power is a constitutional function outside the control of the legislative branch, the courts had traditionally determined that the Sunshine Law was inapplicable to the Governor and Cabinet in dispensing clemency.⁸³ However, this result would change once the constitutional amendment took effect because the open government provision would apply to constitutional entities.

The initial proposal of the Governor's staff was to create a new statute with both a public records and a sunshine exemption. Under the proposed statute, records developed or received by any state agency relating to an Executive Clemency Board investigation would be exempt from disclosure. Additionally, meetings between members of the Board of Executive

79. *Id.*

80. FLA. CONST. art. I, § 24(a), (b).

81. *See id.* § 24(a) providing that the right of access provided therein applies to "each constitutional officer, board, and commission or entity created pursuant to law or this Constitution." Similarly, section 24(b) provides that "[a]ll meetings of any collegial public body of the executive branch of state government . . ." are open to the public. *Id.* § 24(b) (emphasis added).

82. *Id.* art. IV, § 8(a).

83. *See Turner v. Wainwright*, 379 So. 2d 148, 151 (Fla. 1st Dist. Ct. App. 1980), *aff'd and remanded*, 389 So. 2d 1181 (Fla. 1980); *see also In re Advisory Opinion of the Governor*, 334 So. 2d 561 (Fla. 1976) (clemency power does not exist by virtue of legislative enactment; rather, constitution sufficiently prescribes rules for manner of exercise of the power). *Cf.* 1977 FLA. ATT'Y GEN. ANN. REP. 65 (concluding that the Florida Administrative Procedures Act is inapplicable to the Constitution Revision Commission established by article XI, section 2 of the Florida Constitution).

Clemency (the Governor and Cabinet) would be exempt from the Sunshine Law when no official action was taken.⁸⁴

The proposed clemency exemptions were included in a larger bill, House Bill 2007, which contained numerous exemptions for legislative records as well as other exemptions from the Public Records Law that were intended to apply to all agencies.⁸⁵ Although several amendments were made to House Bill 2007 during the legislative process, the clemency exemptions survived with only minimal modifications in the final version of the bill.⁸⁶

House Bill 2007 passed the Legislature as amended on April 2, 1993, and was presented to the Governor.⁸⁷ However, citing concerns about the breadth of exemptions which the Legislature had granted for some of its own records, the Governor vetoed the bill.⁸⁸

During the subsequent special session, the Legislature passed a narrower version of House Bill 2007. As originally introduced, Senate Bill 20-B contained the same exemption for clemency meetings and records as had existed in House Bill 2007.⁸⁹ However, the bill was amended to eliminate the open meetings exemption.⁹⁰ Thus, the final version of the bill contained only the exemption from the public records law.⁹¹ Senate

84. See Fla. HB 2007 (1993). According to the staff analysis prepared by the House Governmental Operations Committee, "Gubernatorial staff" advised that the purpose of the amendment was to protect the safety of individuals providing information in a clemency investigation. For example, public disclosure of the identities of persons requesting that certain felons not be released could jeopardize the health, safety, and welfare of the reporting individuals. The same analysis reports that "gubernatorial staff" felt that it was necessary to protect brief and casual communications between the Governor and clemency board members; see also Fla. H. Comm. on Govtl. Ops., HB 2007 (1993) Final Bill Analysis and Economic Impact Statement, 8 (May 17, 1993) (vetoed by the Governor May 14, 1993).

85. Fla. HB 2007 (1993). The proposed legislative exemptions are discussed *infra* in Part III.B3.

86. The "Sunshine" exemption was amended by Representative Peoples (D-72), on the House Floor to read: "Except for clemency hearings before the Board of Executive Clemency, the provisions of s. 286.011 shall not apply to meetings of board members or their staff." FLA. H.R. JOUR. 401 (Reg. Sess. 1993).

