



PREDATORY PUBLIC RECORDS REQUESTS

JANUARY 2016



Michelle A. Robinson
Chairman of the Board of Trustees

Dominic M. Calabro
President & Chief Executive Officer

Dear Fellow Taxpayers,

The right of Floridians to access information about how they are being governed is guaranteed in Article I, Section 24, of the Florida Constitution. This unfettered access to public records promotes transparency and accountability, and provides Floridians an opportunity to better understand how and why policy decisions that affect them are made. A better educated citizenry is more capable of engaging and communicating with public officials, the end result of which is better policy decisions. This, Florida TaxWatch thinks, is a good thing.

In its 36-year history, Florida TaxWatch has issued numerous research reports containing recommendations to make government more transparent and more accountable. Most recently, Florida TaxWatch issued a report containing recommendations to improve the oversight and accountability of the Florida Municipal Power Agency (FMPA), and to make the activities of the FMPA more transparent to the taxpayers.

It is not a good thing, however, when access to public records is abused. Public agencies, and businesses under contract with public agencies, are falling victim to the predatory practice of individuals filing numerous and vague public records requests and then suing for non-compliance, ostensibly to obtain cash settlements or to prevent government from functioning effectively. Others file public records requests with the intent of preventing government from functioning effectively by overburdening staff. In this report, TaxWatch examines the impact of these predatory practices on public and private entities and makes recommendations to stem this misuse of the public records law.

It should be expressly clear and understood that TaxWatch's recommendations are intended solely to stem this misuse of the public records laws and are in no way intended to limit taxpayers' access to public records or to infringe upon the taxpayers' right to petition their government. I hope that you find this information helpful, enlightening, and useful as you discuss this issue in your local community.

Sincerely,

Dominic M. Calabro
Dominic M. Calabro
President & CEO

INTRODUCTION

Florida’s Public Records Act defines public records as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”¹

This definition includes written correspondence, e-mails, texts and other electronic communications made or received by agency employees in connection with official agency business. Most agency records, including budgets, employee salaries, expense reports, and personnel records are considered to be public records. Any documents transmitted for review and comment or for information, whether in final or draft form, are considered to be public records. Even the records of private businesses, which would not otherwise be considered public records, may be considered to be public records if the business provides services to a public agency or acts on behalf of a public agency.

Unless expressly exempted by the Legislature, all public records are subject to public disclosure or inspection upon request. This right of access is plain and unequivocal. In the absence of a statutory exemption, a custodian “must produce the records requested regardless of the number of records involved or possible inconvenience.”²

A person requesting to inspect or get a copy of public records need not state their reason for the request or their intended use of the information, and there is no requirement to provide any form of identification. A public records request may be written or verbal. A person making a public records request has a right to seek judicial relief if errors are made in processing the request or if the request is not fulfilled within a reasonable amount of time.

Most public agencies designate a “custodian” to process requests for public records. The custodian of public records or his or her designee is required to acknowledge requests to inspect or copy records promptly and to respond to such requests in good faith. The Public Records Act, however, does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests.³

The custodian is authorized to charge both the cost of duplicating the requested records and to charge a reasonable service charge for the cost of the extensive use of information technology resources or of personnel, if such extensive use is required because of the nature or volume of public records to be inspected or copied.⁴ Agencies are required to provide copies of the record in the medium requested if the agency maintains the record in that medium. The agency is not required to reformat the record and provide it in a particular form as demanded by the requestor,⁵ nor is an agency required to create or

1 Reference Section 119.011(12), Florida Statutes.

2 Office of the Attorney General, “2015 Government in the Sunshine Manual.” December 20, 2015.

3 Ibid,

4 Reference Section 119.07(4)(d), Florida Statutes.

5 Office of the Attorney General, “2015 Government in the Sunshine Manual.” December 20, 2015.

construct a record that does not currently exist in order to satisfy a request for information.

The requirements of Florida’s public records law are complex; so complex in fact that the Attorney General’s 2015 Government in the Sunshine Manual dedicates more than 100 pages to trying to explain them. Given this complexity, it is easy to understand how those who deal with public records requests daily make technical mistakes that violate the Public Records Act. It is even easier to understand how those who are not familiar with the Act’s requirements make technical mistakes that violate the Public Records Act. This complexity creates opportunities for individuals to intentionally misuse public records requests for financial gain or to impede the effective operation of government.

PURPOSE

Florida TaxWatch undertakes this independent research project to: (1) examine the impact of financially motivated and malicious public records practices on public and private entities; and (2) make recommendations to stem this misuse of the public records law.

EXTENT OF THE PROBLEM

The intentional misuse of public records laws addressed in this research paper falls into one of two types. The first involves unscrupulous predators who file numerous public records requests with public agencies and private businesses doing business with public agencies, and then sue them for non-compliance with the

requests. These public records requests are filed with the intent of creating confusion that results in a lawsuit, with the hope of securing a cash settlement. Those most adversely affected by this predatory practice are “front line” agency staff who are unfamiliar with the Public Records Act and companies that do business with public agencies, many of whom do not understand that their records are subject to inspection and disclosure under the Public Records Act.

