# SUNBURNED: HOW MISUSE OF THE PUBLIC RECORDS LAWS CREATES AN OVERBURDENED, MORE EXPENSIVE, AND LESS TRANSPARENT GOVERNMENT

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## *I. INTRODUCTION: THE ENLIGHTENED PUBLIC*

"Every Government degenerates when trusted to the rulers of the people alone," Thomas Jefferson wrote, emphasizing the importance of an informed citizenry and its role in monitoring the workings of its government.[1] Similarly, Louis Brandeis noted that "[s]unlight is said to be the best of disinfectants," when he urged for greater disclosure in the regulation of the financial industry.[2] In the era of the administrative state, powerful public records laws have codified and protected these historic sentiments. The federal government has the Freedom of Information Act,[3] and many states have similar laws, including Florida,[4] where the public records law has been praised as a model of open government. But a more careful review of the facts shows that state "government in the sunshine" laws can cause sunburn. A select few people can cause the government to degenerate.

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1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 160 (J.W. Randolph 1853) ("Every Government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree.").

2. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92, 103–05 (Frederick A. Stokes Co. 1914).

3. 5 U.S.C. § 552 (2012).

4. FLA. STAT. ch. 119 (2014).

In theory, the federal Freedom of Information Act and other state public records laws all bestow upon the citizens a right of access to government information. These laws define the process by which people can make and enforce their public record requests. Some documents must be provided immediately; other documents may be exempt from disclosure. A requester might be required to pay for the costs associated with access to those records. Significantly, a person seeking public records has the right to seek judicial relief for government delays and wrongdoing in processing his or her public records request.

The principles of these public records laws protect the people, ensuring that they can monitor their government. Still, these noble laws can be misused. As Oliver Wendell Holmes once warned: "If you want to know the law and nothing else, you must look at it as a bad man . . . ."[5] Sharing the wisdom he earned through years as a law professor and jurist, Holmes recognized that some people would not care about ethics or morality or the "vaguer sanctions of conscience."[6] Rather, the "bad man" would make decisions solely based upon the legal consequences that follow.[7] That predictive analysis readily applies in the states of Florida and Washington, where citizens can manipulate the government and harass the public servants by creating countless public records requests. If the government takes too long to respond, or makes any error at all—even in a good faith response—citizens can file the most trivial of lawsuits, knowing that they will be paid fees and costs. The public records laws have granted the people rights without responsibility. People can, and do, misuse these laws, seemingly immune from consequences.

The problems with the public records laws are acute in Florida where a typical email from a government employee includes a warning at the bottom, such as the following: "Florida enjoys a broad public records law—any emails sent to or from this address

5. Oliver Wendell Holmes, Jr., *The Path of the Law* (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

6. *Id.*

7. *Id.* ("A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.").

are subject to review by the public at any time."[8] That type of openness comes at a price. One town spent $20,000 on legal fees because it gave a citizen a bill for $1.25 in photocopies.[9] Another town continues to litigate over a public records request that it fulfilled because the requester complained that a two-day response was not fast enough.[10] These cases of sunburn are not unique to the Sunshine State. Various academic studies have warned of the unintended consequences of government in the sunshine,[11] and many states struggle with citizens who are pushing the public records laws to the point of logical absurdity.

This Article also shows that some of the problems associated with public records laws can be solved using traditional tools of ethics, compliance, policing, judicial interpretation, and statutory reform. The entire government, and even the legal profession as a whole, must engage in repairs, while keeping intact the fundamental goal of public access to government information. Part II provides a brief nationwide perspective on the problem, consider-

8. *E.g.*, Email from Mary Anne Hodel, Treasurer, Fla. Library, to Fla. Pub. Library Dir. Mailing List, *Support FLA and You Can Also Save Money on Your Conference Registration!* (Dec. 3, 2013, 4:07 PM EST) (copy available at https://lists.fsu.edu/pipermail/fla-pld/2013-December.txt); *see also* FLA. STAT. § 668.6076 (2014) (requiring certain government agencies to post a notice on their website stating that if a person does not want his or her "[email] address released in response to a public records request, do not send electronic mail to [the] entity"); City of Cape Canaveral, *Welcome to the City of Cape Canaveral*, CITYOFCAPECANAVERAL.ORG, http://www.cityofcapecanaveral.org (last visited Apr. 14, 2015) (placing the public on notice that anything sent to the city is subject to public disclosure).

9. Michael Mayo, *Southwest Ranches Shouldn't Be Rewarded for Thwarting Sunshine Law*, SUN SENTINEL (Mar. 28, 2012), http://articles.sun-sentinel.com/2012-03-28/news/fl-ranches-lawsuit-mayocol-b032912-20120328_1_town-attorney-town-clerk-bill-di-scipio.

10. Verified Complaint to Enforce Florida's Public Records Act and for Declaratory, Injunctive and Monetary Relief ¶¶ 31–32, *O'Boyle v. Town of Gulf Stream*, (Fla. 15th Cir. Ct. Jan. 22, 2014) (No. 502014CA000834).

11. *E.g.*, Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 622–23 (2010); Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 314 (2010). At times, the phrase "government in the sunshine" can be used loosely; public records laws can best be viewed as a subset of the overall notion of open governance. In addition to laws requiring the disclosure of public records, the concept of government in the sunshine also includes open meetings laws designed to ensure that government decision-making takes place in the public and not behind closed doors. *See, e.g.*, Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1241 (1976) (codified at 5 U.S.C. § 552) (Federal "Government in the Sunshine Act" intended "[t]o provide that meetings of Government agencies shall be open to the public"); Federal Advisory Committee Act, Pub. L. No. 92-463, § 10, 86 Stat. 770, 774 (1972) (codified at 5 U.S.C. App. §§ 1-16) (requiring notice, public access, and recordkeeping for federal advisory committee meetings); FLA. STAT. § 286.011 (2014) (requiring public meetings to be open to the public at all times and to be recorded).

ing both media and public servant perspectives. After providing examples of how state and federal public records laws have been pushed to their limits, Part II turns to Florida, discussing the provisions of state law and their potential for misuse.

Part III, further analyzing the nuances of Florida statutes and cases, proposes solutions that can be readily implemented. First, in the executive branch, greater compliance with the public records laws is needed, including a commitment to transparency and online publication. That approach, in turn, gives the government the moral and equitable authority to justify change. More robust use of existing cost recovery mechanisms is needed too. And rather than solely relying upon citizens to declare themselves the public records police, government should increase its traditional role of enforcement in the context of the public records laws. Second, the judicial branch should avoid instinctive declarations that the public records law provides "virtually unfettered" rights. Instead, the courts should carefully assess the facts and the letter of the law. Courts must recognize that clever citizens will apply precedent to play "gotcha" with the government, overwhelming governmental entities with burdensome requests and evading any duty to pay for the costs of asking for public records. Citizens can sue for every type of error—no matter how petty—ultimately demanding attorney's fees as a reward for manufacturing the problem in the first place. Third, the legislature should make statutory changes. Citizens should be required to give the government notice of intent to sue and an opportunity to fix the problem before they rush to court. In addition, the incentive to rush to court should be decreased by exposing abusive lawsuits and practices to the possibility of paying the government's attorney's fees. And lastly, the legal profession should adhere to the applicable standards of legal ethics and professionalism and also hold *pro se* plaintiffs accountable.

Part IV concludes that the matter is not just one of morality, governance, or fairness: it is about economics and efficiency too. State public records laws should maintain a meaningful public right of access while reducing the potential for mischief and misuse. Otherwise, the public servants, acting rationally in an effort to reduce the burdens and economic risks of the public records law, are incentivized not to document their decisions. If the burdens and abuses of the public records laws remain as they are,

the public receives a less transparent government that costs more.

## *II. ADMITTING THE PROBLEM: BLACK AND WHITE AND READ ALL OVER*

In general, the public records laws follow a standard pattern. Public records statutes provide rights to citizens and groups that can request records, define the records that are subject to and exempt from disclosure, provide guidance on allowable fees that can be charged to the person requesting the records, identify procedures for enforcement of the law, and establish sanctions for noncompliance.[12] Yet many citizens do not even understand their own state's public records law,[13] and at times, some government agencies have even resisted their public records obligations.[14] Ignorance is unacceptable, especially for the public servants.

Still, there is more than one informed perspective on the public records laws. While the media's emphasis on open government has unquestionable merit, the public servant's perspective lends nuance to the matter. Society should be wary of a black and white belief in open government and access to public records. Careful scrutiny of the law exposes the potential for calculated misuse of the public records laws.

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12. On the Reporters Committee for Freedom of the Press webpage, the public records laws of all fifty states are summarized. The webpage organizes the information using a standard outline, applied to each state. *See generally* Reporter Comm. for Freedom of the Press, *Open Government Guide*, RCFP.ORG, http://www.rcfp.org/open-government-guide, (last visited Apr. 14, 2015).

13. *See, e.g.*, Halifax Media Servs., *Poll: Few North Carolinians Understand Public Record Laws*, SUN J. (Dec. 28, 2013, 2:10 PM), http://www.newbernsj.com/news/local/poll-few-north-carolinians-understand-public-record-laws-1.255031 ("A majority of North Carolina residents are unaware that state laws exist to make public records and government meetings accessible, according to the findings of an Elon University poll released early December.").

14. Mike Wynn, *Kentucky Cabinet Penalized $756,000 for 'Willfully Circumventing' Child-Abuse Open Records Ruling, Judge Says*, THE COURIER-J. (Dec. 23, 2013, 7:15 PM EST), http://www.courier-journal.com/story/news/crime/2013/12/23/kentucky-cabinet-penalized-756000-for-willfully-circumventing-child-abuse-open-records-ruling-judge-says/4180437/ ("The Kentucky Cabinet for Health and Family Services must pay a $756,000 penalty after it 'willfully circumvented' open-records laws by failing to fully release records on child abuse fatalities and near deaths, according to a scathing court order issued Monday.").

### A. Idealism: The Demand for Access to Public Records

As one Florida court succinctly stated, "[a]n open government is crucial to the citizens' ability to adequately evaluate the decisions of elected and appointed officials."[15] Florida is certainly not alone in that view. All fifty states have public records laws allowing public access to the records of state and local government.[16]

In American jurisprudence, the public's right to know is well-established, especially for purposes of protecting the news media, which can expose governmental wrongdoing through careful review.[17] As the United States Supreme Court acknowledged more than fifty years ago in *New York Times Co. v. Sullivan*,[18] the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, ro-

15. Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 492 (Fla. 2d Dist. Ct. App. 1990).

16. ALA. CODE § 36-12-40 (2014); ALASKA STAT. § 40.25.110 (2013); ARIZ. REV. STAT. ANN. § 39-121.01 (2014); ARK. CODE ANN. §§ 25-19-101 to 25-19-110 (2014); CAL. GOV'T CODE §§ 6250–6270 (West 2014); COLO. REV. STAT. §§ 24-72-200.1 to 24-72-206 (2014); CONN. GEN. STAT. § 1-200–242 (2013); DEL. CODE. ANN. tit. 29, §§ 10001–10005 (2014); D.C. CODE §§ 2-531 to 2-540 (2012); FLA. STAT. §§ 119.07–119.15 (2014); GA. CODE ANN. §§ 50-18-70 to 50-18-76 (2014); HAW. REV. STAT. §§ 92F-1 to 92F-19 (West 2014); IDAHO CODE ANN. §§ 9-338 to 9-350 (2014); 5 ILL. COMP. STAT. 140/1–140/11.5 (2014); IND. CODE §§ 5-14-3-1 to 5-14-3-10 (2014); IOWA CODE §§ 22.1–22.14 (2014); KAN. STAT. ANN. §§ 45-215 to 45-229 (2013); KY. REV. STAT. ANN. §§ 61.870–61.884 (West 2014); LA. REV. STAT. ANN. §§ 44:31–44:35 (2014); ME. REV. STAT. ANN. tit. 1, § 408-A (2014); MD. CODE ANN., GEN. PROVIS. §§ 4-101 to 4-601 (West 2014); MASS. GEN. LAWS ch. 66, § 10 (2014); MICH. COMP. LAWS §§ 15.231–15.246 (2014); MINN. STAT. § 13.03 (2014); MISS. CODE ANN. § 25-61-1 to 25-61-17 (2014); MO. REV. STAT. §§ 610.010–610.035 (2013); MONT. CODE ANN. §§ 2-6-101 to 2-6-111 (2014); NEB. REV. STAT. § 84-712 (2014); NEV. REV. STAT. §§ 239.005–239.030 (2013); N.H. REV. STAT. §§ 91-A:1 to 91-A:10 (2014); N.J. STAT. ANN. §§ 47:1A-1 to 47:1A-1.3 (2014); N.M. STAT. ANN. §§ 14-2-1 to 14-2-12 (West 2014); N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2014); N.C. GEN. STAT. §§ 132-1 to 132-10 (2013); N.D. CENT. CODE §§ 44-04-18 to 44-04-18.8 (2013); OHIO REV. CODE ANN. § 149.43 (West 2014); OKLA. STAT. tit. 51, §§ 24A.1–24A.18 (2014); OR. REV. STAT. §§ 192.410–192.505 (2013); 65 PA. CONS. STAT. ANN §§ 67.101–67.3104 (West 2014); R.I. GEN. LAWS §§ 38-2-1 to 38-2-14 (2014); S.C. CODE ANN. §§ 30-4-10 to 30-4-165 (2013); S.D. CODIFIED LAWS §§ 1-27-1 to 1-27-1.19 (2014); TENN. CODE ANN. §§ 10-7-503 to 10-7-508 (2014); TEX. GOV'T CODE §§ 552.001–552.353 (West 2013); UTAH CODE. §§ 63G-2-101 to 63G-2-804 (2014); VT. STAT. ANN. tit. 1, §§ 315–320 (2014); VA. CODE ANN. §§ 2.2-3700 to 2.2-3714 (2014); WASH. REV. CODE §§ 42.56.001–42.56.904 (2014); W. VA. CODE §§ 29B-1-1 to 29B-1-7 (2014); WIS. STAT. ANN. §§ 19.31–19.39 (2013); WYO. STAT. ANN. §§ 16-4-201 to 16-4-205 (2014); *see* FOIA Advocates, *State Public Record Laws*, FIOADVOCATES.COM, http://www.foiadvocates.com/records.html (last visited Apr. 14, 2015) (providing a hyperlinked directory of many of the states' public record laws).

17. *See, e.g.*, Wynn, *supra* note 14 (providing an example of when a news outlet filed suit against a state agency for insufficiently responding to its public records request and the court ruled in the news outlet's favor).

18. 376 U.S. 254 (1964).

bust, and wide-open," and its ruling to limit defamation actions against the press accepted the possibility of "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[19] Leaks to the media are an essential part of American history.[20] The whistleblower serves an accepted role in society[21]—one can even purchase books on how to do it.[22] National security confidentiality is routinely questioned too.[23]

When a government entity does decide to assert a non-disclosure position, news media outlets can be highly critical. For example, even after acknowledging that a series of proposed exemptions being considered by the Florida legislature in 2014 "would not have a major impact," a Tallahassee newspaper headlined that "[o]pen government takes a beating" and equated the lawmakers with mice in your walls, "slowly gnawing away at the idea of open government."[24] Not even the risk of violence is enough to stem the open government idealist. In a Wisconsin case, an appellate court upheld an agency's refusal to provide public records to a person with a history of violence against a state employee, finding that the agency's reasonable concern for the safety and welfare of its employee outweighed the public policy interest in disclosure.[25] Despite these extraordinary facts, the local newspaper editorial board disagreed with the notion that a right of public access should have limits because intent was irrelevant to the right of public access.[26] Similarly, when a respected

19. *Id.* at 270.

20. Matthew Green, *10 of the Biggest Government Leaks in U.S. History*, KQED (June 18, 2013, 6:30 AM), http://blogs.kqed.org/lowdown/2013/06/18/10-big-leaks/.

21. *See* FLA. STAT. § 112.3187 (Florida's whistleblower protection act).

22. *E.g.*, Government Accountability Project, *The Corporate Whistleblower's Survival Guide*, WHISTLEBLOWER.ORG, http://www.whistleblower.org/node/208 (last visited Apr. 14, 2015) (advertising a book that advises people who anticipate blowing the whistle on their company).

23. *See, e.g.*, Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/ (discussing the expansion of secret government agencies in the United States after the terrorist attacks on September 11, 2001).

24. Op-Ed., *Our Opinion: Open Government Takes a Beating*, TALLAHASSEE DEMOCRAT (May 8, 2014), http://www.tallahassee.com/story/opinion/editorials/2014/05/08/opinion-open-government-takes-beating/8867859/.

25. State *ex rel.* Ardell v. Milwaukee Bd. of Sch. Dirs., 849 N.W.2d 894, 894–98 (Wis. Ct. App. 2014).

26. Editorial, *Journal Times Editorial: There Should Be No Judging Intent in Open-Records Requests*, J. TIMES (May 14, 2014, 6:00 AM), http://journaltimes.com/news/opinion/editorial/journal-times-editorial-there-should-be-no-judging-intent-in/article

journalist recently opined that news organizations should sometimes defer to the government and accept limitations upon what the public has a right to know about the secret activities of government, the journalist was attacked by his peers.[27] Simply put, any supporter of government confidentiality becomes a potential target of media criticisms.[28]

To read the publications of the watchdogs, one might think open government to be a hopeless cause. The critique of government is sharp. Evaluating the responsiveness of state governments to freedom of information requests, the Better Government Association and National Freedom of Information Coalition gave thirty-eight out of fifty states an "F" grade, and not a single state earned an "A."[29] Similarly, the Center for Effective Government's evaluation of the United States government concluded that not one of the fifteen federal agencies studied earned an exemplary "A" grade overall; instead, four earned a "B" or "C," four more earned a "D," and the remaining seven all failed.[30] Undoubtedly, the government can and must do better in responding to public records requests. But scorecards generated by media-oriented organizations do not tell the whole story.

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_aae082c2-db5f-11e3-b59b-001a4bcf887a.html; *see also* Editorial, *Public Records Law Must Be Managed Carefully*, LEADER-TELEGRAM (May 15, 2014, 12:00 AM), http://www.leadertelegram.com/opinions/editorials/article_4d89589a-62e7-526a-9c44-145a97e470e8.html (questioning an appellate court's opinion regarding Wisconsin's public records laws).

27. Margaret Sullivan, Op-Ed., *Kinsley, Greenwald and Government Secrets*, N.Y. TIMES (May 27, 2014, 9:22 PM), http://publiceditor.blogs.nytimes.com/2014/05/27/kinsley-greenwald-and-government-secrets/?_php=true&_type=blogs&_r=0.

28. Despite government and agency policies to be open and forthright with public critiques of government confidentiality and government restrictions, leaks are expounded on by various media outlets. *See, e.g.*, Leonard Downie, Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, CPJ.ORG (Oct. 10, 2013), http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php (criticizing President Barack Obama for "pledging open government, but . . . [falling] short of his promise"); *see also* Scott Higham, *Intelligence Security Initiatives Have Chilling Effect on Federal Whistleblowers, Critics Say*, WASH. POST (July 23, 2014), http://www.washingtonpost.com/world/national-security/intelligence-security-initiatives-have-chilling-effect-on-federal-whistleblowers-critics-say/2014/07/23/c9dfd794-0ea0-11e4-8341-b8072b1e7348_story.html (discussing government action in response to leaked classified information).

29. Nat'l Freedom of Info. Coal., *States Failing FOI Responsiveness*, NFOIC.ORG, http://www.nfoic.org/states-failing-foi-responsiveness (last visited Apr. 14, 2015).

30. Ctr. for Effective Gov't, *Making the Grade: Access to Information Scorecard 2014*, FOREFFECTIVEGOV.ORG (Mar. 10, 2014), http://www.foreffectivegov.org/access-to-information-scorecard-2014.

### B. Extremism: Unintended Consequences and the Potential for Misuse

Due to the powerful idealism fueling the demands for open governance, coupled with the frequent suggestion that governmental transparency remains inadequate, bureaucrats and lawmakers find themselves in an uncomfortable position when discussing public records laws. To begin with, the burden of compliance with the procedural and production requirements of public records laws necessitates a commitment of time, money, and staffing that detracts from any effort to comply with or fulfill an agency's other substantive responsibilities. A regulatory agency is unlikely to try to earn an "A" grade in public records compliance if it means earning a "D" on its substantive outcomes.

The realities of limited funding and resources can be ignored by the courts. Routine backlogs, for example, do not give agencies an excuse for a delayed response to a federal public records request pursuant to the Freedom of Information Act.[31] Instead, agencies are expected simply to obtain sufficient congressional funding to address their routine needs.[32] But the realities of public records compliance are not limited to budgetary politics. Rather, any discussion of reforming the public records law quickly transforms into a debate over the First Amendment.

Any admission by public officials that they have not dedicated adequate resources to public records compliance can expose them to criticisms and allegations that they are undermining the journalists working for the fourth estate and the public's right to know. Fearing the power of the press and the adverse publicity it can bring, agencies, towns, and other governmental entities and political leaders all avoid exposing themselves to criticisms that they are evading a state's laws or otherwise preventing public access. To do so is to oppose the press itself and all the organizations and resources advocating for open government.[33] As a re-

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31. COMM. ON GOV'T REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 106-50, at 14 (1999), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt50/pdf/CRPT-106hrpt50.pdf.

32. Fiduccia v. U.S. Dep't of Justice, 185 F.3d 1035, 1041 (9th Cir. 1999).

33. *See, e.g.*, Reporters Comm. for Freedom of the Press, *How to File a FOIA Lawsuit*, RCFP.ORG, http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/how-file-foia-lawsuit (last visited Apr. 14, 2015) (providing instructions on how to file a FOIA lawsuit if an agency fails to respond to a records request in a timely

sult, discussions of public records problems often understate the degree of difficulty faced by the government. Rather than admitting the inadequacy—or even impossibility—of compliance with the public records laws, many public officials stay silent. But truth is truth, nonetheless. Open government may be a beautiful rose, but roses can mildew, even in the sunlight.[34]

### *1. Academic Perspectives*

Scholars have already documented the variety of problems created by the right of public access to public records. For example, public records laws can chill collegial decision-making and cause fewer meetings and less documentation, leading to reduced efficiency.[35] They can encourage an overreliance on individual staff, force disclosure of sensitive information, and create barriers to honesty and compromise.[36] In the worst cases, the public records laws "[r]eward[ ] the [s]cofflaw" who ignores the law, create large volumes of work for the scrupulous official who tries to precisely comply with the law, and ultimately "breed contempt for the law."[37]

State universities have developed a special understanding of the problems and unintended consequences created by public records laws.[38] For example, dozens of scholarly papers have considered the likelihood that employed officials are deterred from applying for jobs at public universities for fear of losing their current jobs when their interest becomes known, and open access to public records can influence a university's tenure and promotion

manner); Nat'l Freedom of Info. Coal., *FOI Center*, NFOIC.ORG, http://www.nfoic.org/foi-center (last visited Apr. 14, 2015) (giving information regarding the Freedom of Information Center, which is a research library in the Donald W. Reynolds Journalism Institute at the Missouri School of Journalism); The Brechner Ctr. for Freedom of Info., *Florida County & State Access Issues 2011–2013*, BRECHNER.ORG, http://brechner.org/cnty%20issues%202011-2012.asp (last visited Apr. 14, 2015) (providing a synopsis of various public record issues and cases throughout Florida).