87. FLA. S. JOUR. 1430 (Reg. Sess. 1993) (vote on passage in the Senate was 30 yeas and 5 nays).

88. FLA. H.R. JOUR. 6 (Spec. Sess. B 1993).

89. FLA. S. JOUR. 3 (Spec. Sess. B 1993).

90. FLA. S. JOUR. 83 (Spec. Sess. B 1993) (vote on passage in the Senate was 31 yeas and 6 nays).

91. The final version states: "All records developed or received by any state entity relating to a Board of Executive Clemency investigation shall be exempt from [public disclosure requirements]." Ch. 93-405, § 6, 1993 Fla. Laws 2906, 2910 (to be codified at

Bill 20-B became a law without the Governor's signature and took effect on June 30, 1993.⁹²

Although the legislative enactments relating to clemency appeared to be the most directly related to the constitutional amendment, several other significant exemptions relating to the executive branch were also enacted in the 1993 session. These included: a law providing circumstances whereby a governmental board could meet privately with its attorney to discuss pending litigation involving the agency;⁹³ an exemption to the Public Records Law providing increased confidentiality for medical records of past, present and current employees and officers;⁹⁴ an exemption allowing for temporary closure of records relating to certain internal investigations;⁹⁵ and a new provision establishing confidentiality for certain complaints alleging discrimination in employment.⁹⁶

2. The Judicial Response

Although early versions of the proposed open government amendment would have permitted public access to records *and* meetings within the judicial branch, with the exception of grand jury and jury deliberations,⁹⁷ the final version provided a right of access only to records in the judicial

FLA. STAT. § 14.28).

92. *Id.* § 8, 1993 Fla. Laws at 2910.

93. Ch. 93-232, § 1, 1993 Fla. Laws 2374 (amending FLA. STAT. § 286.011 (1991), appearing at FLA. STAT. § 286.011(8)).

94. Ch. 93-405, § 4, 1993 Fla. Laws 2906, 2909 (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(cc)).

95. *Id.* (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(dd)).

96. *Id.* (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(bb)).

97. This was the approach taken in the initial proposal offered by Attorney General Butterworth on November 12, 1991. The proposed amendment stated:

Notwithstanding any other provision of this Constitution, no person shall be denied access to any meeting at which official acts are to be taken by any collegial public body in the state or by persons acting together on behalf of such a public body, with the exception of jury and grand jury deliberations.

See Statement by Attorney General Bob Butterworth, November 12, 1991; *see also* House Joint Resolution 863 by Representative Paul Hawkes, Republican, Crystal River, and House Joint Resolution 2035 by Representative Mary Brennan, Democrat, Pinellas Park containing similar language. For an analysis of the various proposals considered in the legislature, and their impact on the judicial branch; *see generally*, *Open Records Amendment Would Impact the Judiciary*, THE FLORIDA BAR NEWS, March 1, 1992, at 17.

branch of government.⁹⁸

The amendment establishes a grandfather clause providing that “rules of court that are in effect on the date of adoption of this amendment [November 3, 1992] shall remain in effect until they are repealed.”⁹⁹ Thus, the supreme court was required to adopt court rules prior to November 3, 1992, in order to authorize its own exemptions. Laws in effect prior to July 1, 1993 could limit access to records of the judicial and legislative branches until repealed.¹⁰⁰

On September 15, 1992, the Public Records Rules Drafting Committee, led by Judge Gerald Wetherington of the Eleventh Judicial Circuit, published proposed amendments to the Rules of Judicial Administration in the Florida Bar News.¹⁰¹ The proposed rule set forth a list of court records “which shall be confidential.”¹⁰² These included trial and appellate memoranda, opinion drafts, complaints alleging misconduct against judges until probable cause is established, periodical evaluations intended to improve job performance of judges, applications by persons seeking to serve as volunteers, all records currently made confidential by state or federal law, and copies of arrest and search warrants.¹⁰³

The proposed rule also established confidentiality for any court records regarding a judicial determination in which confidentiality is required:

- (1) To prevent a serious and imminent threat to the fair, impartial and orderly administration of justice; or
- (2) To protect trade secrets; or
- (3) To protect a compelling governmental interest; or
- (4) To obtain evidence to determine legal issues in a case; or
- (5) To avoid substantial injury to innocent third parties; or
- (6) To avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in

98. FLA. CONST. art. I, § 24(a).

99. *Id.* § 24(d).