The second involves those who file public records requests with the intent of preventing government from functioning effectively by overburdening the staffs and budgets of public agencies. This is particularly true for small local governments and public agencies, with limited staff and budget resources.

A November 2015 survey of 206 Florida City and County Managers Association (FCCMA) member agencies⁶ found that:

- 42 percent of the respondents indicated that the current volume of “Big Data”⁷ public records requests negatively impacts their employees’ ability to fulfill other job functions; and
- 52 percent of responding agencies indicated that the volume of Big Data requests has been increasing or significantly increasing over recent years.

6 University of South Florida, School of Public Affairs, “Managing Public Records Compliance: A 2015 Survey of FCCMA Member Agencies,” November 11, 2015.

7 “Big Data” is defined in this survey as “requests for large amounts of public information that may come from multiple sources, files, etc., and may require reorganization and manipulation in order to be analyzed.”

As a result of these complex requests for large amounts of information, public agencies are more vulnerable to lawsuits arising from perceived unreasonable delays in responding and from technical violations. Public agencies are also more vulnerable to disruptions in work and overburdened staff.

The Florida Center for Investigative Reporting (FCIR) reported that in 2014 one non-profit group filed more than 140 public records-related lawsuits in 27 counties. Approximately 50 percent of these lawsuits were filed against private companies doing business with public agencies,⁸ and all of the lawsuits were filed by a law firm that shared the same building with the non-profit group.⁹ The FCIR reported that the non-profit group had threatened so many engineers with legal action that the Florida Engineering Society sent a warning to its members.

The memo from the Society's General Counsel questioned whether the non-profit was "truly seeking records or just attempting to obtain legal fees for a violation of this requirement."¹⁰

In response to a 2014 survey of its members by the Florida League of Cities, 66 municipalities responded to questions regarding the frequency of public records requests, number of staff assigned, amount of staff time required to respond, frequency of litigation and whether any moneys were budgeted specifically to respond to public records requests.

8 Interactive database provided by the Florida Center for Investigative Reporting, retrieved January 5, 2016.

9 Tristram Korten and Trevor Aaronson, "In Lawsuits Statewide, Questions of Profits and Public Records," Florida Center for Investigative Reporting, November 9, 2014.

10 Ibid.

Some of the more egregious examples of misuse of public records requests follow:

- The City of Eustis, a Lake County community of just under 20,000 residents, received a request for personal information about the City Manager. A request was also made to the Police Department for information that is exempt from disclosure under the Public Records Act. The staff person responding to the request cited an incorrect statutory exemption, which prompted a lawsuit. The City settled the lawsuit for \$1,500.¹¹
- In Cooper City, a community of approximately 34,000 residents in Broward County, one individual filed approximately 600 e-mail requests for public records within a one-year period. Responding to these requests required a considerable amount of time spent by City Clerk, City Manager, City Attorney, and several other managers to research and respond. A lawsuit was filed and eventually dismissed.¹²
- In Dunedin, a community of approximately 36,000 residents in Pinellas County, and in Madeira Beach, a community of fewer than 5,000 residents in Pinellas County, individuals entered the marina dockmaster's office with cameras rolling demanding that receptionists produce slip rental agreements on the spot. The receptionists were not permitted to seek guidance from a supervisor or contact the City Clerk, who was the

11 Florida League of Cities, 2014 Public Records Survey Responses, retrieved January 5, 2016.

12 Ibid.

official custodian. Lawsuits were subsequently filed against both cities. The City of Dunedin has elected to fight the lawsuit, while Madeira Beach settled for \$2,500.¹³

- The City of Boynton Beach, a community of approximately 70,000 residents in Palm Beach County, was sued because the Police Department lobby was only open on Wednesday, requiring the requestor of a public record to have to walk next door to City Hall. The City Commission approved a \$1,000 cash settlement.¹⁴
- The City of Lakeland was sued over the way it charged for public records. The City eventually paid \$95,000 to settle the lawsuit. When legal fees are included, the total cost to the City was \$160,000.¹⁵
- The City of Greenacres, a community of approximately 40,000 residents in Palm Beach County, was sued after refusing to provide the names of police officers working off-duty security. The City eventually agreed to pay a cash settlement of \$29,900 and the requestor's legal fees, which totaled \$38,397.¹⁶
- The Manatee County School Board was one of nine school boards sued by an individual who requested the names, addresses, and telephone numbers of all Florida school

employees, retirees, and dependents enrolled in health insurance plans.¹⁷ The school board eventually agreed to pay a cash settlement.

