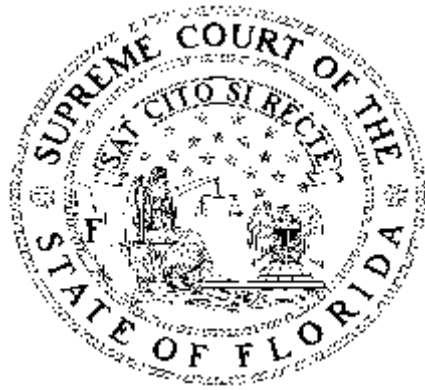


REPORT OF THE SUPREME COURT WORKGROUP ON PUBLIC RECORDS



APRIL 30, 2001

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HISTORY OF THE WORKGROUP

The Chief Justice, by administrative order dated September 18, 2000, created the Supreme Court Workgroup on Public Records. The Workgroup was assigned the task of reviewing public records issues in the judicial branch and making recommendations to the Court. The Committee identified seven areas for review regarding records in the judicial branch:

1. access to records in the judicial branch
2. retention of records in the judicial branch
3. fees for copies of administrative records
4. exemptions from access to public records
5. education and training of judges and court personnel on public records issues
6. copyrighting of records
7. issues regarding access to public records because of changing technology

The committee met on October 23, November 20, and December 6 -7, 2000, January 19-20 and February 13, 2001.

This report addresses the seven areas identified by the Workgroup. The report begins with a summary of the Workgroup recommendations. Background information is then provided. This is followed with a discussion of each issue identified by the Workgroup and an explanation of the recommendation related to that issue. The text of the recommended rule amendments is contained in Appendix A. Appendix B contains the proposed rule amendments in two-column format with the proposed rule changes in one column and the explanation of the change in the corresponding column.

SUMMARY OF RECOMMENDATIONS

1. ACCESS TO RECORDS IN THE JUDICIAL BRANCH

Rule of Judicial Administration 2.051 should be amended to provide clarity and additional guidance for responding to public records requests in the judicial branch. Each entity within the judicial branch should be encouraged to develop policies and procedures for responding to public records requests.

2. RETENTION OF RECORDS IN THE JUDICIAL BRANCH

Rule of Judicial Administration 2.075 should be amended by the Court to provide a schedule for retention of appellate court records.

Rule of Judicial Administration 2.076 should be adopted by the Court to establish a records retention schedule for administrative records for the judicial branch which utilizes the legislatively authorized Department of State schedules, as appropriate.

3. FEES FOR COPIES OF ADMINISTRATIVE RECORDS

Rule of Judicial Administration 2.051 should be amended to provide that fees for copies of administrative records of the judicial branch should be charged in the same manner that fees are charged for copies of public records in the executive branch.

4. EXEMPTIONS FROM ACCESS TO PUBLIC RECORDS

The Supreme Court Workgroup on Public Records recommends that the judicial branch undertake a review of its records and determine if and where additional exemptions may be needed. The Supreme Court should appoint a successor committee to undertake this task

5. EDUCATION AND TRAINING OF JUDICIAL BRANCH PERSONNEL

The Court should encourage the Florida Court Education Council to provide additional educational opportunities for judges on public record issues and the Court should encourage chief judges and other judicial branch entities to provide additional education and training opportunities for employees of the judicial branch.

6. COPYRIGHTING OF RECORDS

The judicial branch has inherent authority to copyright most records of the judicial branch and no action is required on this issue.

7. TECHNOLOGY ISSUES

Future development efforts of computer systems and capability for electronic access, such as electronic filing should address the need to separate exempt information from non-exempt information. This is especially important for information placed on the Internet. Exempt information must be segregated from electronic records before access is provided.

BACKGROUND

Florida has a long history of providing access to public records. The Public Records Law was enacted in 1909. See generally, Gleason & Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, section 4(E) – Let the Sunshine In!*, 18 Nova L. Rev. 973 (1994). Courts have construed the public records law liberally and consistently with the public policy of providing access to records. See City of St. Petersburg v. Romine ex rel Dillinger, 710 So. 2d 19 (Fla. 2d DCA 1998) (the public records law is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose); Christy v. Palm Beach County Sheriff's Office, 698 So. 2d 1365 (Fla. 4th DCA 1997) (the Public Records Act is to be construed liberally in favor of openness); Woolling v. Lamar, 764 So.2d 765 (Fla. 5th DCA 2000) (the Public Records Act is to be construed liberally in favor of openness).