34. Rose Magazine, *Mildew*, ROSEMAGAZINE.COM, http://www.rosemagazine.com/articles02/pages/mildew.asp (last visited Apr. 14, 2015).

35. Mulroy, *supra* note 11, at 314, 360, 362–63.

36. *Id.* at 314, 363–66.

37. *Id.* at 366, 367.

38. MICHAEL K. MCLENDON, LEIGH GILCHRIST & JAMES C. HEARN, STATE OPEN-MEETINGS AND OPEN-RECORDS LAWS IN HIGHER EDUCATION: AN ANNOTATED BIBLIOGRAPHY 1–2 (2003), *available at* http://www.usc.edu/dept/chepa/pdf/governance_bib.pdf.

process too.[39] Public records laws also have been critiqued as a tool to harass academic scholars, jeopardizing the basic premise of academic freedom by exposing state university professors to politically motivated public records requests for their research.[40] As noted by a lawyer for the California university system, "seven people fully exercising their rights under the California public records act could shut the university down."[41] Indeed, in the absence of exemptions, a public records law could even require a public university football coach to turn over the team's playbook to the unscrupulous private university opponent.[42] Aware of that possibility, many Florida public universities create quasi-private corporations to manage their affairs, which are free from the burdens and the transparency of the public records laws.[43]

### *2. State Perspectives*

The potential misuse of the public records laws, however, exceeds the mere inconveniences and unintended consequences facing academia. As one columnist explained, broadly written laws designed to ensure transparency can become weapons "to discredit political opponents, intimidate critics, and simply harass private citizens for no better reason than that they are gov-

39. *Id.* at 6, 9–10, 14, 16–17, 27.

40. *See, e.g.*, Ryan C. Fairchild, Comment, *Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2121, 2133 (2013) (arguing that there should be a statutory exception in public records laws to protect public universities because of academia's "unique role . . . in fostering knowledge and educating students"); William Cronon, *A Tactic I Hope Republicans Will Rethink: Using the Open Records Law to Intimidate Critics*, SCHOLAR AS CITIZEN (Mar. 24, 2011), http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/ (providing a university professor's blog post that voices frustration with Wisconsin's public record laws because of how they could affect academia); Editorial, *Using Open-Records Laws to Harass Scholars*, WASH. POST (Apr. 3, 2011), http://www.washingtonpost.com/opinions/using-open-records-laws-to-harass-scholars/2011/04/01/AFLInHXC_story.html (discussing how public records laws could "pose a particular threat to academic freedom").

41. Fairchild, *supra* note 40, at 2149 (quoting JAMES C. HEARN, MICHAEL K. MCLENDON & LEIGH Z. GILCHRIST, GOVERNING IN THE SUNSHINE: OPEN MEETINGS, OPEN RECORDS, AND EFFECTIVE GOVERNANCE IN PUBLIC HIGHER EDUCATION 20 (2004)).

42. *Id.* at 2151–53.

43. Mike Schneider, *Colleges Duck Public Records Laws Via Corporations*, TALLAHASSEE DEMOCRAT (Oct. 12, 2014, 11:50 PM EDT), http://www.tallahassee.com/story/news/education/2014/10/12/colleges-duck-public-records-law-via-corporations/17176031/.

ernment employees."[44] Across the nation, public records laws can become a source of consternation for public servants who recognize the ideals of the public records laws, but who also endure the flaws.

In California, an upset general contractor whose contract was terminated by the city filed a public records suit against the city, alleging unreasonable delays, even though the city had already produced more than 40,000 pages of requested documents.[45] In Montana, the state attorney general has warned that the use of public records requests can have a chilling effect on whether records are generated in the first place.[46] In New Jersey, where one citizen admitted to sending more than a thousand public records requests to his local government so he could track the government's performance,[47] town clerks have declared the number of public records requests to be "through the roof," emphasizing that public time is being used to help private companies develop marketing information.[48] In North Carolina, as a result of increasing numbers of public records requests, the governor enacted controversial new policies requiring people to pay for public records that once were free.[49] In Tennessee, the publisher and editor of an

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44. Howard Schweber, *Open Records Laws Go from Sunshine to Sunburn*, HUFFINGTON POST, http://www.huffingtonpost.com/howard-schweber/open-records-laws-go-from_b_845432.html (last updated June 6, 2011, 5:12 AM EDT).

45. Jason Green, *Palo Alto: Fight over Mitchell Park Library Project Takes Legal Turn*, SAN JOSE MERCURY NEWS (July 26, 2014, 12:22 AM PDT), http://www.mercurynews.com/peninsula/ci_26221311/palo-alto-fight-over-mitchell-park-library-project.

46. Tim Murphy, *Montana AG: Public Records Requests Create "Chilling Effect"*, MOTHER JONES (August 9, 2013, 11:42 AM EDT), http://www.motherjones.com/mojo/2013/08/montana-ag-reporters-investigating-gun-laws-create-chilling-effect.

47. Geoff Mulvihill, *New Jersey Judge Says State Wrongly Denied Records*, PHILLY.COM (July 22, 2014, 11:59 PM), http://www.philly.com/philly/news/local/20140722_New_Jersey_judge_says_state_wrongly_denied_records.html (noting that "[w]ith the advent of electronic records [former photojournalist Ed Scheeler] could get without paying for it, he has become a regular information requester").

48. Terrence T. McDonald, *Public-Records Requests Are 'Through the Roof' in Jersey City*, JERSEY J. (May 2, 2014, 2:46 PM), http://www.nj.com/hudson/index.ssf/2014/05/public-records_requests_are_through_the_roof_in_jersey_city.html (noting, for example, that a pool supply company can file a public records request seeking permits from everyone in a town who applied for a pool permit, use that information to develop mailing lists, and bog down the clerk's offices).

49. Tom Kludt, *North Carolina Gov. McCrory Wants Payment for Public Records*, TPM LIVEWIRE (Nov. 27, 2013, 7:21 AM EST), http://talkingpointsmemo.com/livewire/north-carolina-gov-mccrory-wants-payment-for-public-records (Upset with the increase in public record requests, North Carolina's governor will start charging for requests that previously were available at no cost to citizens; the media organizations are decrying the move as unprecedented.).

alternative newspaper who wanted to get even with a city demanded that the city produce cookie and cache file records from city computers.[50]

Washington State public officials have endured particularly difficult times due to citizen suits related to the public records laws. The state attorney general warned that requests for public records had tripled in a decade and that people were requesting records and "gaming the system" by suing state agencies to catch the agencies in a costly mistake.[51] The emergence of "gotcha" litigation in Washington State has economic consequences for the government too—as well as the taxpayers who ultimately pay the judgment. The Washington State Department of Labor and Industries was ordered "to pay $500,000 because of errors related to a single Public Records Act Request."[52] The City of Prosser settled with a requester for $175,000 to avoid even greater liability because the city was unable to respond to forty-one requests filed by the requester within the five-day requirement.[53] In another instance, even though the state agencies did respond to a public records request by producing approximately 9,200 emails covering a two-year span, the agency still had to defend itself in court to prove that its response, which took two months instead of the statutorily mandated five days, was reasonable.[54] According to one study, payouts for public records lawsuits leapt from $108,000 in 2006 to nearly $1.7 million in 2011, for a grand total of $4.8 million spent between 2006 and 2011 on alleged violations of the State's Public Records Act.[55]

While the media continues to report these events as if they suggest a failure by governmental officials to comply with the

50. Don Walker, *Tennessee Officials and the Cookie Monster*, AJR.ORG (Jan. 1998), http://ajrarchive.org/article.asp?id=2329.

51. King Staff, *State Paying Record Amount for Records Lawsuits*, KING 5 (Oct. 26, 2013, 4:06 PM PDT), http://www.king5.com/story/news/local/investigations/2014/08/02/13057030/.

52. Foster Pepper Mun. Grp., *Court: $500,000 for Errors Related to a Single Public Records Act Request*, LOCALOPENGOVERNMENT.COM (July 13, 2009), http://www.localopengovernment.com/2009/07/articles/taxpayer-costs/court-500000-for-errors-related-to-a-single-public-records-act-request/.

53. Drew Foster, *Prosser Votes to Pay $175K to Settle Public Records Suit*, TRI-CITY HERALD (July 16, 2009), http://www.tri-cityherald.com/2009/07/16/648319/prosser-votes-to-pay-175k-to-settle.html.

54. West v. Wash. State Dep't of Natural Res., 258 P.3d 78, 80–82 (Wash. Ct. App. 2011).

55. King Staff, *supra* note 51.

public records laws,[56] a coalition of Washington governmental groups is using them to push for reform.[57] As explained by the Association of Washington Cities, public records laws can be strengthened by curbing abuses; so the organization has proposed legislation seeking to serve as: (1) "[a] mechanism to address financially motivated, punitive, or retributive requests"; (2) a way to protect the continuation of essential governmental services; and (3) "[a]uthority to stop subsidizing requests made for commercial purposes."[58] The proposal triggered predictable news media and editorial opposition.[59] Although the legislation did not pass in 2013, the issue is expected to be revisited because the University of Washington is engaged in a state-funded study of the degree to which the State's public records law has been abused.[60]

Interestingly, even the watchdog organizations dedicated to open government recognize the potential for misuses of the public records laws. One California group even issued a warning on its webpage, noting that requests for huge volumes of data were overburdening state agencies and telling its readers: "[do not] abuse the law or it will be repealed or modified!"[61]

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56. *Id.*

57. Jerry Cornfield, *Battle to Restrict Public Records Requests Heats Up*, HERALD NET (Aug. 22, 2013, 12:01 AM), http://www.heraldnet.com/article/20130822/NEWS01/708229915/Battle-to-restrict-public-records-requests-heats-up; Jerry Cornfield, *Officials Seek Relief from Abuse of Public Record Access Law*, HERALD NET (Jan. 26, 2013, 12:01 AM), http://www.heraldnet.com/article/20130126/NEWS01/701269955.

58. Ass'n of Wash. Cities, *Strengthening the Public Records Act by Curbing Abuses*, AWCNET.ORG (Feb. 2013), https://www.awcnet.org/portals/0/documents/legislative/PublicRecords0213.pdf.

59. *See* Editorial, *Editorial: Protect State's Public Records Act*, THE SEATTLE TIMES (July 20, 2013, 4:06 PM), http://seattletimes.com/html/editorials/2021430856_editpublicrecordsxml.html (criticizing proposed state legislation in Washington that would allow the government to sue requesters that abused the Public Records Act).

60. Jeff Rhodes, *Coalition Doing Its Own Study on Public Records Search Abuse*, THE OLYMPIA REP. (July 17, 2013), http://theolympiareport.com/coalition-conducting-its-own-study-on-public-records-search-abuse/.

61. Cal. Public Records Access Project, *California Public Records Act (PRA)*, CALPUBREC.ORG, http://calpubrec.org/pra.html (last visited Apr. 14, 2015) (discussing the California Public Records Act, tips on how to request public records, and what to do in the event a request is not fulfilled).

### *3. Federal Perspectives*

The federal Freedom of Information Act[62] (FOIA) offers a point of comparison to the state experiences. FOIA requires many federal public records to be either published in the Federal Register or made available for public inspection and copying.[63] It also generally requires other records to be made available, upon specific request, for public inspection and copying,[64] allowing fees to be charged for the production of some documents,[65] while also creating exemptions that release some types of documents from the need for public disclosure.[66] Like many state statutes, FOIA is enforceable by citizens, and FOIA allows citizen suits to be filed in the federal courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[67] FOIA, however, includes many provisions that recognize the competing perspectives and needs of the governmental agencies. For example, while state laws might provide strict deadlines that demand a rush to produce documents or that allow an unsatisfied requester to rush to the courthouse, FOIA compels a walk. Before a suit can be filed, the requester must exhaust administrative remedies.[68] Citi-

62. 5 U.S.C § 552 (2012).

63. *Id.* § 552(a)(1)–(2).

64. *Id.* § 552(a)(3).

65. *Id.* § 552(a)(4).

66. *Id.* § 552(b). The exemptions from disclosure of federal documents, which are often more broadly construed than state public records laws, include exemptions for public records related to (1) "national defense or foreign policy"; (2) internal agency personnel rules and practices; (3) exemptions from disclosure specifically made by statute; (4) "trade secrets and commercial or financial information"; (5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; (6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; (7) certain types of records or information compiled for law enforcement purposes; (8) certain records associated with the regulation or supervision of financial institutions; or (9) "geological and geophysical information and data, including maps, concerning wells." *Id.*

67. *Id.* § 552(a)(4)(B).

68. Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004). Some courts have deemed the exhaustion requirement to be a discretionary, prudential doctrine, while others have found it to be jurisdictional. *Compare* Hidalgo v. FBI, 344 F.3d 1256, 1258 (D.C. Cir. 2003) ("[T]he exhaustion requirement is not jurisdictional because the FOIA does not unequivocally make it so.") *and* Taylor v. Appleton, 30 F.3d 1365, 1367 n.3 (11th Cir. 1994) ("Exhaustion of administrative remedies is not a jurisdictional requirement . . . .") *with* Johnson v. Comm'r of Internal Revenue, 239 F. Supp. 2d 1125, 1136 (W.D. Wash. 2002) ("Where a FOIA plaintiff attempts to obtain judicial review without first exhausting

zens seeking records must often wait until the federal agency has undertaken various procedural steps. To begin with, an agency is usually allowed twenty days to respond to a public records request.[69] FOIA also includes numerous mechanisms to enable the agency to extend the time needed to respond to a public records request.[70] For unusual circumstances and unusually burdensome requests,[71] defined to include the need for searches in separate offices,[72] searches for and examinations of voluminous amounts of records,[73] and searches requiring consultation with another agency,[74] federal agencies can obtain an additional ten days.[75] Even after thirty days, and even if a lawsuit is filed, a court still has discretion to retain jurisdiction over the matter and allow the agency additional time if "exceptional circumstances" exist and the agency is acting with "due diligence."[76] But as Congress itself has explained:

> Agencies may . . . make a showing of exceptional circumstances based on the amount of material classified, based upon the size and complexity of other requests processed by the agency, based upon the resources being devoted to the declassification of classified material of public interest, or based upon the number of requests for records by courts or administrative tribunals. A court also shall consider a requester's unwillingness to reasonably limit the scope of his or her request or to agree upon a processing timeframe prior to seeking judicial review.[77]

Just as FOIA allows courts to exercise some discretion when evaluating delays, it also necessitates discretion with regard to application of FOIA's disclosure exemptions.[78] At times, courts

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administrative remedies, the lawsuit is subject to dismissal for lack of subject matter jurisdiction.").

69. 5 U.S.C. § 552(a)(6)(A)(i).

70. *Id.* § 552(a)(6)(B).

71. *Id.* § 552(a)(6)(B)(i).

72. *Id.* § 552(a)(6)(B)(iii)(I).

73. *Id.* § 552(a)(6)(B)(iii)(II).

74. *Id.* § 552(a)(6)(B)(iii)(III).

75. *Id.* § 552(a)(6)(B)(i).

76. *Id.* § 552(a)(6)(C)(i).

77. COMM. ON GOV'T REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 106-50, at 14 (1999), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt50/pdf/CRPT-106hrpt50.pdf.

78. There are nine exemptions to the presumption of disclosure in FOIA pursuant to 5 U.S.C. § 552(b)(1)–(9) (stating that the FOIA does not apply to matters that fall under the

have narrowly interpreted the way FOIA's disclosure requirements apply, erring in favor of privacy interests for the purposes of FOIA, to uphold an agency's decision not to disclose documents or records.[79] In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[80] for example, the Supreme Court explained that "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."[81] Rejecting a demand for information held by the Federal Bureau of Investigation about a living individual, the Supreme Court considered the protected personal privacy interests at stake and concluded that the request fell "outside the ambit of the public interest that the FOIA was enacted to serve."[82] Applying this "central purpose" test, a federal district court later held that an Air Force database was not a public record.[83]

The differences between FOIA and state public records laws—especially Florida's—are significant. FOIA, to a degree, recognizes and manages the tension between the public's demands and competing interests such as the public interest, private interests, and an agency's capacity to respond. Inevitably, some people place higher value upon public access than other competing interests, and FOIA and federal notions of open government have been criticized as providing "[t]ransparency [w]ithout [a]ccountability."[84] Yet, the degree of flexibility that FOIA provides to the agencies (and the courts) prevents the stat-

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categories of: (1) classified information and national security; (2) internal agency personnel information; (3) information exempted by existing statutes; (4) trade secrets and other confidential business information; (5) agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological and geophysical information).

79. *See generally* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 ADMIN. L. REV. 983 (2002) (discussing the impact of *United States Department of Justice v. Reporters Committee for Freedom of the Press* and the courts' increasing deference to government privacy concerns).

80. 489 U.S. 749 (1989).

81. *Id.* at 774.

82. *Id.* at 775.

83. Baizer v. U.S. Dep't of the Air Force, 887 F. Supp. 225, 228–29 (N.D. Cal. 1995).

84. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 117 (2012).

ute from overwhelming Washington, D.C. In contrast, Florida law is much more rigid in its expectations of government.

### C. The Sunshine State: A Model Public Records Law or a Morass?

In Florida, a *constitutional* right of access reflects the intensity of the State's commitment to individual access to "public records," meaning documents and other material produced by the government to communicate or perpetuate knowledge.[85] Florida's open government laws have been described as "among the broadest and most all-encompassing of their kind in the entire nation."[86] But Florida's government also experiences difficulties with the implementation of its public records law.[87] In normal circumstances, the Sunshine State's public records law is a model for ensuring the disclosure of information to the benefit of an informed citizenry. Experience shows that the abnormal is occurring. Lacking sufficient boundaries to prevent misuses of the law, the efficiency of our bureaucracy is compromised, and taxpayers are the victims.

#### *1. Florida's Constitutional and Statutory Rights of Access*

In the Sunshine State, open government is not just a concern of good governance: it is a fundamental right. Article I, Section 24, of the Florida Constitution, governing access to public records and meetings, states as follows:

> 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,

85. *See, e.g.*, Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 640 (Fla. 1980) (Public records encompass all materials "prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge.").

86. Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 258 (2008).

87. *See infra* Part II(C)(2) (discussing the many problems Florida government agencies face because of current public record laws and using the Town of Gulf Stream as an illustrative example).

> 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.[88]

Although self-executing, this constitutional principle is further implemented by the Florida legislature through laws governing the enforcement of the right of access to public records, ininclusing the "maintenance, control, destruction, disposal, and disposition" of public records.[89] Sovereign immunity from disclosure does not exist.[90] Furthermore, exemptions from public records disclosure must be explicit,[91] so the Florida legislature created statutory exemptions for certain types of public records.[92] Indeed, aside from these exemptions, the Florida Supreme Court has ruled that the right to access public documents is "virtually unfettered."[93]

Although much of Florida's public records law is codified in Chapter 119 of the Florida Statutes, specific provisions and exemptions related to public records are scattered throughout the body of Florida law.[94] The definition of a public record in Florida is far-reaching in scope, including not just traditional papers, but all forms of perpetuation or formalization of knowledge.[95] As a

88. FLA. CONST. art. I, § 24(a).

89. *Id.* art. I, § 24(c).

90. "The philosophical argument that 'government can[not] operate' without relief from the legislative waiver of sovereign immunity" has been "consistently rejected." Carter v. City of Stuart, 468 So. 2d 955, 959 (Fla. 1985) (citing Neu v. Miami Herald Publ'g Co., 462 So. 2d 821 (Fla. 1985); Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984); Wood v. Marston, 442 So. 2d 934 (Fla. 1983); Wait v. Fla. Power & Light Co., 372 So. 2d 420 (Fla. 1979); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Bd. of Pub. Instruction of Broward Cnty. v. Doran, 224 So. 2d 693 (Fla. 1969)).

91. "[I]n the Public Records Law, the coverage is expressed generally; exemptions are identified explicitly." *Wood*, 442 So. 2d at 938.

92. FLA. STAT. § 119.07 (2014).

93. Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 492 (Fla. 2d Dist. Ct. App. 1990) ("[T]he right to access public documents is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest.").

94. *See* OFFICE OF THE ATTORNEY GEN. OF FLA., GOVERNMENT-IN-THE-SUNSHINE-MANUAL 199–262 (2014), *available at* http://www.myfloridalegal.com/sun.nsf/sunmanual (listing hundreds of exemptions and other provisions related to the implementation of the public records laws) [hereinafter GOVERNMENT-IN-THE-SUNSHINE-MANUAL].

95. Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 640 (Fla. 1980) (The Florida Supreme Court has interpreted this definition to encompass all materials

matter of public policy, Florida has concluded that the electronic era must not undermine public access to information.[96] Public records, therefore, include emails, voicemails, photographs, and anything else, regardless of physical form, "made or received . . . in connection with the transaction of official business by any agency."[97]

The term "agency" is also broadly defined,[98] and can even include government contractors.[99] Whether or not a contractor's documentation falls within the scope of a public records request depends on a case-by-case evaluation of whether the contractor was acting on behalf of the government or was otherwise delegated a governmental responsibility.[100] Although further analysis of

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made or received by an agency in connection with official business which are used to "perpetuate, communicate, or formalize knowledge.").

96. *See* FLA. STAT. § 119.01(2)(a) ("Automation of public records must not erode the right of access to [public] records."); *cf.* Fla. Att'y Gen. Op. 90-04 (Jan. 25, 1990), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/3CC46507EB4D58798525652C00476FDA ("[I]nformation stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet."). Accordingly, electronic public records are governed by the same rule as written documents and other public records: the records are subject to public inspection unless a statutory exemption exists, which removes the records from disclosure.

97. The Florida Statutes define "public records" to include: "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." FLA. STAT. § 119.011(12).