- The Town of Southwest Ranches, a Broward County community with fewer than 8,000 residents, was sued because an individual requesting to inspect and photograph public records was instead charged \$1.20 for copies. Before a lawsuit was filed, City officials contacted the requestor, admitting that he or she should have been permitted to photograph the records instead of paying charges for copies. A lawsuit was filed, which was then dismissed by the trial court. This dismissal was subsequently upheld by the appellate court. The Town won the case without having to pay the requestor's attorney fees and other costs; however, this \$1.20 mistake by a Town employee cost the Town more than \$20,000 in fees for its own attorneys.¹⁸

Private companies doing business with public agencies are also being subjected to lawsuits following public records requests. For example:

- The owner of RoyalAire Mechanical Services in Oldsmar deleted an anonymous e-mail requesting copies of invoices referenced in the company's heating, ventilating and air conditioning contract with the University of South Florida. The owner produced the requested documents when a lawsuit was

13 Mike Brassfield, "Lawsuits From Public Records Group Are a Nuisance, Florida Cities Say," Tampa Bay Times, July 6, 2015.

14 Attiyya Anthony, "Boynton Beach Settles Lawsuits, Defines 'Shall'," South Florida Sun-Sentinel, June 5, 2013.

15 Rick Rousos and John Chambliss, "Public Records Lawsuit Cost Lakeland \$160,000," The Ledger, November 21, 2014.

16 Kevin D. Thompson, "Greenacres Settles Public Records Lawsuit for Nearly \$30,000," The Palm Beach Post, August 5, 2014.

17 Christopher O'Donnell, "Attorney Advises Manatee School Board to Settle Lawsuits," Manatee Herald-Tribune, December 11, 2011.

18 Keith W. Rizzardi, "Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government," Stetson Law Review, Volume 44, Number 2, Winter 2015.

filed; however, the documents and an initial settlement offer by the owner were rejected. The owner was eventually able to pay a cash settlement.¹⁹

- The Bluefield Ranch Mitigation Bank, which allows developers needing wetland mitigation to purchase wetland credits for federal and state permits, received an anonymous request for public records. The request was followed by a lawsuit and a cash settlement demand. Bluefield Ranch continues to contest this lawsuit.²⁰

Nowhere, however, do these predatory practices appear more pervasive than in the Town of Gulf Stream, a coastal community of fewer than 1,000 residents located in Palm Beach County. The Town has a total budget (FY 2015-16) of approximately \$5.8 million and fewer than 20 municipal employees, including police.²¹ The Town lists on its website public records requests for the years 2013 through 2015.²² During this period, more than 2,000 public records requests were made --- more than 1,100 in year 2014 alone. One individual made more than 400 requests in 2013 and 2014, and one company or business made more than 500 requests in 2014.²³

Since October 3, 2013, the Town has received 42 different public records lawsuits.²⁴ Appearing before the House Government Operations Subcommittee, Vice-Mayor Robert Ganger testified that the Town's limited administrative staff had spent more than 4,000 hours processing public records requests. To pay for the costs associated with these public records requests and associated lawsuits, the Town has budgeted \$1 million for legal fees, reduced its hurricane reserve fund, and raised its millage by 40 percent.²⁵

In a recent publication by the Stetson Law Review, St. Thomas University Law Professor Keith W. Rizzardi reviewed public records requests posted on the Town's website and identified the following examples of requests that "have no purpose other than to create mischief or work" for Town officials:²⁶

- Requests for electronic versions of letterhead and official signatures. A request was made for electronic copies of the Town stationary (sic), the police stationary (sic), the Town Manager's electronic signature block, and the police chief's electronic signature block.²⁷

19 Mike Brassfield, "Lawsuits From Public Records Group Are a Nuisance, Florida Cities Say," Tampa Bay Times, July 6, 2015.

20 Tristram Korten and Trevor Aaronson, "In Lawsuits Statewide, Questions of Profits and Public Records," Florida Center for Investigative Reporting, November 9, 2014.

21 Town of Gulf Stream Final Budget 2015-2016. Retrieved December 28, 2015.

22 <http://www2.gulf-stream.org/weblink/Browse.aspx?dbid=0>, retrieved December 28, 2015.

23 Keith W. Rizzardi, "Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government," Stetson Law Review, Volume 44, Number 2, Winter 2015.

24 Florida League of Cities, 2014 Public Records Survey Responses, retrieved January 5, 2016.

25 Testimony on HB 1021, House Government Operations Subcommittee, January 20, 2016.

26 Keith W. Rizzardi, "Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government," Stetson Law Review, Volume 44, Number 2, Winter 2015.

27 Town of Gulf Stream, Public Records Request 14-0931, May 27, 2014, <http://www2.gulf-stream.org/weblink/O/doc/18853/Page1.aspx>, retrieved December 28, 2016.