100. *Id.*

101. *Florida Rules of Judicial Administration*, THE FLORIDA BAR NEWS, Sept. 15, 1992, at 31 (listing the proposed amendments to the public access to judicial records rule) [hereinafter *Judicial Administration*]. The Drafting Committee also published in the same issue of the THE FLORIDA BAR NEWS notice of proposed amendments relating to access to the records of the Florida Bar. See *Proposed Amendments Deal with Confidentiality*, THE FLORIDA BAR NEWS, Sept. 15, 1992, at 25 [hereinafter *Proposed Amendments*]. However, these amendments are beyond the scope of this article.

102. See *Judicial Administration*, *supra* note 101, at 31.

103. *Id.*

the specific type of proceedings sought to be closed.¹⁰⁴

Additionally, the rule provided procedures in the event of a denial of access (through an action for mandamus) and policies for retention of records. The proposed rule admonished that “[d]emands for access to public records under this rule shall be made in a reasonable manner which does not interfere with the normal functions or duties of the person to whom such demand is made.”¹⁰⁵

In response to the proposed rule, the Florida Press Association and Florida Society of Newspaper Editors (“Press”) expressed concern that the proposed rules did not sufficiently distinguish between the role of the court as an employer of personnel and expender of public funds, and the role of the court as supervisor and custodian of judicial records.¹⁰⁶ The Press urged the court to make it clear that records generated as part of the judiciary’s administrative function should be governed by the same rules applicable to agencies in other branches of government.¹⁰⁷ Moreover, the Press warned that, as currently phrased, the rules were vague and ambiguous in critical areas and could allow the creation of additional confidential records in circumvention of the constitutional amendment.¹⁰⁸

Finally, the Press objected to the portion of the rule providing that public records shall be furnished if the demand for public access is “reasonable” and “does not interfere with the normal functions or duties of the persons to which such demand is made.”¹⁰⁹ The Press stated that this paragraph authorized too much discretion and contravened the supreme court’s prior rulings. In response, at the October 5, 1992 oral argument, Judge Wetherington stated that it was his understanding that the rules simply codified existing practice and were no more restrictive than current laws and

104. *Id.* This provision incorporates the Florida Supreme Court’s decision in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

105. *See Judicial Administration*, *supra* note 101, at 31.

106. Response Brief for the Florida Press Association and Florida Society of Newspaper Editors at 1, 2, 10-11, *In re Amendment to Florida Rules of Judicial Administration, Public Access to Judicial Records and In re Amendments to Rules Regulating The Florida Bar*, 608 So. 2d 472 (Fla. 1992) (Nos. 80419 & 80432) [hereinafter Response].

107. *Id.*

108. *Id.* at 12-13.

109. *Id.* at 17. The Press argued that the “reasonableness” and “non-interference” requirement placed too much discretion in the hands of the records custodian and contravened the supreme court’s holding in *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

rules.¹¹⁰

On October 29, 1992, the court issued an opinion adopting Rule 2.051, entitled Public Access to Judicial Records.¹¹¹ In its ruling, the court stated that “[t]he amendments to the Florida Rules of Judicial Administration are intended to reflect the judiciary’s responsibility to perform both an administrative function and an adjudicatory function.”¹¹² The court observed that in its administrative role (as public employer and expender of public funds), the judiciary is acting in an administrative capacity and hence, “should be subject to the same standards that govern similar records of other branches of government.”¹¹³

The court emphasized, however, that the judiciary’s adjudicatory responsibilities, require a “modified policy toward public inspection.”¹¹⁴ In order for the judiciary to perform these responsibilities and protect “the rights of all citizens” some exceptions to public access were necessary.¹¹⁵