98. The Florida Statutes define "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." *Id.* § 119.011(2).

99. The term "contractor" is defined to mean "an individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency." *Id.* § 119.0701(1)(a); *see also id.* § 119.011(2) (defining "agency"). However, the mere act of contracting with, or receiving public funds from, a public agency is not sufficient to subject a private entity to the Florida public records laws and Chapter 119 of the Florida Statutes. Instead, case history suggests that this sentence will be interpreted by using one of two tests.

100. The Florida Supreme Court held that a public agency could not avoid disclosure by contractually delegating responsibility to a private entity, which would otherwise be an agency responsibility. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., 596 So. 2d 1029, 1031 (Fla. 1992). To determine whether a private entity was "acting on behalf of" a public agency, the court adopted a "totality of factors" approach, listing nine factors for evaluation:

> (1) the level of public funding; (2) commingling of funds; (3) whether the activity was conducted on publicly owned property; (4) whether services contracted for are an integral part of the public agency's chosen decision-making process; (5) whether

the effect of the public records laws on a contractor is best left to a follow-up article, private entities have reason to hesitate before putting their business and reputations at risk by contracting with the government.[101] Recently, the legislature required governmental entities to include specific language related to public records compliance in their contracts with private government contractors.[102] In some circumstances, private contractors will be affected by the excesses of the public records laws. At a minimum, a pri-

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> the private entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for [whose] benefit the private entity is functioning.

*Id.*

Alternatively, to determine whether a contractor is acting on behalf of a public agency, other courts have applied a "delegation" test. *E.g.*, City of Fayetteville v. Edmark, 801 S.W.2d 275, 279 (Ark. 1990) ("The FOIA requirements cannot be circumvented by delegation of regular duties to one specially retained to perform the same task as the regular employee or official."); Forum Publ'g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) ("We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party . . . ."). These cases generally emphasize the notion that a party contracting with a public agency to provide services to the agency is different from a contractor providing services in place of the agency. *See Edmark*, 801 S.W.2d at 279 (An agency "cannot avoid the FOIA requirements by substituting a private attorney for the city attorney."); *Forum Publ'g Co.*, 391 N.W.2d at 172 (rejecting an agency's argument that a government contractor was an independent contractor and therefore finding the government contractor was subject to public record requests). As summarized by the Florida Attorney General's Office: "Stated another way, business records of entities which merely provide services for an agency to use (*e.g.*, legal professional services) are probably not subject to the open government laws. But, if the entity contracts to relieve the public body from the operation of a public obligation such as operating a jail or providing fire protection, the open government laws apply." GOVERNMENT-IN-THE-SUNSHINE-MANUAL, *supra* note 94, at 64 (citations omitted) (also listing as examples of delegation of services: a corrections company operating a county jail, an employment search firm, an engineering company providing ongoing engineering services to a city, a humane society investigating animal abuse for the county, and the Salvation Army providing probation services for a county).

101. The mere act of contracting with the government does not make the public records law applicable to the contractor. Fla. Att'y Gen. Op. 2014-06 (June 18, 2014), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/FFA361674B780AE085257CFD00650CCB ("We are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation acts 'on behalf of' the agency." (quoting Parsons & Whittemore, Inc. v. Metro. Dade Cnty., 429 So. 2d 343, 346 (Fla. 3d Dist. Ct. App. 1983))).

102. *See* FLA. STAT. § 119.0701(2)(a) (Contractors must "[k]eep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service."); *id.* § 119.0701(2)(b) (Contractors must "[p]rovide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law.").

vate entity's failure to fully comply with Florida's public records laws can result in the immediate and unilateral cancellation of its contracts because the Florida Statutes provide, with limited exceptions, that every procurement for contracted services by a State agency be evidenced by a written agreement containing a provision that allows a unilateral cancellation by the agency for the contractor's refusal to allow public access to "all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt" from disclosure.[103] And as noted earlier, contractors in possession of government records, "acting on behalf of" the government or performing delegated functions, could be held to robust compliance with the public records laws, just like the government agencies.

Upon receipt of a public records request, agencies must acknowledge it and respond promptly in good faith.[104] When responding, agencies are allowed to charge actual costs of duplication for copies.[105] In most cases, actual costs are even lower for copies of electronic records.[106] However, Florida law does authorize the imposition of a special service charge when "the nature or volume of public records . . . to be inspected . . . is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance . . . or both."[107] The charge must be reasonable and based on the labor or computer costs

103. FLA. STAT. § 287.058(1)(c).

104. FLA. STAT. § 119.07(1)(c) ("A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.").

105. If no fee is prescribed elsewhere in the statutes, Florida Statute authorizes the custodian to charge a fee of up to fifteen cents per one-sided copy for copies that are 14 inches by 8 1/2 inches or less. *Id.* § 119.07(4)(a)(1). An agency may charge "[n]o more than an additional 5 cents for each two-sided copy." *Id.* § 119.07(4)(a)(2).

106. Fla. Att'y Gen. Op. 2013-03 (Jan. 30, 2013), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/C50E174E0287AFB185257B03005C63BA ("The City of Miami Gardens may charge the 'actual costs of duplication' for electronic mail forwarded to a public records requestor in lieu of photocopying those records. When calculating the 'actual costs of duplication,' charges may not be made for labor costs or associated overhead costs.").

107. FLA. STAT. § 119.07(4)(d); *see also* Fla. Att'y Gen. Op. 99-41 (June 30, 1999), *available at* http://www.myfloridalegal.com/__85256236006EB5E1.nsf/0/E40CB6A900FDF497852567A10063C00D?Open&Highlight=0,99-41 (Unless a special service charge is authorized by law, the agency may charge only the actual cost of duplication and cannot charge for the incidental costs, such as limited labor expenses or non-extensive use of information technology or the costs to maintain a database.).

actually incurred by the agency.[108] Consistent with the policy goal of ensuring public access to information, large special service charges can trigger careful court scrutiny.[109]

An agency's failure to acknowledge or properly respond to a public records request entitles the record requester to seek judicial relief, usually through a mandamus action.[110] In fact, if an action is filed to enforce the public records law, the court shall set an "immediate hearing" and give the case priority.[111] If the court orders an agency to provide access to public records, it generally must do so within forty-eight hours.[112] The requester may be entitled to attorney's fees too.[113] Raising the stakes for the government, even a good faith but mistaken interpretation of the public records exemptions can result in a judicial ruling that the government refused to comply with the law and a judgment for attorney's fees.[114]

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108. *See* Bd. of Cnty. Comm'rs of Highlands Cnty. v. Colby, 976 So. 2d 31, 37 (Fla. 2d Dist. Ct. App. 2008) (providing that "special service charge[s] appl[y] to requests for both inspection and copies of public records when extensive clerical assistance is required" and may include both an employee's salary and benefits in calculating the actual labor costs incurred by the county).

109. Carden v. Chief of Police, 696 So. 2d 772, 773 (Fla. 2d Dist. Ct. App. 1996) (In a challenge to a special service charge that exceeded $4,000 for staff time, the court held that an "excessive charge could well serve to inhibit the pursuit of rights conferred by the Public Records Act" and remanded the case to the agency to "explain in more detail the reason for the magnitude of the assessment.").

110. Generally, mandamus is the appropriate remedy to enforce compliance with the Public Records Act. Staton v. McMillan, 597 So. 2d 940, 941 (Fla. 1st Dist. Ct. App. 1992), *review dismissed sub nom.*, Staton v. Austin, 605 So. 2d 1266 (Fla. 1992) (table); *see also* Weeks v. Golden, 764 So. 2d 633, 634 (Fla. 1st Dist. Ct. App. 2000) ("[M]andamus is an appropriate means of compelling compliance."); Smith v. State, 696 So. 2d 814, 815 (Fla. 2d Dist. Ct. App. 1997) (Mandamus is "used to enforce an 'established legal right.'"); Donner v. Edelstein, 415 So. 2d 830, 831 (Fla. 3d Dist. Ct. App. 1982) (Mandamus was used to compel disclosure.); Mills v. Doyle, 407 So. 2d 348, 350 (Fla. 4th Dist. Ct. App. 1981) ("[M]andamus was the appropriate vehicle to remedy the refusal of the records custodian to accede to [a records] request.").

111. FLA. STAT. § 119.11(1) ("Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases."); Matos v. Office of the State Att'y for the Seventeenth Judicial Circuit, 80 So. 3d 1149, 1149 (Fla. 4th Dist. Ct. App. 2012) ("[A]n immediate hearing does not mean one scheduled within a reasonable time but means what the statute says: immediate.").

112. FLA. STAT. § 119.11(2) ("Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within [forty-eight] hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such [forty-eight]-hour period.").

113. *Id.* § 119.12.

114. Attorney's fees are recoverable even where access is denied on a good faith but mistaken belief that the documents are exempt from disclosure. WFTV, Inc. v. Robbins, 625 So. 2d 941, 943 (Fla. 4th Dist. Ct. App. 1993); Times Publ'g Co. v. City of St. Peters-

While lawsuits and attorney's fees provisions have reputational and economic effects on the agencies, violations of the public records laws can have even more direct and dire consequences for public servants, including prosecution by the state attorney.[115] Unknowing violations of any provision of Chapter 119 by a public officer may be a "noncriminal infraction, punishable by fine not exceeding $500."[116] A public officer who knowingly violates the public records law "is subject to suspension and removal or impeachment and . . . commits a misdemeanor of the first degree," punishable by possible criminal penalties of one year in prison, or a $1,000 fine, or both.[117] In extraordinary cases involving concealment of public records, a felony of the third degree and five years of imprisonment may be imposed upon a public servant.[118] In sum, the public records laws of Florida are not to be trifled with.

### *2. An Unfettered Right: Too Much of a Good Thing?*

Rights still need restraints. Evidence exists that public records laws can be intentionally misused as tools to prevent the effective functioning of government. While citizens can use every provision of the public records laws to their full advantage, public servants cannot stop these excesses of government in the sunshine. Florida, like other states, forbids the government from even asking why public records are needed; commercial uses are acceptable,[119] and motives are considered irrelevant.[120] While it

burg, 558 So. 2d 487, 495 (Fla. 2d Dist. Ct. App. 1990); News & Sun-Sentinel Co. v. Palm Beach Cnty., 517 So. 2d 743, 744 (Fla. 4th Dist. Ct. App. 1987).

115. "A state attorney may prosecute suits charging public officials with violation[s]" of the Public Records Act, including those violations that "may result in a finding of guilt for a noncriminal infraction." Fla. Att'y Gen. Op. 91-38 (May 30, 1991), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/85126F70134B81FA852562A80057D7F3.

116. FLA. STAT. § 119.10(1)(a).

117. *Id.* § 119.10(1)(b); FLA. STAT. § 775.082(4)(a); *id.* § 775.083(1)(d).

118. FLA. STAT. § 838.022(1)(b) (requiring up to 5 years imprisonment "for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another," who seeks to "[c]onceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act").

119. "[T]he fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law." Microdecisions, Inc. v. Skinner, 889 So. 2d 871, 875 (Fla. 2d Dist. Ct. App. 2004); *see also* State *ex rel.* Davis v. McMillan, 38 So. 666, 668 (Fla. 1905) (holding that companies that compile abstracts may copy documents from the clerk's office for their own use and sell copies to the public for a profit).

seems reasonable at first to declare that all documents are public records, the unbounded right of access can produce absurd results.

The Town of Gulf Stream, Florida, is a tiny beach community with a population of about nine hundred people, a municipal town hall staff consisting of four people, and similarly small police and water departments.[121] Its log tracking public records requests, however, exposes an excess of government in the sunshine.[122] Many requests clearly have no purpose other than to create mischief or work for the public servant.

While Florida law treats motive as irrelevant, the nature and content of some public records requests reveals the consequences of that policy decision. Consider these examples of requests received by the Town, which are made available for public inspection on the Town's webpage:[123]

- *Requests for electronic versions of letterhead and official signatures.* While Florida's public records law makes the purpose of the request irrelevant, Town officials and residents cannot help but become suspicious of a request for

120. Florida cases consistently hold that "[t]he motivation or purpose of the person seeking disclosure of public records is irrelevant." Rameses, Inc. v. Demings, 29 So. 3d 418, 421 (Fla. 5th Dist. Ct. App. 2010); *see also* Staton v. McMillan, 597 So. 2d 940, 941 (Fla. 1st Dist. Ct. App. 1992) (stating that petitioner's reasons for seeking access to public records "are immaterial"); Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d Dist. Ct. App. 1985) ("The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. The purpose for such inquiry is immaterial."); News-Press Publ'g Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d Dist. Ct. App. 1980) ("The hospital's defense alleging malicious motives for seeking the documents is likewise irrelevant. The Public Records Act does not direct itself to the motivation of the person who seeks the records."); Heidi Toth, *Freedom of Information Remains a Push-Pull Relationship: Public Records Are Not Always Easy to Obtain*, LUBBOCK AVALANCHE-J. (Mar. 15, 2014, 11:31 PM), http://lubbockonline.com/local-news/2014-03-15/freedom-information-remains-push-pull-relationship#.U6hYWCgoG_J ("The laws say government agencies should make an assumption information is public . . . .").

121. Town of Gulf Stream, *Population*, GULF-STREAM.ORG, http://www.gulf-stream.org/population.html (last visited Apr. 14, 2015).

122. *See* Town of Gulf Stream, *Public Records Request Log*, GULF-STREAM.ORG, http://www2.gulf-stream.org/WebLink8/DocView.aspx?id=19269&dbid=0 (last visited Apr. 14, 2015) [hereinafter *Public Records Request Log I*] (providing a log of public records requests received from August 2013 to December 2013); Town of Gulf Stream, *Public Records Request Log*, GULF-STREAM.ORG, http://www2.gulf-stream.org/WebLink8/DocView.aspx?id=19268 (last visited Apr. 14, 2015) [hereinafter *Public Records Request Log II*] (providing a log of public records requests received for 2014).

123. Town of Gulf Stream, *Public Records Requests*, GULF-STREAM.ORG, http://www2.gulf-stream.org/WebLink8/browse.aspx?dbid=0 (last visited Apr. 14, 2015).

an electronic copy of the Town stationary, the police stationary, the Town manager's electronic signature block, and the police chief's electronic signature block.[124]

- *Requests for documents obviously known to be exempt.* A request for "[a]ny and all records containing a social security number,"[125] remarkable in breadth and lacking any timeframes at all, is pointless. By Florida law, social security numbers are exempt from disclosure.[126]
- *Requests for the impossible.* One public records request sought "all Public Records situate[d] atop the Chief of Police's desk on 7/15/2014 at 11:20 a.m."[127] A Town cannot stop time, and papers move on and off a public servant's desk all day long. Moreover, a police chief's records may need to be redacted to conform with other exemptions.
- *Unfulfilled requests for the tedious.* A request 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 [H]all chambers,"[128] while precise, still requires a city staffer to spend time obtaining a quote and then sending the requester a letter seeking a deposit for the actual costs of creating the requested replica. Nothing, of course, requires the requester

124. Town of Gulf Stream, Public Records Request 14-0931 (May 27, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/18853/Page1.aspx.

125. Town of Gulf Stream, Public Records Request 13-0322 (Oct. 29, 2013), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/18303/Page1.aspx.

126. FLA. STAT. § 119.071(5)(a)(5) (2014).

127. Town of Gulf Stream, Public Records Request 14-1137 (July 15, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/17652/Page1.aspx; *see also* Town of Gulf Stream, Public Records Request 14-1140 (July 15, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/17655/Page1.aspx (seeking all public records "situate[d] atop [a Town employee's] desk on 7/15/2014 at 11:20 a.m."); Town of Gulf Stream, Public Records Request 14-1138 (July 15, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/17653/Page1.aspx (seeking all public records "situate[d] atop the desk in the Lobby to the left of the front door in the Police Department on 7/15/2014 at 11:20 a.m."); Town of Gulf Stream, Public Records Request 14-1139 (July 15, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/17654/Page1.aspx (seeking all public records "situate[d] atop [a Town employee's] desk on 7/15/14 at 11:20 a.m.").

128. Town of Gulf Stream, Public Records Request 13-0413 (Nov. 23, 2013), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/17922/Page1.aspx.

to actually pay that deposit, so the government's time is easily wasted.[129]

- *Requests for documents previously sent to the requester.* In perhaps the perfect game of "gotcha," some public records requests involve requests for documents already possessed by the person or entity making the request—even including requests for documents related to past public records requests.[130] In these instances, if the government fails to produce a document, or makes any error at all, a lawsuit and claim for attorney's fees is likely, because the requester already has a copy of the documents.

These types of public records do not serve the public interest. And they do little, if anything, to achieve the central goal of a public records law: an enlightened society. Instead, these requests require a public servant to drop all other responsibilities and to become a plaything for one individual public records requester—all to the detriment of the public interest.

Among public records lawyers, one example of how the public records laws can burden the government with little public benefit is particularly well-known. A public records request sought to obtain the health insurance information for Polk County school employees, spouses, and children.[131] To many, the request appeared to be a shocking invasion of privacy, but under the Florida Constitution, the right to privacy is subordinate to the right of access to public records.[132] Indeed, the broad request, and the resulting litigation, eventually expanded to include eleven Florida school boards, and the government was compelled to respond.[133]

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129. The Town of Gulf Stream's response to Public Records request 14-0968 (June 25, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/20544/Page1.aspx, shows that no further action was taken by the requester after the deposit request was sent.

130. *See, e.g.*, *Public Records Request Log II*, *supra* note 122, at Log No. 912 (requesting copies of public records requests submitted to the Town); *id.* at Log No. 936, Log No. 1639 (requesting copies of public records containing the requester's own name).

131. Michael Van Sickler, *A Curious Champion for Senate President Don Gaetz's Public Records Bill*, TAMPA BAY TIMES (Apr. 16, 2014, 6:28 PM), http://www.tampabay.com/news/politics/legislature/a-curious-champion-for-senate-president-don-gaetzs-public-records-bill/2175428.

132. FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.").

133. Sickler, *supra* note 131.

But the responsive documents now sit in boxes at the bottom of the litigant's closet, and the legislature eventually created a new public records exemption to make sure this particular request could not reoccur.[134] To some, this example embodies the pointlessness of some public records requests; to others, it represents a civics lesson—albeit an expensive and time-consuming one.

But the substance, breadth, or purpose of a public records request is only one way that the Florida public records law is subject to misuse. The sheer volume of requests is another. While it might seem reasonable, at first, to say that there should be no limit on the number of public records requests that a person can file, the notion of unlimited public access also generates problematic results. Again, the Town of Gulf Stream provides insights into the problem:

- *Volumes of requests over time.* In less than one year, the Town endured more than 1,100 public records requests[135] (By comparison, the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives processed 1,054 FOIA requests for the entirety of 2013.).[136] Moreover, the requests do not need a purpose; the mere act of requesting a public record triggers the duty of the public servant to respond.[137] Among Gulf Stream's many requests were dozens of requests for the "[number of] most recent emails created by the Town Manager and containing the word [ __ ]."[138] One particular example, showing the pettiness of the request, sent to the Town Mayor, and using an obviously fake name for an email address with an unpleasant misspelling of a Town Commissioner's name, requested "the ten most recent emails from each

134. *Id.*

135. *See Public Records Request Log II*, *supra* note 122 (listing all public records requests for the year 2014) The records request log lists the requests for the year 2014 numerically, starting at No. 466 and ending at No. 1639, at least through November 14, 2014. Subtracting these two numbers shows that there have been 1,173 records requests from January 2014 through November 14, 2014. *Id.*

136. U.S. Dep't of Justice, *Data*, FOIA.GOV, http://www.foia.gov/data.html?foia/Services/RequestDisposition.jsp?agencyName=DOJ&requestYear=2013 (last visited Apr. 14, 2015).

137. *See supra* note 120 (providing caselaw that supports the notion that the purpose of the request is immaterial).

138. *E.g.*, *Public Records Request Log I*, *supra* note 122, Log Nos. 33–56 (all received on Sept. 20, 2013); *id.* at Log Nos. 74–88, 90, 92–97, 99–105, 107–14 (all received on Sept. 23, 2013).

and every email account controlled by [the Town Mayor] that contain[ed] public records."[139]

- *Coordinated volumes of public records requests.* The Town of Gulf Stream's "Public Records Request Log" further shows how a select few people can create a substantial problem. In 2013 and 2014, without accounting for emails sent by alias addresses, one person sent more than 400 public records requests, and one company (based on the email suffix) generated more than five hundred public records requests.[140] In many instances, the Town worked on the requests, only to receive no further inquiry.[141] Other times, a deposit was requested but unpaid.[142]
- *Repeated requests.* Repeat requests for documents require the public servants to ensure that they carefully keep track of all public records requests, both to ensure that responses are consistent and to avoid needless duplication of effort.[143]

In other words, citizens can—and do—intentionally send multiple public records requests to a governmental entity and then promptly sue the governmental entity when their own volume of public records requests causes a delay. These stories are not limited to the Town of Gulf Stream. Similar stories revealing the logical limits of the public records laws have occurred elsewhere in Florida. Over the past five years, one citizen, who views himself as a civil rights activist, has sued more than a hundred

139. *See* Town of Gulf Stream, Public Records Request 14-1557 (Oct. 3, 2014), *available at* http://www2.gulf-stream.org/WebLink8/0/doc/23020/Page1.aspx.

140. According to the Town of Gulf Stream's Public Records Log, chrisoharegulfstream@gmail.com sent 237 public records requests in 2013 and 219 public records requests in 2014, and emails with a suffix of @commerce-group.com accounted for 518 public records requests in 2014. *Public Records Request Log I*, *supra* note 122; *Public Records Request Log II*, *supra* note 122.

141. The Town of Gulf Stream's Public Records Log tracks various dates to monitor when requests are received, when "intake" letters are sent to acknowledge receipt, when an estimate is provided, and when documents are produced. Comparison of the fields quickly shows that many deposit requests do not lead to record production. *Public Records Request Log I*, *supra* note 122; *Public Records Request Log II*, *supra* note 122.

142. *Public Records Request Log I*, *supra* note 122; *Public Records Request Log II*, *supra* note 122.

143. *Public Records Request Log II*, *supra* note 122, at Log Nos. 815–23.

different government agencies and state contractors.[144] These lawsuits have been estimated to cost government agencies and contractors over one million dollars,[145] yet the same individual has been honored by organizations representing the media.[146]

Of course, even though a sweeping right to request public records can be abused, the notion of restricting the content or number of public records requests is also problematic. The specific merits of any individual public records request might be debatable. Nevertheless, the overall evidence proves that a problem exists. This Article is an attempt to provide a solution to the outlier problems, while leaving intact the public right of access that democracy holds dear.