- Requests for documents obviously known to be exempt. A request was made for “[A]ny and all records containing a social security number.”²⁸ Records containing social security numbers are exempt from disclosure.²⁹
- Requests for the impossible. A request was made for “all Public Records situate (sic) atop the Chief of Police’s desk on 7/15/2014 at 11:12 a.m.”³⁰
- Unfulfilled requests for the tedious. A request was made for “a photographic reproduction of equal size, resolution, optical value and granularity of the aerial photograph of a portion of Gulf Stream on exhibition in Town hall (sic) chambers.”³¹
- Requests for documents previously sent to the requester. Some requests were made for documents already possessed by the person or entity making the request, some of which related to documents made available through previous public records requests.³²

Professor Rizzardi characterized these types of requests as “serving no public interest.” Instead, these requests require a public servant to drop all other responsibilities and to become a “plaything”

28 Town of Gulf Stream, Public Records Request 13-0322, October 29, 2013, <http://www2.gulf-stream.org/weblink/O/doc/18303/Page1.aspx>, retrieved December 28, 2015.

29 Section 119.071(5)(a)5., Florida Statutes.

30 Town of Gulf Stream, Public Records Request 14-1137, July 15, 2014, <http://www2.gulf-stream.org/weblink/O/doc/17652/Page1.aspx>, retrieved December 28, 2015.

31 Ibid.

32 Town of Gulf Stream, Public Records Request 14-0912, May 15, 2014, <http://www2.gulf-stream.org/weblink/O/doc/20213/Page1.aspx>, retrieved December 28, 2015; and Town of Gulf Stream, Public Records Request 14-0936, May 29, 2014, <http://www2.gulf-stream.org/weblink/O/doc/16706/Page1.aspx>, retrieved December 28, 2015.

for one individual public record requester — all to the detriment of the public interest.³³

Not all lawsuits result in a cash settlement. Some agencies, at great expenditure of money and time, are fighting back. A lawsuit was filed against Lutheran Social Services of Northeast Florida, a non-profit organization that provides social services under contract with Duval County, after an individual’s request for public records was not met to the individual’s satisfaction. No settlement was reached and the court eventually ruled that the means utilized by the individual constituted a flagrant abuse of Chapter 119 and were designed to ambush unsuspecting private entities.³⁴

The court further opined that the practices amounted to no more than a scam and denied the individual’s complaint seeking attorney’s fees and costs.³⁵ This ruling was subsequently affirmed by the District Court of Appeal.

The St. Johns County School Board was sued by the same individual after the individual entered the district’s Maintenance Department and was not permitted to inspect and photograph material safety data sheets on location. Despite the Board’s offer to produce the records at the Maintenance Department office, where they are kept, the individual refused. The Board then filed a motion to dismiss, which was denied.

33 Keith W. Rizzardi, “Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government,” *Stetson Law Review*, Volume 44, Number 2, Winter 2015.

34 Legal Report, January 2015, The Palm Beach County League of Cities, Inc., retrieved January 20, 2015.

35 Legal Report, January 2015, The Palm Beach County League of Cities, Inc., retrieved January 20, 2015.

The Board filed a motion for sanctions against the individual and his attorney, on grounds that the claim was frivolous.³⁶

After the individual filed a notice of voluntary dismissal with prejudice, the Board initiated its own lawsuit, claiming the individual baited the Board's employee into refusing to produce the records in order to parlay that refusal into a lawsuit for personal financial gain via a fee-splitting scheme with his attorney.³⁷ The Board cited in its complaint the final order denying the individual relief under the Public Records Act in the unfounded lawsuit the individual had filed against the Lutheran Social Services of Northeast Florida.

The Town of Gulf Stream filed lawsuits under the Racketeer Influenced and Corrupt Organizations (RICO) Act against those who have made more than 1,500 public records requests to the Town.³⁸ The Town claimed that these individuals filed large numbers of frivolous public records requests that were often intentionally inconspicuous, followed by lawsuits when the claims were not addressed. The Town alleged that these public records requests were the first step of a RICO scheme to defraud and extort money from the Town.³⁹ Although the court dismissed the case in June 2015, the court did state that “[T]o the extent Defendants are abusing the rights afforded

them by the Florida public records laws, those abuses must be addressed in the individual lawsuits filed, or through a change in the laws by the Florida Legislature.”⁴⁰

In considering a subsequent motion for summary judgment against the Town, the court stated that “...any real relief is likely going to have to come from the legislature, who will have to decide whether the “sunburn” inflicted upon Gulf Stream and other State agencies warrants placing limits on the State’s public records law and the public’s nearly limitless right to access.”⁴¹

The court added “[P]erhaps the magnitude of the injuries allegedly inflicted on the Town and others throughout the State will prompt the Legislature to action.”⁴²

In its Order on the Town’s motion to amend the counterclaim, the court expressed concern over allegations that those involved in this proceeding have “escalated even further their alleged war on the Town through an ever increasing and unrelenting barrage of public records requests.”⁴³ The court suggested that this is “only further reason why the legislature should intervene if it deems that Chapter 119 is being misused in ways contrary to the public interest.”⁴⁴

36 Jake Martin, “School Board Trades Lawsuits With Local Man Over Public Records Requests,” *The St. Augustine Record*, December 27, 2015.