The court thus adopted the rules as proposed by the drafting committee. However, some provisions were narrowed in an apparent attempt to avoid their use to shield “administrative” records which would be open in other agencies.¹¹⁶ In addition, the provision dealing with responses to public records requests was modified to provide: “Requests and responses to requests for access to public records under this rule shall be made in a reasonable manner.”¹¹⁷

110. Gary Blankenship, *Justices Ponder Public Access to Courts, Bar*, THE FLORIDA BAR NEWS, Oct. 15, 1992, at 1, 14.

111. *In re* Amendments to the Florida Rules of Judicial Administration—Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992) [hereinafter *Public Access*]

112. *Id.* at 472.

113. *Id.* at 472-73. This point was perhaps most strongly made by Justice Overton in his concurring opinion in which he stated:

I concur and write only to emphasize that, as I read these rules: (1) there is no change regarding the presumption of openness of court records, as set forth in *Barron v. Florida Freedom Newspapers, Inc.*, and (2) the judicial branch’s administrative documents, including personnel and finance records, are being treated the same as similar records in the executive and legislative branches.

Id. at 473 (citation omitted).

114. *Id.*

115. *Public Access*, 608 So. 2d at 473.

116. *See, e.g., Judicial Administration, supra* note 101, at 31 (proposed rule, which was not adopted, provided for confidentiality of “preliminary drafts, notes, or other written materials which reflect the tentative thought processes of court committees and judicial conferences, and the members thereof, assigned to perform functions affecting the administration of justice in Florida.”).

117. *Public Access*, 608 So. 2d at 475.

3. The Legislative Response

Of the three branches of government, the legislative branch faced perhaps the greatest impact. Because of the open government amendment, the Legislature was now subject to public access requirements established by constitutional mandate; historically, the Legislature had argued that it alone had the power to determine which of its records were open and which were not.¹¹⁸

However, the amendment also affected the Legislature by placing limitations on the manner in which public records' exemptions could be enacted both for itself and for all other agencies.¹¹⁹ Prior to the amendment, the only restrictions, other than the general "single subject rule" and similar constitutional¹²⁰ provisions applicable to legislative enactments in general, were a self-imposed statutory directive to consider certain factors when determining whether to enact or continue exemptions from the open government laws.¹²¹ There was little to prevent the Legislature from

118. See *supra* notes 12 and 13, for earlier decisions regarding the Legislature's authority to establish its own rules governing access. This position was expressly adopted by the Florida Supreme Court in both *Locke* decisions. Until the passage of Senate Bill 20 in the 1993 Session, legislative records available to the public were set forth in Florida House Rule 1.11 and Rule 1.442. See Staff of Fla. S. Comm. on Pub. Rec., SB 20 (1993) Staff Analysis (May 25, 1993) (on file with Comm.).

119. FLA. CONST. art. I, § 24(c), (d).

120. See FLA. CONST. art. III, § 6, which provides: The Florida Constitution states: Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida."

Other procedural requirements relating to publication are set forth in article III, section 7 of the Florida Constitution.

121. See FLA. STAT. § 119.14(2) (1991). Exemptions are possible only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

However, the impact of this statutory directive is somewhat weakened by 4(g) of this section, providing:

- (g) Notwithstanding the provision of s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption pursuant to this act. The failure of the Legisla-

placing an exemption deep within a bill filled with numerous other issues.¹²² Occasionally, the absence of a “single subject rule” for exemptions resulted in bills passing the Legislature which were later deemed to be a “mistake” and subsequently vetoed by the Governor.¹²³

Under article I, section 24, the Legislature is authorized to enact general laws providing for exemptions from the access requirements; however, any law creating an exemption must expressly state the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law.¹²⁴ Further, any law creating an exemption or governing enforcement must relate to one subject and shall contain only exemptions and provisions relating to enforcement.¹²⁵ These provisions will be in place for the 1994 legislative session.