## *III. RECOMMENDATIONS AND SOLUTIONS: SEEKING SHADES OF GREY*

At least some of the problems faced by Florida's public servants can be rectified without undermining the objectives of Florida public records law. The executive branch must faithfully implement the law, particularly by ensuring that it makes important public records quickly and readily available, in accordance with the public records laws.[147] But the judiciary also should be judicious in its interpretations of public records laws; the legislature should recognize that its strictures may be too strict; and the legal profession must adhere to its own codes of professionalism and ethics.

144. Jessica Vander Velde, *Public Records Watchdog Sues Several Tampa Bay Agencies*, TAMPA BAY TIMES (Jan. 21, 2013, 3:30 AM), http://www.tampabay.com/news/courts/civil/public-records-watchdog-sues-several-tampa-bay-agencies/1271682.

145. *Id.*

146. Nat'l Freedom of Info. Coal., *Lakeland (Fl.) Public Records Watchdog Joel Chandler Honored*, NFOIC.ORG (Mar. 14, 2012, 1:39 PM), http://www.nfoic.org/lakeland-fl-public-records-watchdog-joel-chandler-honored.

147. While Part III(A) of this Article focuses on the executive branch because, in the era of the administrative state, it is the largest source of government records, these principles apply equally to the judicial and legislative branches of government. *See* FLA. CONST. art. I, § 24 ("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.").

### A. Executive Action: Implementing Principles

Critics of this Article and opponents of any effort to reform Florida's public records laws will inevitably claim that the government itself is the problem. A person accused by some of being a radical abuser of the public records laws might even be defended by others as a hero and a government watchdog.[148] To overcome the skeptics, Florida's governmental entities must continue to show and document their commitment to the faithful execution of the public records laws.

#### *1. Enhancing Compliance*

Compliance with the public records law, however, is no easy task, especially for small local governments with limited staffing. Governmental officials also have a legal duty to implement the sometimes ambiguous, legislatively created exemptions, which are often narrowly interpreted.[149] Individual privacy rights still exist, protecting some forms of personal information.[150] Police

148. Sickler, *supra* note 131.

149. One article, comparing the common exemptions of state public records laws, summarized them as: (1) a balancing test; (2) Federal Law/FERPA; (3) Personal Information; (4) Academic Exams; and (5) Academic Research. Fairchild, *supra* note 40, at 2173. Florida offers none of these exemptions. But when exemptions are offered in Florida, they are narrowly interpreted. For example, in *Southern Bell Telephone & Telegraph Co. v. Beard*, the court agreed with the Public Service Commission's determination that a statutory exemption for proprietary, confidential business information be narrowly construed "consistent with the liberal construction afforded the Public Records Act [and] in favor of open government." 597 So. 2d 873, 876 (Fla. 1st Dist. Ct. App. 1992). FLA. STAT. § 119.071(1)(d) (2014) creates a narrow exception to the Public Records Act for attorney work product, which is more narrowly interpreted than the work product privilege recognized by the courts for private litigants. Fla. Att'y Gen. Op. 91-75 (Oct. 1, 1991), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/FF9BCE32D9225C62852562B50066AAE5; Fla. Att'y Gen. Op. 85-89 (Oct. 30, 1985), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/99BC3B5E9D4A2810852565760056FB2F. Similarly, although the Auditor General's work papers and notes are not a public record pursuant to FLA. STAT. § 11.45(4)(c), the Florida Attorney General concluded that "the term 'audit work papers and notes' should be construed narrowly and limited to such 'raw data' as is commonly considered to constitute the work papers of an accountant." Fla. Att'y Gen. Op. 79-75 (Aug. 23, 1979), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/9511192E3DF39D8F8525658E0063BEF5.

150. Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63 (2006), *available at* http://graysonbarber.com/pdf/SLU_PubLRev_2006.pdf; *see, e.g.*, FLA. STAT. § 119.071(2)(j)(1) (exempting from disclosure the "identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime").

records must be carefully redacted.[151] Corporate trade secrets are exempt from public records disclosure too.[152] And of course, government also has the practical and sometimes burdensome duty to dedicate personnel and other resources to fulfill the requests and adhere to the exemptions—or else.

But legal compliance is compulsory, nonetheless—a point brought home by an industry of compliance professionals who have special skills helping companies to develop policies and procedures to reduce risks of legal violations.[153] The principles of a successful compliance program have been set forth by the United States Sentencing Commission.[154] Originally developed to identify the measures expected of corporations and organizations seeking to minimize risks of criminal misconduct, the seven principles provided by the Sentencing Commission help organizations to reduce and ultimately eliminate misconduct, empowering the organizations to self-police their own conduct.[155] According to the Federal Sentencing Guidelines Manual, the principles of an effective ethics and compliance program are: (1) to "establish standards and procedures to prevent and detect criminal conduct";

151. *See, e.g.*, FLA. STAT. § 119.071 (2)(c)(1) (exempting "[a]ctive criminal intelligence information and active criminal investigative information" from public inspection); *but see id.* § 119.011(3)(c) (stating that six categories of information commonly found in police records are *not* "criminal investigative" or "criminal intelligence information": (1) the "time, date, location, and nature of a reported crime"; (2) the "name, sex, age, and address of a person arrested or of the victim," unless the victim suffered a sexual offense or of child abuse; (3) the "time, date, and location of the incident and of the arrest"; (4) the crime charged; (5) certain documents given or required to be given to the person arrested; and (6) other informations and indictments).

152. *See* FLA. STAT. § 815.045 ("The Legislature finds that it is a public necessity that trade secret information . . . be expressly made confidential and exempt from the public records law because it is a felony to disclose such records."); Andy Bertron, *Conflicts Between the Sunshine Law and Trade Secret Protection in Public Procurement*, 76 FLA. B.J., Feb. 2002, at 36, *available at* https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/4D0BDB6DE7BF91FD85256B52007BF485 (proposing that the legislator should create an "exemption for procurement meetings when trade secret documents are involved").

153. For example, the Society of Corporate Compliance and Ethics (SCCE) is a regulatory compliance association that provides discussion forums and educational programs for its members to promote the introduction, development, and maintenance of high-quality corporate compliance programs in a complex regulatory environment. Soc'y of Corp. Compliance & Ethics, *About the Society of Corporate Compliance and Ethics*, CORPORATECOMPLIANCE.ORG, http://www.corporatecompliance.org/AboutSCCE/AboutSCCE.aspx (last visited Apr. 14, 2015).

154. U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL 503, § 8B2.1 (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Chapter_8.pdf.

155. *Id.* at 503–04, § 8B2.1(b).

(2) to ensure that organizational leadership, including senior officers and boards, is knowledgeable of and oversees the compliance program; (3) to take reasonable efforts to exclude bad actors from managerial ranks; (4) to implement routine education communications and training programs; (5) to monitor, audit, and evaluate the effectiveness of the program, in part by maintaining a confidential system for employee reporting of non-compliance; (6) to promote and enforce the program through appropriate incentives and disciplinary measures; and (7) to take reasonable steps to respond to and prevent misconduct when it occurs.[156] These principles, though originally focused on the criminal context, apply equally well to civil compliance and can certainly be applied to governmental entities seeking to ensure civil and criminal compliance with the public records laws.

In fact, demonstrating their commitment to Florida's system of open government, and in full accord with the first principle of an effective ethics and compliance program, dozens of Florida governmental entities—cities,[157] counties,[158] school boards,[159] ex-

156. *Id.*; *see also* Kwamina Williford & Daniel Small, *Establishing an Effective Compliance Program: An Overview to Protecting Your Organization*, ASS'N OF CORP. COUNS. (Jan. 25, 2013), http://www.acc.com/legalresources/quickcounsel/eaecp.cfm.

157. *E.g.*, CITY OF LONGWOOD, CITY OF LONGWOOD PUBLIC RECORDS POLICY & PROCEDURE (2004), *available at* http://www.longwoodfl.org/filestorage/210/212/314/319/Public_Records_Policy.pdf; CITY OF MAITLAND, CITY OF MAITLAND, FLORIDA, PUBLIC RECORDS REQUEST POLICY (2005), *available at* https://www.itsmymaitland.com/RecordsRequestProcedures.pdf; CITY OF ROCKLEDGE, CITY OF ROCKLEDGE: PUBLIC RECORDS POLICY AND PROCEDURES (2015), *available at* http://www.cityofrockledge.org/DocumentCenter/Home/View/1700; CITY OF SATELLITE BEACH, CITY OF SATELLITE BEACH, FLORIDA: PUBLIC RECORDS POLICY—INSPECTING AND DUPLICATING, *available at* http://www.satellitebeachfl.org/Documents/Public%20Records%20Policy%202-15-07.pdf; City of Deltona, *Public Records Request Policy*, CI.DELTONA.FL.US, http://www.ci.deltona.fl.us/Pages/DeltonaFL_Depts/DeltonaFL_Clerk/FOIA (last visited Apr. 14, 2015); City of Plantation, *City Clerk: Guidelines for Public Records Request*, PLANTATION.ORG, http://www2.plantation.org/City-Clerk/public-records-request.html# (last visited Apr. 14, 2015); Town of Windermere, *Town of Windermere, Florida Public Records Request Policy (Amended)*, TOWN.WINDERMER.FL.US, http://www.town.windermere.fl.us/pView.aspx?id=23887&catid=484 (last visited Apr. 14, 2015).

158. *E.g.*, COLUMBIA CNTY., COLUMBIA COUNTY, FLORIDA: PUBLIC RECORDS REQUEST POLICY, *available at* http://www.columbiacountyfla.com/downloads/columbia_county_records_request_policy.pdf; GULF CNTY., GULF COUNTY, FLORIDA: PUBLIC RECORDS REQUEST "PRR" POLICY (2011), *available at* http://www.gulfcounty-fl.gov/pdf/13696512020400.pdf; OKALOOSA CNTY., PUBLIC RECORDS REQUEST POLICY (2010), *available at* http://www.co.okaloosa.fl.us/Dept_docs/doc/prr_policy.pdf; ST. JOHNS CNTY., GROWTH MANAGEMENT SERVICES RECORDS MANAGEMENT PROGRAM: PUBLIC RECORDS POLICIES AND PROCEDURES (2008), *available at* http://www.co.st-johns.fl.us/GrowthManagement/media/PublicRecordsPoliciesandProcedures2008.pdf.

ecutive branch departments,[160] and other Florida governmental entities[161]—publish their public records standards and procedures online. Generally, these policies help educate the agency staff and the public on topics such as the definition of a public record, exemptions to disclosure, procedures for requesting different records, timeframes for fulfillment of requests, and possible fees to be assessed. At a minimum, every public servant should know that a request for public records can be oral[162] and should be trained to promptly resolve minor requests for documents in his or her immediate possession.[163] For documents not in a person's possession, public employees should be trained to immediately direct a citizen to the record custodian or other proper point of

159. *E.g.*, BREVARD PUB. SCHS., RECORDS MANAGEMENT MANUAL: POLICIES AND PROCEDURES (2012), *available at* http://districtcommunications.brevardschools.org/RecMgt/Publications_Guides/Records_Management_Manual-Policies-Procedures.pdf; Sch. Bd. of Collier Cnty., *The School Board of Collier County Administrative Procedures: 8310A—Public Records Requests*, NEOLA.COM, http://www.neola.com/collier-fl/search/ap/ap8310a.htm (last visited Apr. 14, 2015).

160. *E.g.*, Dep't of Elder Affairs, *Public Record Request Procedure*, EDLERAFFAIRS.STATE.FL.US, http://elderaffairs.state.fl.us/doea/record_request.php (last visited Apr. 14, 2015); Fla. Dep't of Fin. Servs., *Public Records Requests: Making a Public Records Request to DFS*, MYFLORIDACFO.COM, http://www.myfloridacfo.com/sitepages/required/publicrecords.aspx (last visited Apr. 14, 2015).

161. FLA. DEP'T OF JUVENILE JUSTICE POLICY, REQUESTS FOR DEPARTMENT RECORDS (2009), *available at* http://www.djj.state.fl.us/docs/policies/request-departmental-records-policy-djj-1910.pdf?sfvrsn=4; FLA. DEP'T OF JUVENILE JUSTICE PROCEDURE, REQUESTS FOR DEPARTMENT RECORDS PROCEDURES (2009), *available at* http://www.djj.state.fl.us/docs/policies/request_departmental_records_procedures_djj-1910_signed6-24-09.pdf?sfvrsn=0; ORLANDO HOUSING AUTHORITY, PUBLIC RECORDS POLICY FOR THE HOUSING AUTHORITY, *available at* http://www.orl-oha.org/documents/publicrecordspolicyphaform042013.pdf; Miami-Dade Cnty., *Public Records*, MIAMIDADE.GOV, http://www.miamidade.gov/transparency/public-records.asp (last visited Apr. 14, 2015).

162. Fla. Att'y Gen. Op. 80-57 (June 17, 1980), *available at* http://www.myfloridalegal.com/ago.nsf/ Opinions/29B1FE397E99E1238525658D005C903B ("There is no express or implied requirement in the statute that the requesting party make the demand in person, as opposed to requesting copies by telephone or in writing, and I decline to read such a requirement into the statute. Therefore, in the absence of such a requirement, and in view of the public policy enunciated in the cited cases, it is my opinion that a request for *copies* of records which is sufficient to identify the records desired must be honored by the custodian, whether the request is in writing, over the telephone, or made in person, so long as the required fees are paid.").

163. The "duty of disclosure" imposed by FLA. STAT. § 119.07(1) (2014) applies to "'[e]very person who has custody of a public record.'" Puls v. City of Port St. Lucie, 678 So. 2d 514, 514 (Fla. 4th Dist. Ct. App. 1996) (quoting FLA. STAT. § 119.07(1)). The custodian of a record, for purposes of the public records laws, includes all agency personnel "who have it within their power to release or communicate public records." Mintus v. City of West Palm Beach, 711 So. 2d 1359, 1361 (Fla. 4th Dist. Ct. App. 1998) (citing Williams v. City of Minneola, 575 So. 2d 683, 687 (Fla. 5th Dist. Ct. App. 1991)).

contact.[164] In addition, public servants should read and keep a copy of the Florida Attorney General's *Government-in-the-Sunshine-Manual*[165] at hand. The book offers a searchable and readable question and answer summary of decades of caselaw on open government and is an indispensable tool for public records compliance.[166]

But true compliance with the public records laws requires more than just a published manual. A governmental entity could have excellent policies and procedures, a well-trained staff, leadership fully dedicated to ethical compliance with the public records laws, and a robust reporting, monitoring, and enforcement process. Yet, it can still fall short, in substance, of the constitutional goal of giving every person a right to inspect or copy any public record.

To fully embrace the public records laws means that a governmental entity should embrace the right of public access. The underlying goal of an informed public can be achieved through the affirmative effort of publishing and disseminating government records—even without a request. Greater transparency can be readily accomplished because the Internet has made public access easier.[167] For example, governments can easily publish

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164. Courts have concluded that the public records law's reference to a "records custodian" does not alter the "duty of disclosure" imposed by Section 119.07(1) of the Florida Statutes; rather, the duty of disclosure is upon *"[e]very person* who has custody of a public record." *Puls*, 678 So. 2d at 514. Thus, any person who has custody of a record must disclose that record. But not every public servant can immediately answer every public records request, and may not be a custodian of the record. *See, e.g.*, *Mintus*, 711 So. 2d at 1361 ("The mere fact that an employee of a public agency temporarily possesses a document does not necessarily mean that the person has custody as defined by [S]ection 119.07."). Moreover, requests can require additional time for redactions and reviews. *See, e.g.*, Lang v. Reedy Creek Improvement Dist., No. CJ-5546, slip op. at 2, 7–8 (Fla. 9th Cir. Ct. Oct. 2, 1995) (rejecting a claim that the agency should have produced requested records within ten-, twenty-, and sixty-day periods because the nineteen different public records requests, which involved 135 categories of information and records, required time and a considerable amount of review and redaction of exempt information), *aff'd per curiam*, 675 So. 2d 947 (Fla. 5th Dist. Ct. App. 1996) (table).

165. GOVERNMENT-IN-THE-SUNSHINE-MANUAL, *supra* note 94.

166. *Id.*

167. The Obama Administration, for example, expressed its commitment to transparency and the use of the Internet in its Memorandum from Peter R. Orszag, Director, Office of Management and Budget, to Heads of Executive Departments and Agencies, *Open Government Directive* 1, 8 (Dec. 8, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf; *see also* WENDY R. GINSBERG, THE OBAMA ADMINISTRATION'S OPEN GOVERNMENT INITIATIVE: ISSUES FOR CONGRESS (2011), *available at* http://fas.org/sgp/crs/secrecy/R41361.pdf (discussing the Obama Administration's directive to make the government more transparent and providing examples of how Con-

their rules and orders online, which is something explicitly encouraged by Florida law.[168] The agendas and backup material for collegial boards can be posted in advance of the public meetings, which is a practice consistent with other open governance statutes.[169] Once again, many governmental entities do just that, and more.[170]

In addition to the routine publication of various types of public records, specific projects of great public importance might also warrant special consideration. When the South Florida Water Management District (SFWMD) was engaged in an effort to acquire all the assets of the United States Sugar Corporation in 2008, the enormous $2 billion deal made international news.[171] The highly controversial proposal also became the subject of great public scrutiny, leading to an abundance of public records requests.[172] But SFWMD took a highly proactive approach. On a webpage dedicated to the proposed "Reviving the River of Grass" transaction, SFWMD published nearly every non-exempt public

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gress may respond to it). Despite good intentions, criticisms remain. *See, e.g.*, Shkabatur, *supra* note 84, at 80–81 (questioning whether the Obama Administration's open government directive "succeed[s] in improving public accountability").

168. FLA. STAT § 119.01(2)(e) (2014) ("Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible.").

169. The Florida Statutes require various governmental agency meetings to be open to the public and further requires that "minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection." FLA. STAT. § 286.011(1)–(2) (2014). In addition, the Florida Statutes require that "[e]xcept in the case of emergency meetings, each agency shall give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Register and on the agency's website not less than [seven] days before the event. The notice shall include a statement of the general subject matter to be considered." FLA. STAT. § 120.525.

170. For example, Martin County, Florida, provides ready access to virtually all of its public meeting documents through an Internet portal with searchable date ranges. Martin Cnty., *Public Meeting Documents: Agendas and More!*, MARTIN.FL.US, http://www.martin.fl.us/portal/page?_pageid=356,1923330&_dad=portal&_schema=PORTAL (last visited Apr. 14, 2015).

171. Jim Loney, *Florida to Buy Chunk of Everglades from Sugar Firm*, REUTERS (June 24, 2008, 4:42 PM EDT), http://www.reuters.com/article/2008/06/24/us-usa-everglades-idUSN2433223220080624.

172. *See* S. Fla. Water Mgmt. Dist., *Public Records Requests*, SFWMD.GOV, http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_koe/pg_sfwmd_koe_riverofgrass_publicrecords (last visited Apr. 14, 2015) [hereinafter *Public Records Requests*] (providing copies of the public records requests received in response to the acquisition of the sugar firm for years 2008 to 2010).

record associated with the deal.[173] It published the video and audio files and PowerPoint presentations,[174] the contracts and due diligence documents,[175] the amendments to the proposal as they were negotiated,[176] and even the daily news clips.[177] When public records requests were made for material not otherwise posted online, it even published those requests and the responsive documents.[178]

Online publication of an agency's public records provides an effective demonstration of commitment to open governance. By embracing transparency, government agencies can enhance public access and improve their own accountability and credibility, especially by releasing substantive information on their own decision-making processes and on their substantive performances.[179] Moreover, transparency comes with an additional benefit—being able to quickly respond to some public records requests by informing the requester that the desired documents are already available online. In other words, online publication ensures that governmental entities fulfill the fundamental purpose of the public records laws and the Florida Constitution by providing public access to government information.

### *2. Managing Costs*

In theory, a governmental entity's decision to post vast amounts of material online offers a rational and effective tool to enhance compliance with the public records laws. Although this

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173. S. Fla. Water Mgmt. Dist., *River of Grass Land Acquisition Archive*, SFWMD.GOV, http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_koe/pg_sfwmd_koe_riverofgrass (last visited Apr. 14, 2015) [hereinafter *River of Grass Land Acquisition Archive*].

174. S. Fla. Water Mgmt. Dist., *Presentations and Discussions*, SFWMD.GOV, http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_koe/pg_sfwmd_koe_riverofgrass_presentations (last visited Apr. 14, 2015).

175. S. Fla. Water Mgmt. Dist., *Acquisition Documents: Contracts and Due Diligence*, SFWMD.GOV, http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_koe/pg_sfwmd_koe_riverofgrass_acquisition (last visited Apr. 14, 2015).

176. *River of Grass Land Acquisition Archive*, *supra* note 173.

177. S. Fla. Water Mgmt. Dist., *Guest Opinions, Editorials and News Articles*, SFWMD.GOV, http://www.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_koe/pg_sfwmd_koe_riverofgrass_guest (last visited Apr. 14, 2015).

178. *Public Records Requests*, *supra* note 172.

179. Shkabatur, *supra* note 84, at 81 (discussing transparency policies and arguing that policies should focus on including "structured information on [agency] decisionmaking processes and on [agency] performance" because these two categories of information "are most pertinent for public accountability purposes").

can be a costly process, such is the price of good governance. Agencies must design systems to comply with the public records laws and provide necessary staff or information technology systems.[180] In ideal and even normal circumstances, the investment to comply with Florida's public records laws will produce an informed public through information access.

But even with the most abundant of financial resources, and even with the most idealistic of motives, a government agency routinely finds that there are limits to what it can do. Creation of the necessary electronic platforms takes time, effort, funding, as well as substantial information technology expertise. Large volumes of emails and text messages, in particular, can make implementation of the public records law especially challenging.[181] And before being posted online, documents must be carefully scrubbed to ensure that exempt material is not accidentally made public.[182] Ambiguities in the exemptions must also be carefully assessed.[183] Sometimes, even if an agency is willing and able to widely publish its information, the type of record, such as large detailed maps or scientific databases, or the risks of that information being modified, can create special obstacles to embracing public access. As a result, as a practical matter, not every document can be made available online.

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180. FLA. STAT. § 119.01(2)(a) (2014) ("Automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.").