37 Jake Martin, “School Board Trades Lawsuits With Local Man Over Public Records Requests,” *The St. Augustine Record*, December 27, 2015.

38 Legal Report, January 2015, The Palm Beach County League of Cities, Inc., retrieved January 20, 2015.

39 Legal Report, July 2015, The Palm Beach County League of Cities, Inc., retrieved January 20, 2015.

40 United States District Court, Southern District of Florida, Case Number 15-80182-CIV-MARRA, Opinion and Order, June 30, 2015.

41 Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case Number 502014CA004474AXXXMB, Order on Motion for Summary Judgment on Defendant’s Counterclaim and Affirmative Defenses, November 4, 2015.

42 *Ibid.*

43 Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case Number 502014CA004474AXXXMB, Order on Town of Gulf Stream’s Motion to Amend Counterclaim, November 9, 2015.

44 *Ibid.*

It is clear that, although sympathetic to the problems faced by public agencies and companies doing business with public agencies when unscrupulous citizens play “gotcha” with their government, the courts are looking to the state legislature to remedy this problem.

EXPERIENCES OF OTHER STATES

The misuse of public records for financial gain or malicious intent is not unique to Florida. Like Florida, the State of Washington’s Public Records Act requires most documents maintained by public agencies to be made available to the public, and allows a person to go to court when they feel their request is not being properly handled. In response to exorbitant amounts of time and money spent on requests for public records that seem intended to harass employees rather than uncover wrongdoing, the legislature sought to use the courts to block requestors and to limit the hours spent compiling records.⁴⁵

The Public Records Act was amended to permit a public agency or an employee in the agency to get an injunction against filling a request if it can be shown the purpose of the request was: (1) made to harass or intimidate an agency or its employees; (2) in retaliation for an action by the agency; (3) creates an undue burden on the agency; or (4) assists in criminal activity.⁴⁶

In response to “bad actors on both sides of the issue,” the State of Tennessee proposed legislation that would allow government entities to charge for access based on the time it would take a public records custodian to obtain those records, redact any personal information and make them available for public requests.⁴⁷ The proposed legislation was not enacted.

In New Jersey, the absence of restrictions on public records requests for commercial use forces government agencies to respond to requests that are “data mining” for for-profit companies. Businesses have begun to realize that the public records law gives them access to records that help them expand their customer base and recruit new clients. Courts in a number of cases have ruled that a for-profit company filing a public records request is a fair use of the law.⁴⁸

In response to increasingly large requests, the state of North Carolina put into place a policy establishing a “special service fees” for public records requests requiring more than 30 minutes of staff time to complete. The policy drew the ire of journalists and other open-government advocates across the state, who argued that the rule would result in hundreds of dollars of charges for routine requests and effectively double-bill for records already funded by taxpayers.⁴⁹ The state subsequently revised the policy to increase that time limit and lower the hourly rate for labor.

45 Jerry Cornfield, “Officials Seek Relief From Abuse of Public Record Access Law,” *The Herald of Everett, Washington*, January 26, 2013.

46 Section 42.56.565, Revised Code of Washington.

47 Sam Stockard, “Public Outcry Kills Tennessee Bill to Charge for Public Records,” *Memphis Daily News*, September 24, 2015.

48 GovPilot, “Could Open Data Stop Abuse Of New Jersey’s OPRA Law?,” July 14, 2015.

49 Tyler Dukes, “McCrary to Revise Contentious Public Records Policy,” retrieved from www.wral.com/mccrary-to-revise-contentious-public-records-policy/13493508/, January 25, 2016.

In Arizona, an individual requesting public records must state the intended use (including a commercial use) of the records. If the individual misrepresents the intended use, the individual is liable for damages and attorney fees incurred by the public agency.⁵⁰ If the If the custodian of records believes the proposed purpose represents a misuse of records, the custodian may request the governor issue an executive order to prevent disclosure. If the governor does not respond within 30 days, the custodian must issue copies of the requested records.⁵¹

Both California⁵² and Texas⁵³ include provisions in their public records laws that permit public agencies to recover their costs of litigation (court costs and reasonable attorney fees) if a public records lawsuit brought against them is unsuccessful.

EFFORTS TO STEM THE PREDATORY PRACTICES

Proponents of open records argue that predatory practices will open the door for opponents to weaken Florida's public records laws, which are among the strongest in the country. The Florida Legislature has initiated efforts to protect public agencies and contractors doing business with public agencies from the misuse of public records.

Legislation filed during the 2014 and 2015 legislative sessions would have afforded greater

protection to contractors doing business with public agencies by clarifying that, unless specifically required by law, public records requests would not be required to be made in writing. Businesses acting on behalf of an agency would be required to notify the agency before denying a public records request, and would be required to inform the agency of a public records enforcement lawsuit. Other proposals would have required all public records requests relating to a contract for services to be made directly to the public agency rather than to the contractor. The agency would then be required to notify the contractor if the agency does not have the records. The contractor, in turn, would then provide the records to the agency or allow inspection and copying within a reasonable time.