The session following the adoption of the amendment but prior to its taking effect—the 1993 session—was of critical importance because it was the final opportunity for the Legislature to determine which of its records were going to be open and which were not. Any exemptions enacted during this time would be “grandfathered in” once the constitutional amendment took effect in July; all other records would be subject to constitutional access requirements.¹²⁶

On February 23, 1993, the Legislature responded to the challenge with the introduction of House Bill 2007, by Representative Boyd and the

ture to comply strictly with this section shall not invalidate an otherwise valid reenactment.

Id.

122. For example, in 1989, a public records exemption was enacted for certain claims records involved with an agency’s risk management program. The provision was added on the floor of the House of Representatives as Section 92 of an act “relating to insurance and the State Fire Marshall.” See FLA. H.R. JOUR. 1349-79 (Reg. Sess. 1989).

123. For example, in the closing days of the 1993 Session an amendment to an exemption found in section 119.07(3)(z) of the Public Records Act was inserted on the Senate floor as an addition to a bill expanding the definition of “criminal justice agency.” See FLA. S. JOUR. 545 (Reg. Sess. 1993). A newspaper reporter subsequently reported that the bill “accidentally exempted most of the state’s [police] and court records from the public records law” Lucy Morgan, *Legislature Accidentally Closes Police, Court Records*, ST. PETERSBURG TIMES, Apr. 16, 1993, at 5B. The sponsor of the bill stated that he was unaware of this result when he offered the proposal. The Governor concurred that the exemption was too broad and noted that this “was not the intention of the sponsor of the legislation” and vetoed the bill on May 4, 1993. *Id.*

124. FLA. CONST. art. I, § 24(c).

125. *Id.* § 24(d).

126. *Id.*

Committee on Governmental Operations.¹²⁷ As proposed, the bill provided for the following key exemptions from disclosure.

A formal complaint about a member or officer of the Legislature or about a lobbyist would be exempt until dismissal of the complaint, determination as to probable cause, or the respondent had requested that the complaint be made public, whichever occurred first. Other exemptions applied to drafts of legislative material which were not provided to any person other than a member, officer, or employee of the Legislature and to records prepared for or used in executive sessions of the Senate until fifty years after the session was held. The bill also provided confidentiality for these records held by the Legislature which would be exempt from disclosure.

House Bill 2007 passed with one amendment and was certified to the Senate on March 11, 1993.¹²⁸ The full Senate took up the bill on March 31, 1993.¹²⁹ The Committee on Rules and Calendar and Senator Jennings moved an amendment to strike everything after the enacting clause and substitute a new version of the bill.¹³⁰ The revised bill substantially expanded the exemptions provided in the House-passed bill. Specifically, the following changes were made:

(1) While records of future executive sessions would become public in ten years, “[r]ecords of former legislative investigating committees whose records are sealed or confidential as of June 30, 1993” would not be subject to disclosure until December 31, 2028.¹³¹

(2) Requests for advisory opinions concerning application of legislative ethics rules would not be public unless the requestor authorized release.¹³²

(3) “Requests for, and drafts of, bills, amendments, reapportionment plans, and redistricting plans, including supporting documentation; and [w]orking papers of employees, officers or members, relating to their official or legislative oversight responsibilities” were exempted from disclosure and copying.¹³³

An additional amendment was offered by Senators Weinstein, Sullivan, Boczar, Holzendorf, Beard, Forman, Johnson and Grant to exempt “[c]orrespondence received or sent from a member of the Legislature” and

127. FLA. H.R. JOUR. 222 (Reg. Sess. 1993).

128. *Id.* at 427-28.

129. FLA. S. JOUR. 615 (Reg. Sess. 1993).

130. *Id.* (amendment 1).

131. *Id.* (amendment 1(2)(d)).

132. *Id.* (amendment 1(2)(f)).

133. *Id.* (amendment 2(g), (b)).