181. Cheryl Cooper, Comment, *Sending the Wrong Message: Technology, Sunshine Law, and the Public Record in Florida*, 39 STETSON L. REV. 411, 422–23 (2010); Op-Ed., *Governor's End Run Around Public Records Law*, FLA. TIMES-UNION (April 22, 2014, 2:36 PM EDT), http://jacksonville.com/opinion/editorials/2014-04-22/story/governors-end-run-around-public-records-law (discussing applicability of public records laws to text messages by administration employees); Morgan Watkins, *Text Messages as Public Records: A New Set of Issues*, GAINESVILLE SUN (March 10, 2013, 10:14 PM EDT), http://www.gainesville.com/article/20130310/ARTICLES/130319994.

182. Although an agency is not required to provide direct access to the agency's electronic records through a hard drive provided by a requester, it must otherwise allow inspection and copying of such records in a manner that will accommodate the request and protect from disclosure exempt or confidential materials. Fla. Att'y Gen. Op. 2013-07 (Apr. 1, 2013), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/63B1E6EF101AA01685257B41004A23AA.

183. Ambiguities in the exemptions create special complications too. For example, consider whether mail containing Federal Express account numbers can be redacted. A Florida statute provides an exemption for "[b]ank account numbers and debit, charge, and credit card numbers." FLA. STAT. § 119.071(5)(b). But does a Federal Express account number, printed on a mailing label, constitute a "charge . . . number"? *Id.*

Of course, the public will still have a right to access those documents—for a price. Public access does not necessarily mean at no cost to the person making the request. Sometimes, costs are strictly determined by law. Florida's public records laws authorize the government to collect a fee of up to fifteen cents per one-sided copy for copies that are 14 inches by 8 1/2 inches or less, up to twenty cents for each two-sided copy, and up to $1.00 for a certified public record.[184] For other copies, a charge is allowed for the actual cost of duplication.[185] Alternatively, Florida law allows a "special service charge" when "the nature or volume of public records requested to be inspected . . . require[s] extensive use of information technology resources or extensive clerical or supervisory assistance . . . or both."[186]

When implementing these special service charges, the government must be fair not only to the requester, but also to the rest of the public. Agencies must be sure to develop appropriate documentation to support "reasonable" special service charges based on the actual costs of the information technology and labor resources.[187] Some Florida courts have required agencies to communicate to the requester, before beginning work, an estimate of the total charge or the hourly rate to be applied so that the requester can determine whether it appears reasonable under the circumstances.[188] Other courts have noted that the request for an advance deposit is prudent to ensure that taxpayers do not bear the full cost of complying with a public records request.[189]

But requiring a deposit is not a sufficient measure to prevent the potential for abuse of the public records laws. By filing dozens, hundreds, or even thousands of public records requests, a citizen can overwhelm a governmental entity. In these instances, governmental entities should be sure to track the requests and to document the facts as best they can. When the inevitable debate

184. *Id.* § 119.07(4)(a)(1)–(2), (4)(c).
185. *Id.* § 119.07(4)(a)(3).
186. *Id.* § 119.07(4)(d).
187. *Id.*
188. Herskovitz v. Leon Cnty., No. 98-22, slip op. at ¶ 6 (Fla. 2d Cir. Ct. June 9, 1998), *available at* http://myfloridalegal.com/sun.nsf/cases/79A163A3D00E070D852578490076EC3C/$file/Herskovitz+vs.+Leon+County+2.pdf.
189. Bd. of Cnty. Comm'rs of Highlands Cnty. v. Colby, 976 So. 2d 31, 37 (Fla. 2d Dist. Ct. App. 2008) (stating that a "policy of requiring an advance deposit seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records").

over the reasonableness of a delayed response arises, the government will need to be able to provide evidence of the problem.

Notably, while some states, and even FOIA, provide timeframes for responding to a public records request, Florida's public records law does not provide such a specific time frame for a response to be provided. Nevertheless, the Florida Supreme Court has been openly intolerant of delay, stating that the only permitted delay in producing records "is the limited reasonable time allowed [for] the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt."[190] Thus, the reasonableness of the delay can become a question of fact—sadly, potentially necessitating a costly trial for the agencies, entities, or persons responsible for responding to the public records request even when a request had been fulfilled.

When large volumes of documents have been requested or substantial redactions of exempt information might be needed, courts have upheld substantial special service charges and longer periods of time for disclosure of the requested records.[191] One divided appellate court upheld an agency rule allowing the imposition of service charges based on the aggregation of multiple requests that collectively would take more than fifteen minutes of time.[192] Such a rule, however, will not stop the requests. To begin

190. Tribune Co. v. Cannella, 458 So. 2d 1075, 1079 (Fla. 1984).

191. *See, e.g.*, *Herskovitz*, slip op. at ¶¶ 5–6 (In view of the "nature and volume of the materials requested[, which included over 9,000 pages], their location, and the need for close supervision by some knowledgeable person of the review of those records for possible exemptions," the county's need for several weeks to produce records was not unreasonable.); Lang v. Reedy Creek Improvement Dist., No. CJ-5546, slip op. at 7–8 (Fla. 9th Cir. Ct. Oct. 2, 1995) (finding that an agency's response to public records requests for 135 categories of information and records, which were filed by an opposing party in litigation, was reasonable in light of the cumulative impact of the requests and the need for a considerable amount of review and redaction), *aff'd per curiam*, 675 So. 2d 947 (Fla. 5th Dist. Ct. App. 1996) (table).

However, for the Clerk of Court, a "fee may not be charged for the redaction of a social security number or a bank account, debit, charge, or credit card number pursuant to such request." FLA. STAT. § 119.0714(2)(c). Instead, the clerk must keep social security numbers confidential and exempt pursuant to Section 119.071(5)(a) of the Florida Statutes, and bank account, debit, charge, and credit card numbers must be kept exempt as provided for in Section 119.071(5)(b) without any person having to request redaction.

192. Fla. Inst. Legal Servs., Inc. v. Fla. Dep't of Corr., 579 So. 2d 267, 267–69 (Fla. 1st Dist. Ct. App. 1991). The dissenting judge argued that Florida law prevented the agency from aggregating multiple public records requests when calculating the appropriate fees:

> The rule defines "extensive" as requiring a clerk to expend at least fifteen minutes of time. The hearing officer's order contains a finding that fifteen minutes is not in itself extensive, but justifies treating this short limitation as "extensive"

with, its purpose can be evaded by multiple requesters who simply file daily requests for records, demanding only the number of records that can be produced in fifteen minutes or less—a practice currently being endured by the Town of Gulf Stream.[193] Furthermore, even the possibility of requiring a public records requester to pay for some of the costs of responding to a request will not stop the well-funded requester.

The prospect of a small governmental entity being overwhelmed by an overabundance of public records requests parallels the circumstances created by litigators who once toyed with the rules of civil procedure. Well-financed law firms with large clients could bury smaller opponents in the discovery process. Discussing the problem of excessive requests in the context of interrogatories and civil procedure, one scholar explained that:

> [a] broad interrogatory practice can thus occasion gross inefficiencies and encourage abuse. This is particularly true for big-ticket cases, where the stakes frequently motivate parties to litigate by hook or crook. But interrogatory abuse can reach smaller cases as well, where moneyed parties can protract discovery beyond the means of their less wealthy opponents.[194]

To end the tactical abuse of civil procedure, the rules were amended to be consistent with the goals of ensuring the "just,

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within the meaning of the statute by reason of the "cumulative effect of numerous requests" for information from the agency. I find no language in section 119.07(1)(b) that supports a notion that this section contemplates the cumulative effect of numerous requests in determining what is "extensive." On the contrary, this section is written in terms of a single request, and it is clear to me that unless a single request for location and review of public records requires "extensive" time, no charge may be made for the service pursuant to the statute. In view of the hearing officer's finding that fifteen minutes per se is not extensive, neither the record nor section 119.07(1)(b) supports the validity of this rule requirement.

*Id.* at 270. If this dissenting view ever became law, the public records laws would collapse—one citizen could send thousands of tiny public records requests, each designed to be small enough to stay under the fifteen minute (or other) threshold, but collectively requiring countless amounts of time. The government would have no hope at all of cost recovery; the government would be sued for alleged non-compliance and unreasonable delays; and the taxpayers would foot the bill.

193. *See, e.g.*, *Public Records Request Log*, *supra* note 122 (noting that one person was responsible for more than 400 public records requests).

194. David S. Yoo, Comment, *Rule 33(a)'s Interrogatory Limitation: By Party or by Side?*, 75 U. CHI. L. REV. 911, 912–13 (2008).

speedy, and inexpensive determination of every action."[195] Federal civil procedure now allows only twenty-five written interrogatories, including discrete subparts,[196] and many states have imposed similar constraints.

Just like the interrogatory abusers of the past, people using Florida's public records laws can intentionally burden poorer and smaller governmental agencies with public records requests. Eventually, just as the courts rewrote civil procedure, the Florida legislature will need to consider limiting the number of public records requests that can be made. But until reform happens, the governmental entities trying to comply with the public records laws must rely upon the law's limited cost recovery tools as the sole mechanism to deal with large volumes of public records requests. On this subject, two legal opinions warrant careful review.

First, in *Lozman v. City of Riviera Beach*,[197] the Florida Fourth District Court of Appeal considered a situation where a citizen had requested public records related to meeting transcripts covering a two-year period and "emails and letters between numerous people over a [three-year] period."[198] The city compiled the copies of the records and requested payment for $233.50.[199] Lozman, however, refused to pay and instead requested other documents.[200] The city, in turn, refused to do any further work until the outstanding debt was paid.[201] Rejecting Lozman's subsequent complaint seeking a writ of mandamus, the court held, in a short opinion, that the public records law "does not require the [c]ity to do any more than what it did in this case."[202] Taking this case to its logical conclusion, a governmental entity could simply refuse to respond to any public records requests made by the same individual until the debts associated with prior requests are settled.

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195. FED. R. CIV. PRO. 1 ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

196. *Id.* at 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than [twenty-five] written interrogatories, including all discrete subparts.").

197. 995 So. 2d 1027 (Fla. 4th Dist. Ct. App. 2008).

198. *Id.* at 1028.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

Second, in a formal opinion issued to the City of Lake Worth, the Florida Attorney General concluded that not only could the city seek a monetary deposit for its actual costs incurred in making copies to comply with a public records request, but the city could also "bill the requester for any shortfall between the deposit and the actual cost[s]."[203] In fact, even after the requesting party advised the city that the copies were no longer needed, the Florida Attorney General concluded that the city's "clerk [was] entitled to receive payment for the entire amount of the value of his or her services as authorized by the statute."[204]

These decisions provide helpful (but still incomplete) tools that can be used by a governmental entity to manage the requests made by a single person. Charges and bills for public records services, however, and even the possibility of the cessation of work for unpaid bills, will not stop the well-financed and zealous public records litigant. If the requester pays the deposits or withdraws some requests and files others, the government is still forced to respond. Meanwhile, time spent on public records is time not spent on the rest of the government's business, which is an especially vexing problem for a small governmental entity with a small number of employees capable of working on the public records responses. Anonymous requests, as discussed below, provide another problem. A careful and well-organized strategy for requesting deposits and recovering costs is, at a minimum, an important component of any governmental entity's efforts to contain the public records process. But by itself, it is wholly inadequate to solve the problems of extreme sunshine and misuse of the public records laws.

### *3. Enforcing Laws Without Citizen Lawsuits*

When documents are not made public as required or when costs are improperly imposed, an enforcement mechanism becomes necessary. The government must, of course, be held accountable to comply with the law. But an important question should also be considered: enforcement by whom?

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203. Fla. Att'y Gen. Op. 2005-28 (Apr. 28, 2005), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/C6EF678CEB69883B85256FF1005C71B1.

204. *Id.*

As a matter of both law and fact, the Florida Attorney General, who is the constitutional "chief state legal officer,"[205] possesses expertise with the state public records law. The Attorney General's office publishes the annual *Government-in-the-Sunshine-Manual*[206] and has offered hundreds of advisory opinions on the public records laws.[207] The Attorney General is also responsible for public records training.[208] In addition, the Attorney General has a statutory duty to implement a public records mediation program and to provide a formal, non-adversarial assistance to parties in identifying issues, "fostering joint problem solving, and exploring settlement alternatives."[209]

To a degree, the Attorney General has abdicated its role in enforcement of the public records laws to the citizen. To some, the yielding of authority makes sense. For example, when the media, the prisoner, or the regulated entity seeks information and is denied access, the affected person who has a right of access has both an equitable basis for a claim and a special understanding of the circumstances to justify a citizen suit.

But public records compliance need not be different from other areas of executive authority. If the legislature and citizenry are genuinely concerned that Florida's public records laws need enforcement, then they should consider enhancing the way public records laws are policed within the state. The State Attorney's office already has authority to prosecute criminal and noncriminal cases involving the public records and public meetings laws.[210]

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205. FLA. CONST. art. IV, § 4(b).

206. GOVERNMENT-IN-THE-SUNSHINE-MANUAL, *supra* note 94.

207. Fla. Office of the Attorney Gen., *Search for Advisory Legal Opinions*, MYFLORIDALEGAL.COM, http://www.myfloridalegal.com/ago.nsf/Web+Search+Simple?OpenForm (last visited Apr. 14, 2015) (searching for the term "public records" reveals more than five hundred advisory opinions).

208. FLA. STAT. § 16.60(3)(c) (2014) (requiring the Attorney General to "[a]ssist the Department of State in preparing training seminars regarding access to public records").

209. *Id.* § 16.60(1).

210. "A state attorney may prosecute suits charging public officials with violation of Florida's Public Records Law," including those violations that may result in a finding of guilt for a noncriminal infraction. Fla. Att'y Gen. Op. 91-38 (May 30, 1991), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/85126F70134B81FA852562A80057D7F3; *see also* FLA. STAT. § 286.011(3)(a) (imposing noncriminal penalties and a fine of up to $500 for violations of the Sunshine Law); State v. Foster, 12 Fla. L. Weekly Supp. 1194a (Fla. Broward Cnty. Ct. Sept. 26, 2005) (providing an example where county commissioners where charged with a noncriminal infraction of Florida's public records law); *cf.* State v. Foster, 13 Fla. L. Weekly Supp. 385a (Fla.17th Cir. Ct. Jan. 25, 2006) (finding that

Elsewhere in government, ethics commissions exist to ensure enforcement of and compliance with various local government ethics laws.[211] Surely, the Attorney General's office can serve a similar role. It could audit governmental entities by sending public records requests to the government, evaluate the results, and engage in follow up training or enforcement measures.[212] To reduce the perceived need for enforcement by self-proclaimed citizen watchdogs, the Attorney General could also make its data public. But Florida's governmental entities, like their counterparts in Washington State seeking legislative reforms,[213] need to demand the change and must be prepared to police themselves effectively.[214]

### B. Judicial Interpretation: Exercising Caution

Until and even after reforms to the public records laws are made, citizens can and will bring public records cases to court. The reality for the governmental entity is that once a matter reaches the Florida judiciary, the case is likely to be resolved against it. A Florida appellate court held, "If there is any doubt about the application of the law in a particular case, the doubt is resolved in favor of disclosing the documents."[215] Precedent

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there is no right to a jury when an individual faces a noncriminal violation of the Sunshine Law).

211. *E.g.*, Miami-Dade Comm'n on Ethics & Pub. Trust, *About the Miami-Dade Commission on Ethics and Public Trust*, ETHICS.MIAMIDADE.GOV, http://ethics.miamidade.gov/about.asp (last visited Apr. 14, 2015); Palm Beach Cnty. Comm'n on Ethics, *Home*, PALMBEACHCOUNTYETHICS.COM, http://www.palmbeachcountyethics.com/ (last visited Apr. 14, 2015).

212. As noted earlier in this Article, the Department of State already prepares training seminars related to the public records laws. FLA. STAT. § 16.60(3)(c).

213. *See supra* notes 51–60 and accompanying text (discussing issues that have arisen in the State of Washington because of public records laws and how government entities are calling for reform).

214. During the 2014 session, the Florida Legislature considered a number of bills that would make the public records laws even more onerous for government. One bill even sought to reduce the special service charges that the government agency could assess for the costs of producing records, requiring government (and taxpayers) to further subsidize the already high costs of voluminous requests. Incongruously, a Florida state senator who endured a reporter's repeated public records requests criticized them as a "fishing expedition." Matt Dixon, *Public Records Request Brings Profanity-Laced Response from Florida Ethics Chairman*, FLA. TIMES-UNION (Mar. 12, 2013, 2:27 AM), http://jacksonville.com/news/florida/2013-03-11/story/public-records-request-brings-profanity-laced-response-florida-ethics.

215. Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1206 (Fla. 1st Dist. Ct. App. 2009).

speaks for itself. A review of more than forty Florida Supreme Court cases citing Section 119.07 of the Florida Statutes, which codifies the right to inspect and copy public records, demonstrates the strict construction and pro-requester manner in which the law has been interpreted and implemented. Exemptions for law enforcement information have been narrowly construed in favor of the requester.[216] Other categories of documents traditionally deemed to be confidential, including medical documents, hospital records, employment records, and even attorney records, have also been found to fall within the disclosure requirements of the public records laws.[217] Neither individual privacy considerations,

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216. *See, e.g.*, Lightbourne v. McCollum, 969 So. 2d 326, 332–33 (Fla. 2007) (The public records act "is to be construed liberally in favor of openness," and two Department of Corrections memoranda discussing the lethal injection procedures and the methods for assessing an inmate's level of consciousness during an execution, despite being prepared by counsel, were public records because they were not prepared "exclusively for litigation" and "conveyed specific factual information rather than mental impressions or litigation strategies."); Provenzano v. Dugger, 561 So. 2d 541, 547 (Fla. 1990) (stating that the criminal investigative information exemption in public records laws "expire[ ] when the defendant's conviction and sentence bec[o]me final"); State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990) (finding that a criminal was entitled to disclosure of the state attorney's files, but only documents defined as public records were to be disclosed).

217. *See, e.g.*, Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936, 941 (Fla. 2002) (stating that "[a]bsent an applicable statutory exception, pursuant to Florida's Public Records Act . . . public employees (as a general rule) do not have privacy rights in [employment] records"); Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp., 784 So. 2d 438, 441 (Fla. 2001) (finding that "the right of access to public records is a substantive right," and a statute exempting from disclosure records and meetings of corporations that lease public hospitals if certain conditions are met was "presumptively prospective," and in the absence of clear legislative intent, could not be applied retroactively); Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 384 (Fla. 1999) (concluding that private entity was subject to public records request based on *Schwab* factors); Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 119 (Fla. 1988) (finding that a sealed file did not contain protected information, and all portions of a trial are subject to public disclosure, including medical reports, which are generally protected by a person's right to privacy); Michel v. Douglas, 464 So. 2d 545, 546 (Fla. 1985) (finding that employee records, kept as part of tax-supported hospital's employee records, were public records within the scope of the Public Records Act); City of N. Miami v. Miami Herald Publ'g Co., 468 So. 2d 218, 220 (Fla. 1985) (stating that "[t]he lawyer-client privilege section of [C]hapter 90 does not exempt written communications between lawyers and governmental clients from disclosure as public records, but [S]ection 119.07(3)(o) does provide a limited exception within its terms"); Wait v. Fla. Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979) (stating that the provision of the Public Records Act that all public records which are "deemed by law to be confidential" or which are "prohibited from being inspected by the public, whether provided by general or special acts . . . [or which] shall be exempt" operates to "exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product"); News-Press Publ'g Co. v. Wisher, 345 So. 2d 646, 648 (Fla. 1977) (finding that documents discussing possible termination and were placed in personnel file of county employee were public records).

nor the government's objectives of efficiency, have altered the pro-requester interpretation of the public records laws.[218] In the cases where a public records requester ultimately lost, the cases involved a judicial finding that an existing exemption applied,[219] a

218. *See, e.g.*, Henderson v. State, 745 So. 2d 319, 326–27 (Fla. 1999) (amending the Florida Rules of Criminal Procedure, and finding that in a criminal defendant's use of the public records laws to expand the scope of discovery, the defendant could use Chapter 119 to obtain otherwise unavailable documents, but in so doing, triggered a reciprocal discovery obligation for the defendant); Tribune Co. v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984) (The custodian of records does not need to be present during the inspection or even be given notice that an inspection has been given or made, and a delay in the inspection of the records "is not within the legislative scheme."); Forsberg v. Hous. Auth. of City of Miami Beach, 455 So. 2d 373, 379 (Fla. 1984) (stating that the public examination of housing authority files is a "reasonable intrusion necessary to implement the state interest of having the public know how [the] agency [works]"); Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 640–41 (Fla. 1980) (Neither the state nor federal right of privacy prevent public disclosure of papers prepared by a management recruitment consultant; and "letters, memoranda, resumes, and travel vouchers made or received by the consultant" were public records; only the handwritten and preliminary notes still to be finalized were not public records.); Lewis v. Bank of Pasco Cnty., 346 So. 2d 53, 55 (Fla. 1976) (finding that a statute declaring banking information to be confidential except when released "with the consent of the department" delegated "unrestricted and unlimited power to exempt particular records" and was therefore unconstitutionally broad (internal citations omitted)); State *ex rel.* Cummer v. Pace, 159 So. 679, 681 (Fla. 1935) ("The fact that the city . . . owns and operates as a public utility its municipal docks and terminals in a proprietary, instead of a governmental, capacity" does not give it the right to deny a citizen examination of its "books and records . . . including those relating to and covering the details of its operation of its municipal docks and terminals."); State *ex rel.* Davidson v. Couch, 156 So. 297, 299 (Fla. 1934) ("The language of the statute . . . accords the privilege of personal inspection of municipal records" in a county to any citizen of Florida, even if the citizen is not a citizen of the county in question.); *cf.* Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000) (declaring the Death Penalty Reform Act unconstitutional to the extent it "regulate[d] the procedure for public records production in capital cases").