Legislative proposals would have required public agency contracts for services to make clear the contractor's obligation to either provide the public agency a copy of the requested public records in the possession of the contractor, or allow records to be inspected or copied within a reasonable time. Contact information for the agency's public records custodian (should the contractor have questions regarding the applicability of the public records law) would also be included in the contract. Other proposals addressed the contractor's obligation to retain records after the contract has ended. None of these proposed legislative proposals have been passed.

Legislation filed during the 2014 and 2015 legislative sessions would have afforded greater protection to public agencies by requiring

50 Subsection 39-121.03(C), Arizona Revised Statutes.

51 Subsection 39-121.03(B), Arizona Revised Statutes.

52 Subsection 6259(d), California Government Code.

53 Subsection 552.323(b), Texas Government Code Annotated.

agencies to provide public records training to each of their employees, commensurate with his or her duties. The provisions that permit an agency to recover their cost of duplication or inspection of public records would have been revised to be based on the actual cost incurred or attributable to the agency, not to exceed the rate of the lowest paid personnel who would be capable of providing these services.

One proposal designed to reduce the number of financially-motivated lawsuits would have required the person requesting the public records to first send a notice of intent by certified mail, at least five business days before filing a civil action, to the public agency's custodian of public records and to the contractor if the contractor is a defendant.⁵⁴ None of these proposals was passed.

The most contentious proposals to address the misuse of the Public Records Act involve the assessment and award of attorney fees. Legislation has been filed in 2016 that would make the assessment and awarding of attorney fees discretionary, even if the court determined that the agency unlawfully refused to permit a public record to be inspected or copied. Under current law,⁵⁵ the court must assess and award attorney fees if the court determined that the agency unlawfully refused to permit a public record to be inspected or copied.

Critics argue that the proposed legislation to address the assessment and award of attorney fees goes too far. The First Amendment Foundation has expressed concerns that attorneys will not take on public records lawsuits unless there is a guarantee of payment, and that citizens may be reluctant to file public records lawsuits if they may be responsible for paying their attorney's legal fees even if they win. Under current law, the public agency or contractor is responsible for paying attorney fees if it loses.

CONCLUSIONS AND RECOMMENDATIONS

Despite being recognized as a model of government transparency, Florida's public records laws offer significant potential for misuse. There are individuals who are filing numerous and vague public records requests and then suing for non-compliance, their intent not to become informed taxpayers but to obtain cash settlements. Other individuals file hundreds if not thousands of public records requests to overburden local governments like the Town of Gulf Stream in an attempt to prevent government from functioning effectively.

Left unchecked, government will likely become less efficient, as the misuse of the public records laws will continue to overburden public officials, both in terms of staff time spent processing these malicious requests and budget dedicated to defending the public agency against these malicious public records lawsuits. Left unchecked, government will likely become less transparent and accountable, as public officials

54 "CS/CS/SB224, Public Records/Public Agency Contracts: Bill Analysis and Fiscal Impact Statement," Prepared by the Professional Staff of the Committee on Fiscal Policy, The Florida Senate, March 25, 2015.

55 Reference section 119.12, Florida Statutes.

are more likely to conduct fewer meetings and more likely to create less documentation. This will make it more difficult for taxpayers to become informed, and more difficult for informed taxpayers to monitor the activities of their government.

It is clear that in finding a solution a balance must be struck. Measures must be put into place that deter financially-motivated and malicious requests for public records without infringing on the rights of taxpayers making legitimate requests for information to better educate themselves on the activities of their government. It is appropriate then to focus on remedies that can be exhausted before a lawsuit is filed. This solution will help weed out those who are “gaming the system” by filing lawsuits with the intent of obtaining a cash settlement instead of public records.

Public agencies and companies doing business with public agencies can better educate and train their employees on the Public Records Act requirements and their obligations regarding the inspection and disclosure of public records. Distributing copies of the Government in the Sunshine Manual to employees and posting public records policies and procedures on the agency or company website will help employees better understand the requirements of the Public Records Act and their obligations under the Act.

Since a large number of the financially motivated public records related lawsuits involve technical violations committed by front-line staff, something as simple as educating these staff on who to contact when someone requests access to or copies of public records may be helpful in

reducing the number and frequency of technical violations and the number of subsequent lawsuits.

Public agencies and companies doing business with public agencies can make their public records available for inspection without being asked to do so. A good example of this is the State’s “Transparency Florida” website,⁵⁶ through which the Chief Financial Officer provides public access to state government spending information by posting the operating budget and associated expenditure records of state agencies online, and public access to the state contract management system. The 2015 FCCMA Public Records Survey⁵⁷ found that 77 percent of the responding cities and counties are proactively making public records available online, with 73 percent reporting that the most common form of public record made available online is budget information. This suggests that there are opportunities to post additional types of commonly requested information on city and county websites.