“[w]orking papers relating to constituent casework.”¹³⁴ This amendment was adopted and House Bill 2007, as amended, was approved by a vote of thirty-eight to zero.¹³⁵ Senator Jennings then offered an additional amendment relating to the records of former legislative investigating committees to provide that such records are subject to disclosure, except that the names of persons testifying before such committees were to be deleted.¹³⁶

On its return to the House, the Senate inspired version of House Bill 2007 was amended again to narrow the exemptions added on the Senate side. On motion by Representative Boyd, the House adopted an amendment to the Senate amendment to strike everything after the enacting clause and inserted new language.¹³⁷ Specifically, the House amendment limited the exemption for legislative correspondence to those portions of correspondence which, if disclosed, would reveal,

information otherwise exempt from disclosure by law; an individual's medical treatment, history, or condition; the identity or location of an individual if there is a substantial likelihood that releasing such information would jeopardize the health or safety of that individual; or information regarding physical abuse, child abuse, spouse abuse, or abuse of the elderly¹³⁸

The exemption relating to “working papers” was modified to apply to “[w]orking papers of employees, officers, or members relating to their legislative responsibilities.”¹³⁹ The House amendment also spelled out the “supporting documentation” relating to bills which could be withheld as “supporting documentation to or for bills, resolutions, memorials, amendments, bill analyses, fiscal notes, reapportionment plans and redistricting plans.”¹⁴⁰ As amended, the bill passed the House with 114 yeas and 0 nays.¹⁴¹

The bill returned to the Senate. This time the Senate concurred with the House amendments and the bill was approved by a 30 to 5 vote as the

134. FLA. S. JOUR. at 616 (amendment 1(d)).

135. *Id.*

136. *Id.*

137. FLA. H.R. JOUR. 1515, 1516 (Reg. Sess. 1993) (House Amendment 1 to Senate Amendment 1).

138. *Id.* (section (a), (h)).

139. *Id.* (section (2)(c)).

140. *Id.* (section (2)(d)).

141. *Id.* at 1517.

regular session drew to a close.¹⁴²

Florida newspapers, not surprisingly, were critical of House Bill 2007. It was described by the Florida Press Association and the Florida Society of Newspaper Editors as opening a “major loophole” in the open government law and establishing a “terrible precedent.”¹⁴³

Although early reports indicated that Governor Chiles was prepared to allow the bill to become law without his signature,¹⁴⁴ he subsequently vetoed the measure. In withholding his approval, the Governor wrote that he was concerned about the breadth of the exemptions for working papers and legislative drafts. The Governor stated that these provisions had not been granted to other governmental entities and served to frustrate the will of the people as expressed in the passage of the open government constitutional amendment. According to the Governor, the exemptions impeded “public understanding of influences on, and the purpose of, legislation, and diminishes the ability of Floridians to hold their lawmakers accountable.”¹⁴⁵

In the ensuing special session, the Legislature refined the legislative exemptions bill in an attempt to address the Governor’s concerns. The staff analysis for Senate Bill 20 B noted that in his veto message on House Bill 2007, the Governor stated that most of the exemptions in that bill were “appropriate and necessary to a smooth running government.”¹⁴⁶ However, staff commented that neither the constitutional amendment nor the Governor had defined what constitutes an “appropriate” exemption. According to staff, this determination must therefore be a “policy” question.¹⁴⁷

The “policy” reflected in Senate Bill 20 essentially focused on meeting the objections noted by Governor Chiles to the doomed House Bill 2007. This meant that the provisions relating to legislative working drafts and working papers required revision. Instead of the broad exemption for

142. FLA. S. JOUR. 1428, 1430 (Reg. Sess. 1993).

143. Louis Lavelle, *State Newspapers ask Governor for Public Access to State Records*, TAMPA TRIBUNE, May 11, 1993, at B3.