219. *See, e.g.*, Chavez v. State, 132 So. 3d 826, 828, 830 (Fla. 2014) (A prisoner awaiting sentence of death was not entitled to records because relevant rules of executive clemency stated that "all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential." (internal citations omitted) (typeface altered)); Bryan v. State, 753 So. 2d 1244, 1251 (Fla. 2000) (upholding the constitutionality and public necessity for an exemption of the executioner's identity); Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998) (finding that "the transfer of a document from one agency to another [does not] nullif[y] the exempt status of the record"); State v. Buenoano, 707 So. 2d 714, 717–18 (Fla. 1998) (finding that documents "made available to the State Attorney by the federal government on a 'confidential or similarly restricted basis' . . . were criminal intelligence or investigative information" and were inadvertently "given . . . in violation of the terms of the loan agreement and [public records laws]," so court should have issued a protective order); Lopez v. State, 696 So. 2d 725, 728 (Fla. 1997) (holding that an "attorney's handwritten notes dealing with trial strategy and cross-examination of witnesses were not public records"); Roberts v. Butterworth, 668 So. 2d 580, 582 (Fla. 1996) (finding that, "for purposes of capital collateral litigation," the work product exemption applies "whether a death-sentenced person is represented by private counsel or state-appointed counsel"); Times Publ'g Co. v. A.J., 626 So. 2d 1314, 1315 (Fla. 1993) (holding that "child protection statutes and the accompanying public-records law exceptions give standing to the noncustodian of a public record to assert a statutory exception *provided*

matter where a requester failed to pay required costs,[220] or otherwise involved preliminary judicial records or attorney notes.[221] Even the cases involving remands or the need for other activity tend to demonstrate a strict and pro-requester reading of the statute.[222] Only on rare occasion, where the lines between public and private conduct become blurred (such as cases involving personal emails and government contractors) has the Florida Supreme Court taken a more cautious approach to the public

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the noncustodian is a member of a class the exception was intended to protect"); Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990) (holding that documents in "possession of [Capital Collateral Representative] in furtherance of its representation of an indigent [murder defendant were] not subject to public disclosure under [public records law]"); Fla. Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 34 (Fla. 1988) (stating that "the legislature recognized that there would be occasions where court files containing public records would nevertheless be closed to the public by order of the court"); City of Orlando v. Desjardins, 493 So. 2d 1027, 1028–29 (Fla. 1986) (allowing retroactive application of statutory attorney-client exemption from disclosure under Florida Public Records Act to litigation files); Rose v. D'Alessandro, 380 So. 2d 419, 419–20 (Fla. 1980) (noting that records related to state attorney's investigation would not have been confidential but for the subsequent passage, during the litigation of this case, of pertinent exemptions).

220. *See, e.g.*, Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993) (finding that a prisoner was not entitled to receive copies of documents under the Public Records Act without paying for them).

221. *See, e.g.*, Times Publ'g Co. v. Ake, 660 So. 2d 255, 256 (Fla. 1995) (newspaper was not entitled to attorney's fees because court clerks, when acting under the authority of their Article V powers concerning judicial records and other matters relating to administrative operation of the courts, are not subject to the Public Records Act.); Scott v. Butterworth, 734 So. 2d 391, 391, 393 (Fla. 1999) (affirming that handwritten notes and drafts of pleadings prepared by Attorney General's office were not public records); Johnson v. Butterworth, 713 So. 2d 985, 987 (Fla. 1998) (Notes by attorneys in Attorney General's office were not yet public records; they were "preliminary guides intended to aid the attorneys when they later formalized the knowledge." (internal citations and quotations omitted); Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997) (upholding trial court's conclusion, after in camera review, that prosecutors' personal notes were not public records under Chapter 119); Palm Beach Newspapers, Inc. v. Burk, 504 So. 2d 378, 384 (Fla. 1987) (agreeing that "once a transcribed deposition is filed with the court[,] . . . it is open to public inspection," and finding that "nothing in chapter 119 . . . would point toward the blanket access to unfiled depositions").

222. *See, e.g.*, *Henderson*, 745 So. 2d at 326–27 (amending the Florida Rules of Criminal Procedure, and finding that in a criminal defendant's use of the public records laws to expand the scope of discovery and to obtain otherwise unavailable documents, but in so doing, triggered a reciprocal discovery obligation for the defendant); *Desjardins*, 493 So. 2d at 1029 (remanding for further proceedings regarding the litigation file created by the City of Orlando, and ordering the court to prohibit the disclosure to "only of those records reflecting 'a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency'" (internal citations omitted)); Sch. Bd. of Marion Cnty. v. Pub. Emp. Relations Comm'n, 334 So. 2d 582, 585 (Fla. 1976) (The school board did not specifically allege any of the grounds enumerated in other labor laws that would entitle the Board to examine union authorization cards signed by public employees; case was dismissed without prejudice.).

records law.[223] While public access to the public records is a clearly established and essential civil right, the judiciary should be aware of how its pro-requester precedent is being manipulated. Perhaps the courts should rethink the principles of standing in Florida, as discussed below. In addition, courts must be wary of the reflex to support the right of access to public records; instead, when exercising its role in constitutional and statutory interpretation, the judiciary should carefully consider the particular facts, and the specific language in the statutory scheme.

### *1. Rethinking Standing and Denying Citizen Suits Based on Self-Inflicted Injuries*

In other areas of civil litigation where citizen suits are available, the concept of standing is an important component that prevents needless litigation. Pursuant to the Case or Controversy Clause of the United States Constitution, a federal lawsuit requires an actual, live dispute.[224] The Supreme Court has held that a person bringing suit, to have Article III standing, must suffer an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[225] Often, standing is a major obstacle to the availability of judicial review, especially in the context of environmental citizen suits.[226] Importantly, in the absence of a proper

223. *See, e.g.*, Times Publ'g Co. v. City of Clearwater, 830 So. 2d 844, 845 (Fla. 2d Dist. Ct. App. 2002) (finding that a newspaper's request for personal emails of city employees was properly denied because the emails did not qualify as public records subject to disclosure under the public records statute.), *approved sub nom.*, State v. City of Clearwater, 863 So. 2d 149, 155 (Fla. 2003); News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., 596 So. 2d 1029, 1033 (1992) (stating that "an architectural firm . . . that contracts to provide professional services for the construction of a school is not acting on behalf of a public agency so as to be subject to the provisions of [C]hapter 119").

224. U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party . . . .").

225. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149–50 (2010).

226. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564–66 (1992) (finding that environmental plaintiffs lacked standing because a threatened future injury was not imminent); *see also* David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 304–05 (2007) (stating that the holding in "*Lujan* restricts the availability of judicial review in Article III federal courts to those situations where some party with the ability and inclination to sue has suffered a redressable injury-in-fact"). *See generally* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39,

case or controversy, the doctrine of standing places important limits on the ability of citizens to sue, leaving at least some portion of the law enforcement role to the Executive Branch.

The test of whether a party's standing is "fairly traceable" to a defendant's illegal conduct requires plaintiffs to establish that there exists a "substantial likelihood" that the defendant's conduct caused the plaintiff's harm.[227] But when plaintiff's injury is an injury of the plaintiff's own creation, it can become "unfairly traceable" to the defendant. So, as the courts have warned, an overly broad application of the fairly traceable concept can be problematic;[228] on the other hand, as other legal writers have noted, a broad view of standing may be acceptable when it comes to the exercise of fundamentally beneficial constitutional rights, but only if they outweigh the judicial burdens.[229]

Public records cases create a special circumstance, testing the limits of the principles of standing. Citizens have clear constitutional rights to ask for records. Yet public records laws that empower citizens to file lawsuits are easily abused because citizens can create the circumstances necessary to give themselves standing. A citizen who is determined to harass a governmental entity can send an endless stream of public records requests that are designed to ensure that the overburdened government does not adequately respond to the public records requests. Citing the government's breach of its legal duties, the citizen then sues to remedy the alleged injury. In the federal courts, this type of "manufactured standing" might not survive constitutional scrutiny. For example, in *Clapper v. Amnesty International USA*,[230] a divided United States Supreme Court found that lawyers, journalists, and human rights advocates did not have standing to challenge a provision of the Foreign Intelligence Surveillance Act (FISA).[231] The various plaintiffs argued that government surveil-

39 (2002) (examining "competing approaches to standing" in citizen suits that involve environmental issues).

227. *See, e.g.*, Pub. Interest Research Grp. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990) (stating that the "fairly traceable" test for standing does not require the plaintiff to show "to a scientific certainty" that the defendant was the cause of injury).

228. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996).

229. Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2099–100 (2011).

230. 133 S. Ct. 1138, 1143 (2013); *id.* at 1151.

231. *Id.* at 1155.

lance would intercept their communications with "foreign contacts," requiring costly and burdensome measures to protect the confidentiality of their communications.[232] Applying concepts of standing, the Supreme Court found that the injury was not fairly traceable to the government because the affected parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[233]

State legislatures have also been rebuffed when they tried to manufacture standing by passing legislation specifically designed to cause a federal case or controversy. For example, the Virginia Health Care Freedom Act[234] was a direct response to the individual mandate component of the Patient Protection and Affordable Care Act,[235] and Virginia's Attorney General then sued the federal government on constitutional grounds.[236] Even the writers who supported this type of "manufactured standing" recognized that "[i]t would be naive to ignore the potential for abuse inherent in [this] type of standing."[237] But the Fourth Circuit Court of Appeals later characterized Virginia's law as a "smokescreen" to vindicate a desired policy objective, holding that the state lacked constitutional standing because the law had not injured Virginia's sovereign interests.[238] The Fourth Circuit noted, "[I]f we were to adopt Virginia's standing theory, each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court."[239]

Manufactured standing may prove to be a useful doctrine in federal court to rebut cases where FOIA is abused, and it might

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232. *Id.* at 1141, 1146.

233. *Id.* at 1151; *see also id.* at 1143 (The respondents "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.").

234. VA. CODE ANN. § 38.2-3430.1:1 (2014).

235. 42 U.S.C. § 18091 (2012); 26 U.S.C. § 5000A (2012).

236. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 770 (E.D. Va. 2010), *rev'd*, 656 F.3d 253 (4th Cir. 2011).

237. Crocker, *supra* note 229, at 2099.

238. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011).

239. *Id.* at 272. The Supreme Court denied certiorari for Virginia's appeal. Virginia *ex rel.* Cuccinelli v. Sebelius, 133 S. Ct. 59 (2012). Instead, it heard the constitutional challenge to the federal health care laws in *National Federation of Independent Business v. Sebelius*, which was a case that included private entities and did not address the matter of state standing in its plurality decision upholding the constitution. 132 S. Ct. 2566 (2012).

have parallels in state courts too.[240] But in Florida, the doctrine might be unavailable as a barrier to public records litigation. On the one hand, Florida's courts have stated that litigation requires a "real controversy" because courts cannot merely issue advisory opinions on abstract propositions.[241] Thus, a manufactured controversy need not be adjudicated. In fact, at the appellate level, courts have also held that a party cannot benefit from an "invited error" by appealing a ruling that they invited the lower tribunal to make.[242] On the other hand, for purposes of evaluating a party's standing in the lower court, the Florida Rules of Civil Procedure state that a person with a legally protectable right or interest at stake in an otherwise justiciable controversy is a proper party to obtain judicial resolution of that controversy.[243] The legislature, through statute, elaborated on the constitutional rights of access to public records, defined the scope of their protection, and granted every individual the capacity to sue.[244] Nev-

240. For examples of the "fairly traceable" test of Article III constitutional standing being applied in the FOIA context, see McBurney v. Cuccinelli, 616 F.3d 393, 410 (4th Cir. 2010); Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 253 (D.D.C. 2012); Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998).

241. Merkle v. Guardianship of Jacoby, 912 So. 2d 595, 600 (Fla. 2d Dist. Ct. App. 2005); Orchid Island Props., Inc. v. W.G. Mills, Inc. of Bradenton, 889 So. 2d 142, 143 (Fla. 4th Dist. Ct. App. 2004); Reinish v. Clark, 765 So. 2d 197, 202 (Fla. 1st Dist. Ct. App. 2000); Breakers of Fort Walton Beach Condos., Inc. v. Atl. Beach Mgmt., 552 So. 2d 274, 276 (Fla. 1st Dist. Ct. App. 1989).

242. Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) (holding that under the invited error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal); Zanoletti v. Norle Props., Corp., 688 So. 2d 952, 954 (Fla. 3rd Dist. Ct. App. 1997) (providing that invited error occurs when an appellant "induce[s] the specific ruling by [his or her] affirmative action or inactivity"); Fuller v. Palm Auto Plaza, Inc., 683 So. 2d 654, 655 (Fla. 4th Dist. Ct. App. 1996) ("It is well settled that under the invited error rule 'a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.'"); *cf.* City of Coral Gables v. Levison, 220 So. 2d 430, 431 (Fla. 3rd Dist. Ct. App. 1969) (finding where a party is given an opportunity to correct an alleged error and the party fails to take advantage of that opportunity, the party cannot successfully challenge the alleged error on appeal).

243. *See* FLA. R. CIV. P. 1.210(a) ("All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs . . . ."); Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178, 1183 (Fla. 3d Dist. Ct. App. 1985) (stating that a claim must be brought by a "'real party in interest,' that is, 'the person in whom rests, by substantive law, the claim sought to be enforced'" (internal citations omitted)).

244. FLA. STAT. § 119.11(1) (2014) ("Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases."); *see also* Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So. 2d 1350, 1352 (Fla. 1993) (discussing the interplay between the Florida court's role in determining whether an individual litigant has standing and the legislature's role in granting capacity to sue).

ertheless, Florida Courts must begin to engage in more rigorous scrutiny of public records cases, carefully evaluating whether a party's self-generated injuries form the necessary "legally protectable right" and "real controversy" necessary to and justify public records litigation.

While it may seem romantic and democratic to make every Florida citizen a constitutional watchdog, the watchdogs who file public records requests and bring lawsuits lack the checks and balances that are imposed upon the rest of our government. Unlike trained law enforcement officers and prosecutors, citizens may not know when to exercise discretion. Litigants have their own ulterior motives, including the pursuit of profit through the recovery of attorney's fees and costs.[245] The government simply cannot stop the self-appointed watchdog—arguably, the public records vigilante—who is neither elected nor supported by the people but who can take the people's money by filing hundreds of public records requests, and bringing dozens of lawsuits that push the boundaries of public records laws and cripple the capacity of government to do anything else.[246] By failing to rigorously enforce the need for a real controversy in the context of the public records laws, the courts have allowed citizens to exercise great power without any responsibility.

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245. *See, e.g.*, Sickler, *supra* note 131 (noting that the Florida Senate President was seeking to expand the mechanisms for attorney fee recovery, and also noting that his son is an attorney who specializes in public records suits); David M. Young, *Plaintiffs' Attorneys' Fees in Class Action Litigation: An Ethical Solution?*, 2 J. INST. STUD. LEGAL ETHICS 255, 255 (1999) (recognizing incentives for litigation where attorney's fees are disproportionate to the legal work performed and the benefit to plaintiffs or society in general, and calling for safeguards, ethics, and reasonableness).

246. Another example of a citizen pushing the boundaries of his or her authority by relying on a statutory scheme in unintended ways occurred when George Zimmerman shot and killed an unarmed minor, Trayvon Martin. The citizen viewed himself as a neighborhood watchdog empowered by the Stand Your Ground Law but ignored the warnings of police and clearly lacked the discretion of a law enforcement officer. *See* Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271 (2012) (providing background of the Trayvon Martin case and calling to reform Florida's Stand Your Ground Law). But interestingly, some lawmakers have proposed a public records exemption to impede public access to information related to the Stand Your Ground Law. Janie Campbell, *Florida Moves to Restrict Media Access to Stand Your Ground Case Records*, HUFFINGTON POST (March 24, 2014, 1:36 PM EDT), http://www.huffingtonpost.com/2014/03/24/stand-your-ground-records_n_5007847.html.

### *2. Recognizing the Burden of Cumulative and Anonymous Requests*

A frequent talking point, raised in opposition in any discussion of public records reform, is an assertion that the government can recover its costs. That statement is simply false. In fact, a Florida governmental entity can only recover a *portion* of actual costs and can only charge a special service charge for "extensive" labor or information technology resources.[247] The law does not define extensive use; although as noted earlier, an agency rule defining "extensive" as more than fifteen minutes was upheld.[248] Yet this principle is easily evaded. For example, if multiple requests for public records are made by *multiple* people, each request is entitled to fifteen minutes of labor. The cumulative sum of the minimal labor becomes extensive, yet the government's costs are never recovered.

Inevitably, the citizens asking for access to public records object to the fees being charged by governmental entities,[249] but as one Florida court noted, "taxpayers should not shoulder the entire expense of responding to an extensive request for public records."[250] Consistent with that principle, the judiciary, when interpreting whether the charge is for "extensive" labor, should recognize the agency's need to plan for the cumulative sum of many public records requests. For an agency with a tiny staff, grappling with thousands of public records requests, five minutes per request might even be extensive.

To some degree, this entire discussion has been rendered academic by a series of flawed judicial and attorney general opin-

247. FLA. STAT. § 119.07(4)(d) (authorizing a record custodian to charge, in addition to the cost of duplication, a reasonable service charge for the cost of extensive use of information technology resources or of personnel).

248. Fla. Inst. Legal Servs., Inc. v. Fla. Dep't of Corr., 579 So. 2d 267, 268–69 (Fla. 1st Dist. Ct. App. 1991). *See also* Bd. of Cnty. Comm'rs of Highlands Cnty. v. Colby, 976 So. 2d 31, 32 (Fla. 2d Dist. Ct. App. 2008) (approving the county's "formula" for assessing special service charges involving "extensive public records requests").

249. In a particularly colorful example of the problem, a dispute emerged in Missouri when taxpayers were required to pay more than $18,000 for 16,500 copied pages of public records requested. Elizabethe Holland, *Group Upset over $18,005 Fee for Rockwood Public Records*, STLTODAY.COM (May 4, 2012, 12:05 AM), http://www.stltoday.com/news/local/education/group-upset-over-fee-for-rockwood-public-records/article_98599609-59a0-5f2a-ae5f-a1bdf510e433.html.

250. Lozman v. City of Riviera Beach, 995 So. 2d 1027, 1028 (Fla. 4th Dist. Ct. App. 2008) (citing *Bd. of Cnty. Comm'rs of Highlands Cnty.*, 976 So. 2d at 37).

ions. Florida courts and the attorney general have interpreted Florida's laws to allow public records requests to be made anonymously, without revealing any personal information.[251] But both the Florida constitution and the public records statute grant the right of access to public records to a "person."[252] An anonymous email—which can even be generated by an automated system—is certainly not the same thing as a "person" making a public records request. Moreover, there is no statutory exception supporting anonymity. If anonymous public records requests are to be allowed, then that should be based on a policy decision made by the legislature or the affected executive agency; it should not be mandated by the attorney general or the courts.

The decision to allow anonymous public records requests actually harms the government and runs contrary to the basic principles of the public records laws. Elsewhere in public records laws, anonymity is *not* allowed unless expressly provided for by law. For example, Florida law creates exemptions to allow anonymity to protect donors,[253] investors,[254] government hotline call-

251. *See, e.g.*, Chandler v. City of Greenacres, 140 So. 3d 1080, 1085 (Fla. 4th Dist. Ct. App. 2014) (concluding that the anonymous requester could not be required to fill out the city's form and give an "address or other identifiable source for payment of the associated costs"); Bevan v. Wanicka, 505 So. 2d 1116, 1118 (Fla. 2d Dist. Ct. App. 1987) (concluding that the production of public records may not be conditioned upon a requirement that the person seeking inspection disclose background information about himself or herself ); Fla. Att'y Gen. Op. 92-38, 1992 WL 527447, at *3 (May 6, 1992) ("A person requesting access to or copies of public records . . . may not be required to disclose his [or her] name, address, telephone number or the like to the custodian, unless the custodian is required by law to obtain this information prior to releasing the records."); Fla. Att'y Gen. Op. 91-76, 1991 WL 528207, at*1 (Oct. 4, 1991) (concluding that "a person requesting access or copies of a court file is not required to disclose his [or her] name, address, telephone number or the like to the clerk on duty"); Fla. Att'y Gen. Inf. Op. to Sandra M. Cook (May 27, 2011) (concluding that an agency may not require an anonymous requester "to disclose his or her name, address, telephone number, or similar identifying information to the custodian prior to inspecting or receiving copies of public records").

252. FLA. CONST. art. I, § 24 ("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 . . . ."); FLA. STAT. § 119.01 ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.").

253. Multiple statutes protect the identities of donors, allowing them to remain anonymous or confidential. *See, e.g.*, FLA. STAT. § 11.45(3)(i) (protecting anonymity for donors to Enterprise Florida, Inc.); *id.* § 11.45(3)(j) (protecting anonymity for donors to the capital development board); FLA. STAT. § 265.7015(2) (protecting anonymity for donors to benefit a publicly owned performing arts center); *id.* § 267.076 (protecting anonymity for donors to a museum designated by the United States Department of the Interior as a National Historic Landmark); *id.* (protecting anonymity for donors to the Division of Historical Resources of the Department of State); *id.* § 267.1732(8) (protecting anonymity for donors to the University of West Florida); *id.* § 267.1736(9) (protecting anonymity for donors to the

ers,[255] and respondents to publicly conducted marketing surveys.[256] Each of these exemptions serves an important public purpose by allowing the State of Florida's governmental entities to obtain funds or information and to ensure that the public gains a benefit that might have been lost in the absence of anonymity. In contrast, an interpretation of the public records laws to protect the anonymity of a public records requester has precisely the opposite effect: it denies the public of a benefit, withholding the information and the funding that it would otherwise have gained. The government cannot recover fees from an anonymous email address, and the public is denied its right to know who is asking for public records.

Clever citizens using anonymous requests can make cost recovery impossible. For example, a public records requester can file many anonymous public records requests by email—jim1a@yahoo.com, joe2b@gmail.com, jon3c@outlook.com, etc. Each email forces the government to engage in some degree of responsive efforts, sending acknowledgement letters, records,

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University of Florida's assistance in the historic preservation of the City of St. Augustine); *id.* § 272.136(7)(a) (protecting anonymity for donors to the Florida Historic Capitol and the Legislative Research Center); FLA. STAT. § 288.1226(6) (protecting anonymity of donors to the Florida Tourism Industry Marketing Corporation); *id.* § 288.809(4) (protecting anonymity of donors to the Florida Intergovernmental Relations Foundation); FLA. STAT. § 292.055(9) (protecting the anonymity of donors to the Department of Veterans' Affairs); FLA. STAT. § 379.223(3) (protecting the anonymity of donors to the Fish and Wildlife Conservation Commission); FLA. STAT. § 413.615(7)(a)–(b) (protecting anonymity of donors to the Florida Endowment Foundation for Vocational Rehabilitation); FLA. STAT. § 570.686 (protecting anonymity for donors to the Florida Agriculture Center and Horse Park Authority); *id.* § 570.691(6) (protecting the anonymity of donors to the agricultural support programs through the Department of Agriculture and Consumer Services); FLA. STAT. § 744.7082(6) (protecting anonymity for donors to the Statewide Public Guardianship Office); FLA. STAT. § 1004.28(5) (protecting anonymity for donors to university direct-support organizations); *id.* § 1004.45(2)(h) (protecting anonymity for museum donors); *id.* § 1004.55(6) (protecting anonymity of donors to regional autism centers); *id.* §§ 1004.70(6), 1004.71(6) (protecting anonymity for donors to Florida College System institution direct-support organizations); *id.* § 1009.983(4) (2014) (protecting anonymity of donors in reports related to the Florida Prepaid College Program).