In addition to demonstrating a commitment to transparency and open access and relieving some of the administrative burden associated with responding to public records requests, posting public records online may preempt a number of legitimate public records requests, but it is not likely to have a significant impact on the number of financially-motivated and malicious public records requests filed.

56 Transparency Florida. <http://www.transparencyflorida.gov/>.

57 University of South Florida, School of Public Affairs, “Managing Public Records Compliance: A 2015 Survey of FCCMA Member Agencies,” November 11, 2015.

The Legislature could amend the Public Records Act to reinforce the intent of current statutory language regarding the assessment and awarding of attorney fees. Under current law,⁵⁸ the standard to be used by the court to award attorney fees is whether the public agency “unlawfully refused” to permit a public record to be inspected or copied. This suggests that, in the absence of an affirmative indication that a governmental entity will not comply with a public records request, the government has not “unlawfully refused.”⁵⁹ Florida’s courts have historically awarded attorney fees for any error by a public agency, whether it is willful or due to mistake, omission, or ignorance.

This type of reinforcement is more likely, however, to deter legitimate public records requests than requests that are either malicious or financially motivated. If taxpayers have questions about whether they will be awarded attorney fees and other reasonable costs, even if they win, then they may be less likely to file a civil action if their request is not timely and accurately processed. Those who file a civil action with the intent of securing a cash settlement or to overburden a public agency are not likely to be dissuaded by this reinforcement, since their intention is not to go to trial in the first place.

Some have suggested the establishment of a “public advocate” or ombudsman-like office within state government, where taxpayers and public agencies can go for assistance in the review and mediation of public records related disputes

before they go to court. There is currently within the Office of the Attorney General a formal, non-adversarial mediation program⁶⁰ intended to provide a method for resolving disputes involving public records. A mediator works with the parties to identify issues, explore settlement alternatives, and facilitate resolution of the dispute.⁶¹

Reestablished by executive order,⁶² the current duties of the Office of Open Government within the Executive Office of the Governor include: (1) facilitating Floridians’ right to know and access to information with which they can hold government accountable; (2) establishing and maintaining a website providing ready access to accountability information; (3) continuing to assure full and expeditious compliance with Florida’s open government and public records laws; and (4) providing training to all executive agencies under the Governor’s purview on transparency and accountability.

The Office of Open Government is also responsible for ensuring that the Office of the Governor complies with public records requests in an expeditious manner. Other states have taken a more aggressive approach in providing taxpayers with a public advocate.

Perhaps the best known is the Connecticut Freedom of Information Commission. The Commission hears complaints from persons who have been denied access to public records. Any person denied the right to inspect, or to get a copy of a public record, or denied access to a meeting of a public agency, may file a complaint

58 Reference Section 119.12, Florida Statutes.

59 Keith W. Rizzardi, “Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government,” *Stetson Law Review*, Volume 44, Number 2, Winter 2015.

60 Reference section 16.60, Florida Statutes.

61 Reference section 16.60(1), Florida Statutes.

62 Reference Executive Order 11-03, January 4, 2011.

against the public agency within 30 days of the denial. The Commission conducts hearings on complaints, and then renders a decision either finding the public agency either in violation or dismissing the complaint.

The Commission can order the disclosure of public records, null and void a decision reached during a public meeting, or impose other appropriate relief. There are currently eight appointed Commissioners and 15 staff.⁶³ The Commission disposes of approximately 600-700 complaints each year in a state with a population of 3.5 million.⁶⁴

Expanding the duties and responsibilities of either the Attorney General's mediation program or the Governor's Office of Open Government along the lines of those of the Connecticut Freedom of Information Commission would provide taxpayers making legitimate requests with both a public advocate and an additional resource to exhaust before having to go to court if an agency denies or unreasonable delays a request for public records. For those filing malicious or financially-motivated public records requests, the possibility of having to go through mediation or dispute resolution before going to court may discourage misuse of the Public Records Act.

A greater sharing of the risks of attorney fees and related costs may discourage the filing of financially-motivated and malicious lawsuits.

Subjecting citizens who misuse the Public Records Act for financial gain or malicious intent

⁶³ <http://www.ct.gov/foi/cwp/view.asp?a=3171&q=488272>, retrieved January 20, 2015.

⁶⁴ Harry Hammitt, "Mediation Without Litigation, The FOI Reports: Volume 2, Number 3," published by the National Freedom of Information Coalition, 2007.

to the possibility of having to pay the agency's costs and attorney fees will likely discourage some requestors from pursuing lawsuits after they receive the records they requested. Consider the example of the Town of Southwest Ranches (see page 4), which successfully defended itself against a lawsuit over a \$1.20 mistake by a Town employee. Even though the Town won the suit and did not have to pay the requestor's attorney fees, the Town incurred more than \$20,000 in fees for its own attorney. If there was a possibility that the requestor may have to pay the Town's costs, it is unlikely this lawsuit would have ever been filed.