144. Lucy Morgan, *Records Secret Bill is to Become Law*, ST. PETERSBURG TIMES, May 12, 1993, at B3.

145. *Id.*

146. See Staff of Fla. S. Comm. on Pub. Rec., SB 20 (1993) Staff Analysis 5 (May 25, 1993) (on file with Comm.).

147. *Id.* However, it might be noted that the constitutional amendment appears to set forth policy considerations to be considered in the enactment of exemptions by stating that such “law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the Law.” *Id.*

preliminary documents contained in the earlier bill, Senate Bill 20 narrowed the exemption to those documents which had not yet been circulated outside the legislative arena.

Thus, legislative produced bill drafts, and requests for drafts, are exempt from disclosure if they have not been provided to any person other than the member or members who requested the draft, an employee of the Legislature, a contract employee or consultant retained by the Legislature, or an officer of the Legislature. Bill analysis drafts or fiscal note drafts are exempt from disclosure until the bill analysis or fiscal note is provided to a person other than a legislative employee, a contract employee or consultant retained by the Legislature, or an officer of the Legislature. In addition, drafts or requests for drafts of a reappointment plan or redistricting plan and amendments are exempt. "Supporting documents" used in connection with reapportionment or redistricting plans are exempt "until a bill implementing the plan, or the amendment, is filed."¹⁴⁸

This bill appeared to represent a consensus view and was quickly passed in the Legislature.¹⁴⁹ The only revision of significance was to remove the Sunshine Law exemption for informal clemency meetings which had been requested by the Governor's office and had been contained in the vetoed House Bill 2007.¹⁵⁰ Although there was some grumbling in the media that the exemptions in Senate Bill 20 were still too broad,¹⁵¹ the Governor allowed the bill to become law without his signature. Senate Bill 20, now Chapter 93-405 of the Laws of Florida, took effect June 30, 1993.¹⁵²

IV. CONCLUSION

With the passage of the open legislative meetings constitutional amendment in 1990 and two years later, the open government constitutional amendment, Floridians have overwhelmingly voiced their approval for government in the sunshine at all levels of government. It is still too early, however, to assess the full extent to which government will give effect to the expressed will of the people.

148. Ch. 93-405, § 1, 1993 Fla. Laws 2906, 2907 (to be codified at FLA. STAT. § 11.0431(2)(e)).

149. FLA. S. JOUR. 83 (Spec. Sess. B 1993).

150. FLA. S. JOUR. 3 (Spec. Sess. B 1993).

151. See, e.g., Lucy Morgan, *Bill to Limit Records Access Advances*, ST. PETERSBURG TIMES, May 26, 1993, at B3.

152. Ch. 93-405, § 8, 1993 Fla. Laws 2906, 2910 (to be codified at FLA. STAT. § 14.28).

Allegations of legislative meetings behind closed doors still arise.¹⁵³ The legislative open meetings amendment provides that it is the Legislature, not the courts, which has the right to interpret and enforce its terms. While both houses have adopted rules to implement the legislative open meetings amendment, it is not yet clear how well the Legislature will fulfill its role in enforcing those provisions. The first test for the open government amendment will come in the 1994 legislative session as the Florida Legislature implements for the first time the procedural safeguards contained in article I, section 24 of the Florida Constitution that are intended to assure that the public interest in open government is given equal consideration when proposal for closure are considered.

The challenge issued by the people by their overwhelming support of these two constitutional amendments, however, cannot be ignored. For the people of this state have recognized that open government provides the best assurances that the people will get good government that is responsive and responsible to its needs.

153. See, e.g., Lucy Morgan, *Discord Hits Lunch of Hours of Power*, ST. PETERSBURG TIMES, March 9, 1993 at B1 (lobbyist invited five members of the Senate Commerce Committee to lunch to discuss a bill to benefit his clients and sought to eject newspaper reporter who showed up at the gathering, thus "creating a situation that appears to be in direct violation of Senate rules and the state's open government laws"); Judy Doyle, *Lobbyist Holds Secret Meeting with Senators*, TALLAHASSEE DEMOCRAT, March 9, 1993, at A1.