254. FLA. STAT. § 288.9626(2) (protecting the anonymity of investors in the Florida Opportunity Fund); FLA. STAT. § 288.9627(2) (protecting the anonymity of investors in the Institute for the Commercialization of Public Research).

255. FLA. STAT. § 17.325(3) (preserving anonymity of a caller on the governmental efficiency hotline established by the chief financial officer by providing that the caller "may remain anonymous, and, if the caller provides his or her name, the name shall be confidential"); FLA. STAT. § 760.11(12) (preserving anonymity for complaints filed with the Commission on Human Relations).

256. FLA. STAT. § 288.1226(8) (protecting anonymity of respondents to surveys by the Florida Tourism Industry Marketing Corporation).

estimates or deposit requests, or other responses without the requester ever paying a penny. Lacking specific knowledge of who made each request, the government cannot force a person to pay for the costs of exercising his or her right of access to public records. The statutory cost recovery provision and even the attorney general opinion espousing a right to enforce cost recovery are rendered largely meaningless because the person making the request remains anonymous.

Meanwhile, the anonymous requester has a unique advantage. The requester can make up fake email addresses, face no risks of paying fees or costs, and stay immune from public scrutiny; but the anonymous requester cannot be ignored. Instead, the government must spend time on an acknowledgement letter and a response, or a good faith estimate of the costs of a response.[257] If the anonymous person making public records request is unsatisfied with the government's response, then by revealing him or herself, a lawsuit can be brought alleging constitutional violations and breaches of the public records laws. This outcome is not compelled by the Florida Constitution, and the judiciary and attorney general should revisit past conclusions that a public records request can be anonymous. The Florida Constitution and the statutory scheme grant a *person* the right to make a public records request[258]—which also includes a duty to pay for it. Allowing anonymity disregards the rights of the taxpayers and the public servants who pay for and endure the consequences of anonymous abuses of the public records laws.

### *3. Punishing Refusal, Not Mere Error*

Once a person makes a request, the custodian of public records must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.[259] This law, of course, must be meaningfully enforced, and the statute and its enforcement mechanisms are designed to encourage compliance.[260] An award of attorney's fees to a successful plaintiff serves

257. FLA. STAT. § 119.07(1).

258. FLA. CONST. art. I, § 24; FLA. STAT. § 119.07(1)(a).

259. FLA. STAT. § 119.07(1)(c).

260. Office of the State Attorney for the Thirteenth Judicial Circuit of Fla. v. Gonzalez, 953 So. 2d 759, 762 (Fla. 2d Dist. Ct. App. 2007) (Section 119.12 of the Florida Statutes is designed "to encourage voluntary compliance with Florida's public records law.").

as a form of punishment and can have a deterrence effect, making agencies less likely to deny proper requests for documents.[261] Nevertheless, it is important to note the actual language of statutory scheme. Section 119.12 of the Florida Statutes, with regard to the availability of attorney's fees, states:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency *unlawfully refused* to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.[262]

The standard to be applied, based on this provision, is to award fees when an agency has "unlawfully refused" to permit public access.[263] And elsewhere in the statutes, government is instructed to respond to a public records request "in good faith."[264] Mere "unlawful" activity, therefore, is not enough; the concept of unlawfulness supplements the verb "refused."

In the word's ordinary meaning, "to refuse" something requires an affirmative action with intent. Merriam-Webster defines "refuse" as "to say that you will not accept (something, such as a gift or offer), to say or show that you are not willing to do something that someone wants you to do, [or] to not allow someone to have (something)."[265] Logically, it follows 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."

Despite this statutory language, Florida's courts have held that an "unjustified delay in complying with a public record request amounts to an unlawful refusal."[266] Attorney's fees have

261. N.Y. Times Co. v. PHH Mental Health Servs., Inc., 616 So. 2d 27, 29 (Fla. 1993) ("If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents.").

262. FLA. STAT. § 119.12 (emphasis added).

263. *Id.*

264. *Id.* § 119.07(1)(c).

265. Merriam-Webster Dictionary, *Refuse*, M-W.COM, http://www.merriam-webster.com/dictionary/refuse (last visited Apr. 14, 2015).

266. Johnson v. Jarvis, 74 So. 3d 168, 171 (Fla. 1st Dist. Ct. App. 2011) (quoting Barfield v. Town of Eatonville, 675 So. 2d 223, 224 (Fla. 5th Dist. Ct. App 1996)). *See also*

also been assessed against the government when access is denied on a good faith but mistaken belief that the documents are exempt from disclosure.[267] Another appellate court found that attorney's fees were authorized, even if the failure to turn over the records was due to a mistake or ineptitude, and its opinion rendered the term "refused" and the concept of "good faith" largely irrelevant:

> [A]ttorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.[268]

In other words, despite the explicit statutory language to the contrary, a government can be exposed to claims for attorney's fees based on something less than a refusal. In fact, another court held that attorney's fees were appropriate even if an agency's error was "neither knowing, willful, nor done with malicious intent."[269] Based on the logic above, even if the government is working on a response in good faith, any governmental error, and even the mere fact that a requester files a lawsuit before receiving the documents, can be sufficient to justify an award of attorney's fees against the government. This runaway judicial logic should be revisited.[270]

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Hewlings v. Orange Cnty., Fla., 87 So. 3d 839, 841 (Fla. 5th Dist. Ct. App. 2012) (awarding attorney's fees even though the county had responded to the records request).

267. WFTV, Inc. v. Robbins, 625 So. 2d 941, 942 (Fla. 4th Dist. Ct. App. 1993); Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 495 (Fla. 2d Dist. Ct. App. 1990); News & Sun-Sentinel Co. v. Palm Beach Cnty., 517 So. 2d 743, 744 (Fla. 4th Dist. Ct. App. 1987).

268. Office of the State Attorney for the Thirteenth Judicial Circuit of Fla. v. Gonzalez, 953 So. 2d 759, 764 (Fla. 2d Dist. Ct. App. 2007).

269. Lee v. Bd. of Trs., Jacksonville Police & Fire Pension Fund, 113 So. 3d 1010, 1010 (Fla. 1st Dist. Ct. App. 2013) (finding that the agency's failure to produce public records was "neither knowing, willful, nor done with malicious intent" and reversing a lower court's refusal to award attorney's fees to petitioner), *perm. app. granted*, 147 So. 3d 521 (table), 2014 WL 2885421 (Fla. 2014).

270. Of course, this is another area where the legislature could choose to amend the statute, using the same concept already applied elsewhere in Florida law. Not every case against the government deserves a fee award, as the Florida Administrative Procedure Act has already clearly recognized:

> If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall

Although an award of attorney's fees can have the benefit of deterring misconduct by the government, these overreaching, pro-requester interpretations of the public records laws have generated another consequence altogether: incentivizing mischievous litigation.[271] Self-proclaimed citizen watchdogs and other citizens can push the public records laws to their logical extreme. A requester can ask for a public record, and if the government does not respond to the satisfaction of the requester, the rush to the courthouse follows with the filing of a lawsuit and a claim for attorney's fees.[272] The public records laws should not be so abused.

### C. Legislative Modification: Removing the Misguided Incentives

While the executive and judicial branches have important roles to play in reducing some of the problems with Florida's public records laws, it is the legislature that can make the biggest difference. As with any other effort to reform the public records laws, the legislature will need to take into account competing tensions. Lawmakers must ensure public access while avoiding abuse. They must allow citizens to enforce the law and to be fairly compensated, without incentivizing litigation or exposing government to needless payouts. Legislative caution is essential.

As noted earlier in this Article, there is room for change and debate associated with the question of how many public records requests should be allowed and by whom.[273] A strict rule on the number of requests could be adopted, and the notion of anonymity

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> be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

FLA. STAT. § 120.595(2) (2014).

271. *See generally* Young, *supra* note 245, at 255 (recognizing incentives for litigation where attorney's fees are disproportionate to the legal work performed and the benefit to plaintiffs or society in general, and calling for safeguards, ethics and reasonableness).

272. In fact, pursuant to Senate Bill 1648, lawyers would be compensated for counts on which they prevailed, even if they lost the case, which creates an even more powerful incentive to drag cases on; the bill also proposed to compensate lawyers for the time spent negotiating for their legal fees. S. 1648, Reg. Sess. (Fla. 2014).

273. *See supra* text accompanying notes 121–147, 247–260 (discussing the Town of Gulfstream and using it as an illustrative example of how the public records laws in Florida have been abused as well as discussing the burden and costs associated with cumulative requests).

could be eliminated to uphold the language in the constitution that empowers a person—not an anonymous email address—to access public records. Putting these two concepts together, an amendment to Section 119.07(1)(a) of the Florida Statutes, which codifies the public right of access to public records,[274] could clarify that the right is limited to one request per person per day, without anonymity. Under this simple rule, large requests could still be made, provided that they are paid for; whereas the overabundance of tiny, harassing, anonymous requests that trigger uncompensated work and unnecessary waste of government resources would be reduced.[275]

But two topics deserve further attention. First, the legislature should enact a requirement that a notice of intent to sue must be filed before a lawsuit can begin, giving the government (and the courts) an opportunity to avoid needless litigation. And second, to dissuade baseless lawsuits, the risk of exposure to attorney's fees should be shared by all litigants.

### *1. Requiring Notice of Intent to Sue*

The mere fact that the person is unsatisfied with response to a public records request is not necessarily sufficient to empower the person to rush to court. The concept of empowering the citizen to sue is a well-established tool for ensuring that the government complies with a law. But Florida's lawmakers should learn from history too.

In the field of environmental law, the altruistic notion of an environmental citizen as plaintiff has been overshadowed by practical realities. Critics note that the enforcement of environmental law is routinely the domain of environmental advocacy groups, and the citizen suit and attorney's fees provisions in those laws have become measures for subsidizing the environmental movement.[276] Cognizant of this possibility, many federal laws—the Clean Air Act,[277] the Clean Water Act,[278] the Safe Drinking

274. FLA. STAT. § 119.07(1)(a).

275. In addition, Florida law could be amended to allow the imposition of special service charges where evidence exists that multiple people are coordinating their requests to evade special service changes.

276. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 341–42 (1990).

277. 42 U.S.C. § 7604 (2012).

Water Act,[279] the Endangered Species Act,[280] the Resource Conservation and Recovery Act,[281] the Comprehensive Environmental Response, Compensation and Liability Act,[282] and the Emergency Planning and Community Right-to-Know Act,[283] (EPCRA)—include a jurisdictional requirement, establishing that no lawsuit can be filed unless the litigant has sent the agency a notice of intent to sue. By requiring a notice of intent to sue, the government and any other alleged violator are provided notice of the facts, such as the specific activity involved, as well as notice of the relevant legal standards, rules, conditions, or orders that have been violated.[284] In addition, the notice of intent to sue provides the government and any other alleged violator a chance to remedy the problem and to settle with the plaintiff—all without going to court.[285]

The same concept of a notice of intent to sue exists throughout Florida law too. Pursuant to the Florida Tort Claims Act,[286] a case cannot be brought against the government unless the litigant files a notice of intent to sue with the affected agency.[287] Similarly, pre-suit notice must be provided before a medical malpractice suit can be filed.[288] The Florida Construction Defect

278. 33 U.S.C. § 1365(b) (2012).
279. 42 U.S.C. § 300j-8.
280. 16 U.S.C. § 1540 (2012).
281. 40 C.F.R. § 254.2 (2014).
282. 42 U.S.C. § 9613(g)(1)(B).
283. 42 U.S.C. § 11046(d).
284. *See generally* Steven C. Russo & Elizabeth A. Read, *Defense Perspectives on Environmental Citizen Suits*, 10 WIDENER L. REV. 395 (2004) (discussing the requirement in a citizen suit regarding environmental laws that the plaintiff must provide the defendant an intent to sue before commencing an action and how this requirement is beneficial in resolving disputes).
285. *Id.* at 398–99.
286. FLA. STAT. § 768.28 (2014).
287. *Id.* § 768.28(6)(a) (In general, "[a]n action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency . . . [and to the] Department of Financial Services, within [three] years after such claim accrues.").
288. *Id.* § 766.106(2)(a) ("After completion of presuit investigation pursuant to [Section] 766.203(2) and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the [two]-year period prior to the alleged act of negligence who treated or evaluated the claimant, copies of all of the medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in [Section] 766.1065.").

Statute[289] requires owners to send a "notice of claim" to developers, contractors, subcontractors, suppliers, and other design professionals, specifically identifying any alleged construction or design defects in "reasonable detail" before any litigation may be initiated.[290] The public records laws should be no different. If the government deserves advance notice of and an opportunity to cure problems associated with environmental and tortious injuries, and if private doctors and contractors must be given advance notice too, then clearly the omission of a handful of public records, or even the complete failure to respond, deserves similar treatment.

Once given notice of intent to sue, the government should be given a reasonable amount of time to respond before the suit can be filed. For example, in the Florida Civil Rights Act,[291] which also requires a pre-suit notice, the government is allowed 180 days to investigate the matter.[292] Of course, Florida's public records laws would never tolerate such a long delay. The current statutory scheme demands an "immediate" hearing on a case once filed[293] and allows a mere forty-eight hours for the government to respond to a public records request once ordered to do so.[294] Yet the public records law also allows ten days for a person who *illegally* possesses public records to turn them over.[295] That same ten-day standard could readily be used for a notice of intent to sue, allowing a governmental entity to become aware of the problem, to consult with its lawyer, and to either prepare a defense for an immediate hearing or to turn over the records.

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289. FLA. STAT. ch. 558.

290. *Id.* § 558.004(1).

291. FLA. STAT. ch. 760.

292. *See id.* § 760.11(4), (8) (providing that if the Florida Commission on Human Relations fails to make a reasonable cause determination within 180 days of the filing of the complaint, the claimant may proceed with an action).

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

294. *Id.* § 119.11(2) ("Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within [forty-eight] hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such [forty-eight]-hour period.").

295. *Id.* § 119.06(4)(b) ("Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him or her. Any person unlawfully possessing public records shall upon demand of any person and within [ten] days deliver such records to their lawful custodian unless just cause exists for failing to deliver such records.").

For these reasons, the legislature should amend the Florida public records laws to include a notice of intent to sue provision, requiring the public records requester to identify the relevant facts and laws and also requiring them to wait a sufficient period of time to allow the government to respond before filing a lawsuit. For example, mirroring the Florida Tort Claims Act, the public records laws in Section 119.11 of the Florida Statutes[296] could be amended as follows:

> (1) Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases. *An action may not be instituted on a claim against an agency or contractor unless the claimant presents the claim in writing at least 10 days before filing suit.*[297]

### *2. Expanding the Risk of Attorney's Fees and Costs*

While the requirement of a notice of intent to sue might enable the government to quickly comply with some public records requests and avoid the need for some litigation, it represents only a partial solution. Some citizens, determined to use the public records laws to its fullest extent, will still file suits against the government. But not every lawsuit deserves to be heard. The one-directional attorney's fees provisions in Florida law should be reformed, and citizens who engage in abuses of the public records laws should be exposed to the potential consequence of paying the government's actual costs and attorney's fees.

Consider the experience of the Town of Southwest Ranches, as reflected in the court-filed pleadings and news coverage.[298] After making a public records request, a citizen asked to review

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296. *Id.* § 119.11.

297. Rather than leaving debates over the adequacy of the notice of intent to sue to the judiciary, the legislature might also consider including a series of requirements to clarify exactly what information should be provided in the notice. But at a minimum, a meaningful notice of intent to sue should include: (a) the facts at issue, including the date and nature of the original public records request and the date and nature of the response; and (b) the legal arguments, such as the need for a mandamus action due to a lack of response, unreasonable delay, incomplete response, or improper withholding or redaction.

298. Huffpost Miami, *Resident Bill Di Scipio Sues Town of Southwest Ranches for $1.25*, HUFFINGTON POST (Dec. 6., 2011, 4:29 PM EST), http://www.huffingtonpost.com/2011/12/06/bill-di-scipio-sues-town-_n_1132061.html; Answer Brief of Appellees, the Town of Southwest Ranches and Jeff Nelson, *DiScipio v. Town of Southwest Ranches*, 113 So. 3d 13 (Fla. 4th Dist. Ct. App. 2012) (No. 4D12-1953) [hereinafter Answer Brief of Appellees].

and photograph the records, but was charged $1.20 for copies instead.[299] Days later, but before a lawsuit was filed, the Clerk of Court called, admitting that the citizen should have been allowed to take the pictures instead of paying copying charges.[300] Most people would have ended the debate there. Instead, the *pro se* plaintiff filed suit.[301] The trial court dismissed the case, and an appellate court affirmed, per curiam.[302] Although the Town won the case and did not pay for the plaintiff's fees or costs, the $1.20 mistake cost the Town more than $20,000 in fees for its own attorney.[303] A wholly separate but similar matter involved a charge for $1.89.[304] While the media might treat these cases as heroic, the legal system should not.[305]

In federal litigation, an attorney's signature on a pleading represents a personal certification.[306] Pursuant to Rule 11 of the Federal Rules of Civil Procedure, that signature means that a lawsuit is "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and that the legal contentions being made are

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299. Answer Brief of Appellees, *supra* note 298, at 1–2.

300. *Id.* at 4.

301. *Id.* at 4–5.

302. While the case was dismissed, the orders lack specific explanations for the dismissal. Order Granting Motion to Dismiss, *DiScipio v. Town of Sw. Ranches* (17th Jud. Cir. Mar. 12, 2012) (No. 11-28577(21)), *aff'd per curiam*,113 So. 3d 13 (Fla. 4th Dist. Ct. App. 2013) (table). The Town had argued, among other points, that the matter was moot, and the court dismissed the case for failure to state a claim. Answer Brief of Appellees, *supra* note 298.

The DiScipio case may be unusual. Florida courts have not looked favorably on mootness arguments in public records cases. *See, e.g.*, Grapski v. City of Alachua, 31 So. 3d 193, 195–96, 198 (Fla. 1st Dist. Ct. App. 2010) (The plaintiff alleged the city violated the public records laws because the city refused to provide a copy of unapproved board meeting minutes; once approved, but after suit was filed, the city provided the minutes to the plaintiff; the court held that unreasonable delay thwarted the "primary usefulness" of the documents after approval, the release did not cure the injury, and the city's policy was capable of repetition yet evading review.).

In contrast, FOIA cases have been held to be moot when the agency has complied. Vazquez-Gonzalez v. Shalala, No. 94-2100 (SEC), 1995 WL 67659, at * 1 (D.P.R. Feb. 13, 1995) (After the FOIA suit was filed, the Department of Health and Human Services provided copies of the documents, and the court found that compliance with the FOIA request rendered the case moot.).

303. Mayo, *supra* note 9.

304. Joel Engelhardt, *Gulf Stream Millionaire Challenging State Attorney's Office over . . . . $1.89*, PALM BEACH POST (Aug. 22, 2013, 12:47 PM), http://www.palmbeachpost.com/news/news/gulf-stream-millionaire-challenging-state-attorney/nZY8C/.

305. Mayo, *supra* note 9.

306. FED. R. CIV. P. 11(b).

warranted or otherwise not frivolous.[307] Courts have, in fact, threatened and used sanctions for breaches of this rule in FOIA cases.[308]

In Florida, pursuant to Section 57.105 of the Florida Statutes, a defendant can notify a plaintiff that a lawsuit or a claim is baseless and unsupported by material facts or existing law.[309] If the claim is not withdrawn and the defendant wins, then the plaintiff will pay the defendant's legal fees.[310] Florida's provision, however, offers an inadequate deterrent to stop the filing of needless public records cases because the risk of fees can be evaded with a voluntary dismissal.[311] Dropping a lawsuit does not relieve the government defendant from enduring the expenses and frustration of the initial process of responding to a baseless public records complaint. Even in cases where a lawsuit is dropped after the plaintiff receives the Section 57.105 letter,[312] the government entity and lawyer still incur time and costs on the research and drafting of the letter and the other litigation pleadings and motions. Something more is needed, and appropriate solutions already exist elsewhere in the law.

When it comes to fee shifting provisions in the public records laws, the fifty states and Washington, D.C. take a variety of approaches. Twenty-seven jurisdictions, including Florida, have laws with a one-directional fee shifting provision that awards attorney's fees and costs or reasonable expenses to a prevailing

307. *Id.* at 11(b)(1)–(2).

308. *See, e.g.*, Schwarz v. CIA, 182 F.3d 933 (table), 1999 WL 330237, at *1 (10th Cir. 1999) (admonishing the plaintiff for "frivolousness" in light of a "recurring pattern of similarly unsuccessful FOIA actions" and warning that "future frivolous filings . . . will result in sanctions"); Goldgar v. Office of Admin., 26 F.3d 32, 35–36, 36 n.3 (5th Cir. 1994) (warning the plaintiff that subsequent filing or appeal of FOIA lawsuits without jurisdictional basis may result in assessment of "costs, attorney's fees, and proper sanctions" or that the plaintiff may be required to "obtain judicial preapproval of all future filings").

309. FLA. STAT. § 57.105(1) (2014) ("Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.").

310. *Id.* § 57.105(2)–(3).

311. *Id.* § 57.105(3)(d).