Florida TaxWatch offers the following recommendations for consideration by the Florida Legislature:

1. Amend the Public Records Act to require public agencies to provide an appropriate level of public records training for employees who might receive or process requests for public records. It would be left up to each agency to determine the appropriate amount of information or training needed for each agency employee. Employees who work in areas where public records are maintained or requested would receive more detailed training.
2. Amend the Public Records Act to permit extensions of time to respond in the event of unusual circumstances or requests that are extremely burdensome. Agencies and contractors would have a reasonable amount of additional time, if needed, to respond to voluminous requests for records, requests

that require extensive review and redaction, and requests that are extremely burdensome or involve other unusual circumstances. The agency or contractor would be required to provide written notice to the requestor of the delay, the unusual circumstances justifying the need for additional time, and an estimated timeframe for compliance with the request.

- 3.a. Amend the Public Records Act to include a provision that a notice of intent to sue must be sent to the agency or contractor within a specified period of time before any civil action related to a public records request may be initiated. The notice of intent will make the agency or contractor aware that a problem exists and provide the agency or contractor and potential litigant an opportunity to resolve issues in dispute without going to court.
- 3.b. Amend the Public Records Act to permit an agency or contractor, upon receipt of the notice of intent to sue, to have a specified period of time in which to respond before a civil action can be filed. This would give the agency or contractor time to make the requested records available, to properly respond to a voluminous or other unusual request and provide a reasonable timeframe to comply, or to begin preparing for an anticipated civil action.
- 4.a. Amend the Public Records Act to require all public records requests relating to a contract with a public agency to be made directly to the public agency rather than to the

contractor. This will reduce the number of lawsuits resulting from technical violations made by staff that is not as familiar with the Public Records Act requirements as the designated public records custodian.

- 4.b. Amend the Public Records Act to then require the agency to notify the contractor if the agency does not have the records. The contractor, in turn, would then provide the records to the agency or allow inspection and copying within a reasonable amount of time.
5. Amend the Public Records Act to tie the assessment and award of attorney fees to a notice of intent to sue that must be sent to the agency or contractor before any civil action related to a public records request may be initiated. A person who alleges a violation of the Public Records Act would be required to send a notice of intent to sue to the agency's designated public records custodian within a specified period of time in order to be eligible to be awarded attorney fees. If the person fails to send the notice of intent to sue within the specified period of time, he or she would still be able to be awarded access to the requested records, but would not be able to recover any attorney fees.
6. Amend the Public Records Act to require contracts between public agencies and contractors to make clear the contractor's obligation to either provide the public agency a copy of the requested public records in the possession of the contractor, or allow records to be inspected or copied within a reasonable amount of time. Additionally,

establish the custodian of records at a public agency as the point of contact for both the requestor of public records and a contractor that has questions about its duties under the public record laws.

7. Amend the Public Records Act to require a public agency, if it has a website, to display the name and contact information for the records custodian on the website.
8. Expand the duties and responsibilities of the Attorney General's mitigation program or the Governor's Office of Open Government to include conducting hearings on complaints, rendering decisions either finding the public agency either in violation or dismissing the complaint, ordering the disclosure of public records, or imposing other appropriate relief. This will provide taxpayers making legitimate requests with an additional resource to exhaust before having to go to court if an agency denies or unreasonable delays a request for public records, and will discourage misuse of the Public Records Act by those who would make malicious or financially motivated public records requests.
9. Amend the Public Records Act to limit the number of public records requests an individual or company can file within a given timeframe. Exceptions for the media and concessions for small, fiscally constrained local governments should also be considered. There is little that can be done to stop individuals who have time, money, and an axe to grind with a public agency from filing

hundreds and thousands of malicious requests for public records. Establishing a reasonable cap on the number of public records requests that can be filed will help to curtail the number of malicious public records requests without infringing on the rights of informed taxpayers to monitor the activities of their government.

10. Amend the Public Records Act to more equitably share the risks of attorney fees and related court costs. If the court determines that the agency or contractor unlawfully refused to permit a public record to be inspected or copied, then reasonable costs of enforcement, including reasonable attorney fees and court costs, should be assessed and awarded against the responsible agency or contractor. This is only fair, since filing a civil action is the only remedy currently available to the taxpayers to enforce the provisions of the Public Records Act.

If, however, the court determines that the public records request is frivolous or serves no legitimate public purpose or interest, then reasonable attorney fees and court costs incurred by the agency or contractor should be assessed and awarded against the person filing the civil action. This too is fair, since public agencies and contractors doing business with public agencies should not be expected to assume the costs incurred while defending themselves against lawsuits related to malicious or financially motivated public records requests.

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As an independent, nonpartisan, nonprofit taxpayer research institute and government watchdog, it is the mission of Florida TaxWatch to provide the citizens of Florida and public officials with high quality, independent research and analysis of issues related to state and local government taxation, expenditures, policies, and programs. Florida TaxWatch works to improve the productivity and accountability of Florida government. Its research recommends productivity enhancements and explains the state-wide impact of fiscal and economic policies and practices on citizens and businesses.

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