312. *Id.* § 57.105(4).

public records requester.[313] Eighteen jurisdictions allow for attorney's fees and costs to be collected by the either *prevailing* party, although some of them require fees to be paid to the government only if the requester's case involved bad faith or a lack of substantial justification.[314] Although other state laws related to attorney's fees might apply, two jurisdictions' public records laws are wholly silent on the subject of attorney's fees,[315] three more jurisdictions provide only for fines or civil penalties against the government,[316] and one state has a unique fee shifting provision that inures to the benefit of the public agency, preventing misuse of the public records laws for commercial purposes, and including a triple damages clause.[317]

Based on this analysis, a modification to Florida's attorney's fee shifting provisions would not be unusual in comparison with other states. In fact, it would not even be unusual in Florida, where statutes already provide for fee shifting and awards to the prevailing party. The Florida False Claims Act empowers people to sue the government contractors for specified misuses of public funds.[318] However, citizen activists cannot simply file baseless

313. D.C. CODE § 2-537 (2014); FLA. STAT. § 119.12; HAW. REV. STAT. § 92F-15 (West 2014); 5 ILL. COMP. STAT. 140/11 (2014); IOWA CODE § 22.10 (2014); LA. REV. STAT. ANN. § 44:35 (2014); ME. REV. STAT. ANN. tit. 1, § 409 (2014); MD. CODE ANN., GEN. PROVIS § 4-632 (West 2014); MICH. COMP. LAWS § 15.240 (2014); MISS. CODE ANN. § 25-61-15 (2014); MO. REV. STAT. § 610.027 (2014); MONT. CODE ANN. § 2-6-101 (2013); NEB. REV. STAT. § 84-712.07 (2013); NEV. REV. STAT. § 239.011 (2013); N.J. STAT. ANN. § 47:1A-6 (2014); N.M. STAT. ANN. § 14-2-12 (West 2014); N.Y. PUB. OFF. LAW § 89 (2014); N.D. CENT. CODE § 44-04-21.2 (2014); OHIO REV. CODE § 149.43 (2014); OR. REV. STAT. § 192.410 (2014); S.C. CODE ANN. § 30-4-100 (2013); TENN. CODE ANN. § 10-7-505 (2014); UTAH CODE. § 63G-2-802 (2014); VA. CODE § 2.2-3704 (2014); WASH. REV. CODE § 42.56.550 (2014); W. VA. CODE § 29B-1-7 (2014); WIS. STAT. ANN. § 19.37 (2013).

314. ARIZ. REV. STAT. ANN. § 39-121.02 (2014); ARK. CODE ANN. § 25-19-107 (2014); CAL. GOV'T CODE § 6259 (2014); COLO. REV. STAT. § 24-72-204 (2014); CONN. GEN. STAT. § 1-206 (2013); DEL. CODE. ANN. tit. 29, § 10005 (2014); GA. CODE ANN. § 50-18-73 (2014); IDAHO CODE ANN. § 9-344 (2014); IND. CODE § 5-14-3-9 (2014); KAN. STAT. ANN. § 45-222 (2014); MINN. STAT. § 13.085 (2014); N.C. GEN. STAT. § 132-9 (2013); N.H. REV. STAT. § 91-A:8 (2014); OKLA. STAT. tit. 51, § 24A.17 (2014); 65 PA. CONS. STAT. ANN. § 67.1304 (West 2014); R.I. GEN. LAWS § 38-2-9 (2014); TEX. GOV'T CODE § 552.323 (West 2013); VT. STAT. ANN. tit. 1, § 319 (2014).

315. ALA. CODE § 36-12-40 (2014); ALASKA STAT. § 40.25.110 (2013).

316. MASS. GEN. LAWS ch. 66, §§ 10 (2014); S.D. CODIFIED LAWS § 1-27-40.2 (2014); WYO. STAT. § 16-4-205 (2014).

317. KY. REV. STAT. ANN. § 61.8745 (West 2014); *cf.* UTAH CODE. § 63G-2-802 (allowing prevailing requesters to recover fees from the government, but not "if the purpose of the litigation is primarily to benefit the requester's financial or commercial interest").

318. FLA. STAT. § 68.083(2) (2014) ("A person may bring a civil action for a violation of [section] 68.082 for the person and for the affected agency. Civil actions instituted under

suits against government contractors because Florida law will hold the citizens accountable. Attorney's fees and costs can be assessed against a plaintiff for the reasonable costs of defending a claim that was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[319] Similarly, pursuant to the Florida Administrative Procedure Act, if an administrative law judge "determines that a party participated in the proceeding for an improper purpose," the judge can "determine the award of costs and attorney's fees."[320] An improper purpose was further defined as participation in a proceeding "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity."[321] As noted above, an embrace of this approach, which uses a restricted form of prevailing party fee shifting, would make the Sunshine State's public records laws similar to the ones used in eighteen other United States jurisdictions.

The legislature can control the excesses of the public records laws if it chooses to. Amending the public records laws to mirror either the Florida False Claims Act[322] or the Florida Administrative Procedure Act[323] would mean that the government can recover fees only in cases where the citizen abuses the law. A limited fee-shifting provision of this type could reduce the misuse of the public records laws without creating an undesirable chilling effect on the honorable citizen who simply seeks access to public records as an exercise of an important civil right.

### D. Professional Restraint: The Vaguer Sanctions of Conscience

The executive, judicial, and legislative branches of government all have roles to play if the abuses of the public records law are to be stopped. But another form of change must occur in the marketplace: lawyers need to stop contributing to the problem.

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this act shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the State of Florida.").

319. *Id.* § 68.086.

320. *Id.* § 120.595(1)(d).

321. *Id.* § 120.595(1)(e)(1).

322. *Id.* § 68.083(2).

323. *Id.* § 120.595(1)(d).

### *1. Adhering to Professionalism*

In theory, lawyers should not allow themselves to be a participant in the misuse of the public records laws. Florida's principles of professionalism—which are now mandates as part of a Supreme Court order[324]—call for professional self-restraint. Of greatest relevance, perhaps, is Rule 7.1 of Florida's Ideals and Goals of Professionalism, which states as follows:

> A lawyer should counsel the client or prospective client, even with respect to a meritorious claim or defense, concerning the public and private burdens of pursuing the claim as compared with the benefits to be achieved.[325]

In other words, professionalism standards would normally dissuade a lawyer from bringing a lawsuit to challenge the government's request for $1.25 for copies of public records,[326] or a lawsuit alleging that a city's response to a public records request, forty-eight hours after receipt, was an unreasonable delay.[327] These types of petty claims place needless burdens upon the agency, the public, and the entire system of justice that the lawyers serve. Those burdens far exceed any possible benefits to be achieved—except, perhaps, for the requester's lawyer, who may gain attorney's fees just by litigating. Similarly, the Guidelines for Professional Practice, which state that "a lawyer should not force an adversary to make a motion and then not oppose it," would normally prevent a lawyer from filing a series of lawsuits only to withdraw them, forcing his or her opponent to file an answer, affirmative defenses, counterclaims, or demands for attorney's fees.[328] Yet these behaviors happen anyway.

Professionalism violations might even deserve a referral to the local courts for enforcement actions pursuant to the Supreme

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324. *In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280 (Fla. 2013).

325. FLA. BAR R. IDEALS & GOALS OF PROFESSIONALISM 7.1 (2010), *available at* https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F25F0275EE5AC973852571C6006F039F/$FILE/3IdealsAndGoals.pdf?OpenElement.

326. Mayo, *supra* note 9.

327. Verified Complaint to Enforce Florida's Public Records Act and for Declaratory, Injunctive and Monetary Relief ¶¶ 31–32, *O'Boyle v. Town of Gulf Stream* (Fla. 15th Cir. Ct. Jan. 22, 2014) (No. 502014CA000834).

328. FLA. GUIDELINES FOR PROFESSIONAL PRACTICE I(1)–(2) (2008), *available at* http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/2f2668cdfd7b99e085256b2f006ccd15?OpenDocument.

Court's order mandating lawyer professionalism.[329] The effectiveness and legality of the professionalism mandates and enforcement mechanisms, however, remain untested.[330] And, of course, as this Article suggests, the anonymous clients and devious lawyers are unlikely to be swayed by the vaguer sanctions of conscience or lawyer professionalism. To paraphrase Justice Holmes, the "bad man" can find a bad attorney.[331]

### *2. Enforcing Ethics*

In the most egregious matters, violations of professionalism standards in public records litigation should expose the lawyer to claims of ethical misconduct. For example, Rule 4-3.1 of the Rules Regulating the Florida Bar, which follows the American Bar Association's Model Rules of Professional Conduct, states as follows:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.[332]

Explaining this concept, the commentary acknowledges the potential for abuse of the law and addresses the lawyer's duties:

> The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal

329. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d at 283.

330. *See* Keith W. Rizzardi, *Redefining Professionalism? Florida's Code Mandating the Aspirational Raises Challenging Questions*, 87 FLA. B.J., Nov. 2013, at 39–41 (discussing the newly enacted code governing Florida lawyer professionalism).

331. Holmes, *supra* note 5, at 459. Ideally, when confronted with the client who is clearly engaged in misuse of the law, the ethical lawyer will act as a steward for the justice system. *See, e.g.*, Keith R. Fisher, *Repudiating the Holmesian "Bad Man" Through Contextual Ethical Reasoning: The Lawyer as Steward*, 2008 J. PROF. LAW. 13, 14 ("In *The Path of the Law*, Justice Holmes defined law as simply a prediction about how particular cases might be decided and illustrated this instrumental approach through the metaphor of a 'bad man' who is interested only in avoiding legal penalties that might attach to his conduct or business affairs." (internal citations omitted)).

332. FLA. R. PROF'L CONDUCT 4-3.1.

> procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.[333]

Based on this ethical directive, the Florida Bar could even discipline a lawyer who repeatedly brings public records lawsuits against a governmental entity, only to withdraw them in response to a letter or affirmative defense establishing the frivolousness of the claim.[334] The Florida Supreme Court also has been intolerant of cases where attorneys file frivolous and meritless lawsuits that waste a defendant's time and resources and those of the court system.[335] Abuses of the public records laws should be treated with the same type of severity. Governments, however, should be careful not to expose themselves to counterarguments that they are misusing the discipline process.[336] Nevertheless, legal ethics have a proper place in the contentious area of public records litigation.

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333. *Id.* at 4-3.1 cmt. The commentary also notes that "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." *Id.*

334. Multiple instances of withdrawing cases, for example, could provide a reasonable context for imposing attorney discipline. FLA. R. PROF'L CONDUCT 4 pmbl. ("Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations."); *see, e.g.*, Fla. Bar v. Kelly, 813 So. 2d 85, 88, 89 (Fla. 2002) (disapproving a referee's recommended discipline of a sixty-day suspension and imposing a ninety-one-day rehabilitative suspension for filing a frivolous lawsuit and other misconduct); Fla. Bar v. Richardson, 591 So. 2d 908, 910, 911 (Fla. 1991) (suspending an attorney for sixty days for filing a frivolous federal lawsuit in violation of Rule 4-3.1); *see also* Fla. Bar v. Nunes, 734 So. 2d 393, 398, 399 (Fla. 1999) (imposing a three-year suspension for filing a frivolous lawsuit, continuing to represent clients after being discharged, making disparaging remarks about judges and opposing counsel, and making false representations to a tribunal in violation of Rule 4-8.4(d), among others).

335. Fla. Bar v. Committe, 136 So. 3d 1111, 1113, 1118 (Fla. 2014) (finding a violation of Rule 4-3.1 where Committe and "his client knew or should have known that the claims asserted in their complaint were not supported by the material facts; [and] would not be supported by the application of then-existing law to those facts," and increasing the lawyer's suspension from ninety days to three years).

336. FLA. R. PROF'L CONDUCT 4-3.4(h) (providing that an attorney must not "present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter"). Of course, the Florida Bar is likely to be cautious in enforcing disciplinary rules and might be concerned about appearances of partisan interference. *See generally* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 730 (2005) (discussing the "misuse of the bar machinery to punish government dissenters").

### *3. Seeking Fairness in Pro Se Cases, Too*

While attorney discipline might be an available option, it certainly cannot suffice, by itself, to end the excess of Florida's public records laws. The lawyers are not alone in shouldering the blame for the problems because pro se litigation is quite commonplace with public records. Indeed, a simple Lexis search[337] reveals more than thirty different *appellate* cases involving pro se litigants and the public records law Section 119.07. It is a certainty that many more unreported cases have been threatened, filed, settled, or otherwise decided.

In these pro se cases, the non-lawyer advocate is often unaware of the legal profession's principles of ethics and professionalism, which do not apply to him or her.[338] But the standards of ethics and professionalism still apply, to a degree, in matters where a lawyer remains involved as a ghostwriter. As noted in the Florida Rules of Professional Conduct, pro se filings can include assistance from counsel.[339] The lawyers who assist with pro

337. The search used the term "pro se" and Section 119.07 of the Florida Statutes to identify relevant cases.

338. A noteworthy exception recently occurred in Palm Beach County, however, where the non-lawyer executive director of a non-profit organization, who was purportedly dedicated to open government, resigned from his position, citing ethical concerns. In his publicly circulated parting statement, he acknowledged the excesses and abuses of public records litigation and the ethical violations that were taking place:

> My decision to resign was the result of a series of irreconcilable philosophical and ethical differences. I have come to believe that my continued affiliation with the Foundation in spite of those differences would have eroded my credibility as a civil rights activist and negatively impacted the public's right to know.
>
> As an activist, my objective is to strengthen the public's right to know. While litigation may at times be a means to that end, for me it *has never been—and will never be*—the end in itself. Over the past five months it has become increasing[ly] clear that my judgment on this and other issues is at odds with the Foundation's Board of Directors.
>
> In spite of my reputation for being litigious, I don't love filing open government lawsuits although I am certainly willing to do so when the facts are right and the case will serve to improve the public's right to know. What I'm passionate about is helping regular folks gain access to the records and meetings they are entitled to.

Joel E. Chandler, *Defending the Public's Right to Know*, FOGWATCH.ORG (July 1, 2014), http://fogwatch.org/from-the-editor/defending-the-publics-right.html (typeface altered). Not everyone maintains these ethical standards.

339. FLA. R. PROF'L CONDUCT 4-1.2 cmt. (noting that "[i]f the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate 'Prepared with the assistance of counsel' on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no

se filings can still be held accountable for their actions, including breaches of the duties of competence and candor.[340] It is also attorney misconduct for an attorney to knowingly use or induce another person to violate or attempt to violate the ethical rules.[341]

Furthermore, even though pro se litigants receive great leniency from the courts[342] and do not need to adhere to the rules of professional conduct, limits still exist. Pro se litigants are not wholly immune from complying with the rules of the court.[343] For example, federal appellate courts have allowed punitive awards against pro se litigants when the non-lawyer advocate engaged in a "pattern of delay and contumacious behavior" and "fail[ed] to comply with [ ] discovery obligations."[344] In the most egregious cases, the lawyers representing the beleaguered governmental entities should not hesitate to invoke these principles against the pro se public records litigants too.[345]

## *IV. CONCLUSION: DARK SHADES OF RED*

Florida's public records laws, like those of other states, have enormous benefits to an informed public. But good laws can still

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assistance from a lawyer"); *id.* at 4-5.5 cmt. (commenting that "a lawyer may counsel nonlawyers who wish to proceed pro se").

340. *See generally* John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2689 (1999).

341. FLA. R. PROF'L CONDUCT 4-8.4(a).

342. Rothermich, *supra* note 340, at 2698–99 (discussing caselaw and quoting Haines v. Kerner, 404 U.S. 519, 520 (1972) (stating that pro se complaints are held "to less stringent standards than formal pleadings drafted by lawyers")).

343. *See, e.g.*, Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989) (stating that a pro se litigant "is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure").

344. Baldinger v. Ferri, 541 F. App'x 219, 222 (3d Cir. 2013) (upholding district court judgment); *see also* Lisa R. Hasday, *No Mercy for Pro Se Litigant*, ABA LITIG. NEWS (Jan. 13, 2014), http://apps.americanbar.org/litigation/litigationnews/top_stories/011314-pro-se-litigant.html (discussing the court's holding in *Baldinger*).

345. *See, e.g.*, Paula J. Frederick, *Learning to Live with Pro Se Opponents*, GPSOLO MAG. (Oct./Nov. 2005), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/proseopponents.html ("Judges and court personnel have grown increasingly accustomed to dealing with pro se litigants. . . . If you think the court has gone too far in forgiving the pro se litigant's errors, point it out. The court is required only to give a fair hearing to a litigant, not to take on the role of counsel to the unrepresented."); Rick Rousos, *Public Records Advocate Finds Court Trouble*, THE LEDGER (May 10, 2013, 11:28 PM), http://www.theledger.com/article/20130510/NEWS/130519923?Title=Public-Records-Advocate-Finds-Court-Trouble (discussing lawsuit where public records requester was accused of fraudulently claiming indigent status).

be manipulated and abused. A powerful right of public access to public records must be preserved without bestowing an unlimited right to harass the government. This Article shows how some problems can be fixed, and many of these concepts can quickly be applied to other state laws too.

As presently constructed, a small municipality simply cannot fully comply with the Florida public records laws when faced with a well-financed and determined adversary. Even the insurance industry recognizes the impossibility of compliance. While local governments routinely obtain insurance policies to cover the defensive legal expenses of unanticipated litigation, insurers will not cover the municipality's risks associated with public records suits.[346] The insurance adjusters have read the public records laws too.

Any individual can quickly fire off hundreds of emails requesting public records and make dozens of oral requests too. The small municipality, however, has a much greater task: it must respond—perfectly. Send a letter acknowledging the request. Calculate an estimate of the costs of responding. Receive and manage the deposits. Track time. Locate documents. Apply exemptions and redactions. Reproduce and deliver the documents. The government must accomplish every task, expeditiously and without error, or else defend itself against claims of unreasonable delay or an unlawful refusal to produce the documents. If the government loses, it pays the requester's attorney's fees, and even if it wins, the taxpayer still foots the bill for the defense. The government's budgetary risk is uncontainable, and the costs are all too real. Faced with the deluge of public records requests discussed above, the Town of Gulf Stream's budget and staff were crippled.[347] This overabundance of public records requests can have other policy consequences too. The large volume of public records requests made by one resident became a contributing factor to Gulf Stream's decision-making in a zoning dispute; in

346. Email from Irma Cohen, Litigation Specialist, to Bill Thrasher, *Re: Bthrasher@gulf-stream.org Has Sent You a File Via WeTransfer* (Apr. 3, 2014, 2:30 PM) (copy on file with *Stetson Law Review*) (explaining that insurance coverage does not extend to public records cases where the relief requested does not include any claims of bodily, property, or personal injury).

347. *See supra* notes 121–146 (using the Town of Gulf Stream as an example of the effect that public records requesters can have on a government agency when they abuse public records laws).

2012, the Town paid $181,000 as part of a settlement of just one zoning dispute that also included dismissal of a series of public records cases.[348] The following year, in 2013, the Town depleted its budget of emergency reserves to deal with its public records problems,[349] and legal fees associated with public records compliance and litigation exceeded $400,000, accounting for more than ten percent of the Town's approximately $3 million total budget.[350] Information technology costs, including a massive investment into the online publication of Town Commission and architectural review board meetings, minutes, and documents, exceeded $130,000 in 2013; in fact, the Town estimates that cumulatively it spends ten to fifteen percent of its annual budget on public records matters without even accounting for staffing.[351]

These expenses of open governance have the potential to render government less effective. In the face of an onslaught of public records requests, funding and staffing is redirected, and other responsibilities are cast aside. The private information demands of citizens and organizations, whether meritorious or not, take precedence over the rest of the public interest. Further complicat-

348. The Town and resident agreed to a settlement for $180,000 that included a publicly recorded land use development agreement and a withdrawal of all pending public records requests. Development Agreement Between Town of Gulf Stream & Martin E. O'Boyle, Exhibit B, Settlement Agreement ¶ 10, CFN 20130420056, OR BK 26343 PG 1285 (Palm Beach Cnty., Fla. Sept. 24, 2013) ("Plaintiffs agree that upon execution of this Agreement, all pending public record requests made to the Town shall be deemed withdrawn."); *see also* Tim O'Meilia, *Gulf Stream: Remodeling Approved in O'Boyle Lawsuit Settlement*, THE COASTAL STAR (July 31, 2013, 2:49 PM), http://thecoastalstar.ning.com/profiles/blogs/gulf-stream-remodeling-approved-in-o-boyle-lawsuit-settlement (describing the lawsuit between Martin Boyle and the Town of Gulf Stream and the $181,000 settlement agreement). That same resident was also involved in similar public records disputes with the Palm Beach County State Attorney's office. Engelhardt, *supra* note 304.

349. Tim O'Meilia, *Gulf Stream: Town Sets Up Finances for Legal Wrangle*, THE COASTAL STAR (May 29, 2013, 12:30 PM), http://thecoastalstar.ning.com/profiles/blogs/gulf-stream-town-sets-up-finances-for-legal-wrangle?xg_source=activity. In 2014, the Town's budget increased, due to increased revenue from property value increases, but the new funds were consumed by the continuing public records costs.

350. The Town of Gulfstream spent $30,016 in legal fees in 2010–2011, $51,554 in legal fees in 2011–2012, $411,987 in 2012–2013, and more than $400,000, and counting, in 2013–2014. Town of Gulf Stream, *General Fund: 2012-2013 Budget*, GULF-STREAM.ORG, http://www.gulf-stream.org/images/fy13budget.pdf (last visited Apr. 14, 2015); Town of Gulf Stream, *General Fund: 2013-2014 Budget*, GULF-STREAM.ORG, http://www.gulf-stream.org/images/Final%20Budget%2013-14.pdf (last visited Apr. 14, 2015); Town of Gulf Stream, *Final Budget 2014–2015*, GULF-STREAM.ORG (Sept. 23, 2014), http://www.gulf-stream.org/images/Final%20Budget%2013-14.pdf.

351. Memorandum from William Thrasher, Town Manager, Town of Gulf Stream, to Erika Bowen, Florida League of Cities, *Public Records Inquiries* 1 (Oct. 22, 2014), *available at* http://www2.gulf-stream.org/WebLink8/DocView.aspx?id=34459&dbid=0.

ing the government's efforts to fulfill its mission while complying with the public records laws, some public servants who are tired of pointless searches through emails and other files might even resign.

Misuse of the public records law by the relentless public records vigilante also undermines the law's objective of public access to information in two ways. First, while one overzealous person can manipulate the public records laws by burdening the government with innumerable requests, the government's responses to other persons making appropriate public requests can be delayed. Rather than instinctively defending the abuses of the public records laws, reporters and other advocates who want rapid access to the government's public records should recognize that if the abuses are not curbed, then their own self-interests may be affected.

Second, the mere existence of a public records vigilante can cause government transparency to decline. Cognizant that every written word can be responsive to future public records requests, public servants avoid creating documentation in the first place. They stop using email, relying instead upon in-person and unrecorded communications. The once-proud footer on the typical public servant's email is rewritten: "Florida has a broad public rec-records law that costs taxpayers millions. Please think before you type."

The rights of access to public records must be preserved for the media, the prisoners, the innocence commissions, and other genuinely interested persons. The ideal of government in the sunshine requires a powerful public records law with citizen suit enforcement too. Yet ideals sometimes contrast with reality. The virtually unfettered rights in the public records laws need to be fettered, and the recommendations in this Article would be a meaningful start. Until reform occurs, a few individuals, irresponsibly exercising their government in the sunshine rights, will continue to scald our government with a blistering case of sunburn.