With the 1992 adoption of article I, section 24, Florida Constitution, the judicial branch was specifically required to make its records open to the public except for certain records exempted by court rule, the constitution or the Legislature. Article I, section 24(a), Florida Constitution, provides the right of access to records. It provides:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. **This section specifically includes the legislative, executive and judicial branches of government. . . .**

(Emphasis added).

Article I, section 24 (c) and (d) establishes exemptions from disclosure and provides:

(c) . . . The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . .

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

Prior to the adoption of this constitutional amendment, the Court adopted Rule of Judicial Administration 2.051. In re Amendments to the Florida Rules of Judicial Administration – Public Access to Judicial Records, 608 So.2d 472 (Fla. 1992).

ISSUES AND RECOMMENDATIONS

1. ACCESS TO RECORDS IN THE JUDICIAL BRANCH

Since the adoption of article I, section 24, Florida Constitution, the judicial branch has experienced an increasing number of public records requests. These requests range from a simple request for a copy of an administrative memorandum to extensive requests for materials from various databases. Questions have arisen about who is responsible for maintaining records, how to handle draft documents, and duplicate records. The branch does not have clear directives regarding how these requests are to be handled.

Recommendation

The Public Records Workgroup recommends that Rule of Judicial Administration 2.051 be amended to provide a clear procedure for handling public records requests in the judicial branch. Rule of Judicial Administration 2.051 should be amended as follows.

1. The definition of “records of the judicial branch,” and “court records” should be amended to be compatible.

When Rule of Judicial Administration 2.051 was amended in 1995, a definition of the term “judicial records” was added. In re Amendments to Rule of Judicial Administration 2.051– Public Access to Judicial Records, 651 So.2d 1185 (Fla. 1995). The commentary notes that the definition of “judicial records” is consistent with the definition of “court records” contained in Rule 2.075(a)(1) and the definition of “public records” contained in chapter 119, Florida Statutes. The Workgroup concluded, that despite the commentary, these definitions are **not** the same. The Workgroup, therefore, recommends a definition of “records of the judicial branch” that is consistent with the definition of public records in chapter 119 and would not limit the access contemplated by article I, section 24, Florida Constitution. The term “records of the judicial branch” is an all-inclusive term that includes court records as defined in Rule 2.075(a)(1) and administrative records in the judicial branch.

2. A definition of the “judicial branch of government” should be added and the phrase “agencies of the judicial branch” should be eliminated.

Because of the mistaken tendency of other branches of government as well as some members of the public to consider the judicial branch an agency, the Workgroup recommends that the phrase “agencies of the judicial branch” be eliminated from the rule. The definition of judicial branch would clarify the scope of the rule and would include all entities that might have previously been considered an “agency of the judicial branch.” In accordance with the Court’s decision in Times Publishing Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995), the definition includes clerks of the court when acting as an arm of the court.

3. Add a definition of “custodian.”

In order to clarify procedures for access to public records, a definition of the records custodian is added. This definition is consistent with the definition of records custodian in section 119.021, Florida Statutes.

4. Eliminate the requirement that exemptions for administrative records be approved by the Chief Judge of the next highest appellate court.

In order to utilize the exemption in the current Rule 2.051(c)(2), the chief judge must obtain the approval of the chief judge of the next highest appellate court

or the chief justice. The Workgroup recommends that this provision be eliminated because of the potential for conflict. If a decision to deny access is appealed, the mandamus action would be filed in that same appellate court.

5. Establish a procedure for public record requests in the judicial branch.

In order to provide efficient public access to records of the judicial branch, the rule provides for requests for records to be in writing and directed to the records custodian. The reason for seeking the records need not be disclosed. The commentary emphasizes that each judicial branch entity should develop policies and procedures for responding to requests consistent with the requirements of Rule 2.051.

The Workgroup recommends a requirement that the request for records be in writing. This will avoid confusion or misunderstanding regarding the nature of the request. Utilization of a written request will protect the public and facilitate enforcement of the right to access.

6. Make conforming changes to Rules of Judicial Administration 2.030 and 2.040.

2. RETENTION OF RECORDS IN THE JUDICIAL BRANCH

Article I, section 24(c), Florida Constitution, provides:

(c) . . . The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. . . .

The Legislature requires state agencies to follow retention schedules established by the Secretary of State. Section 119.01(4), Florida Statutes, provides:

(4) Each agency shall establish a program for the disposal of records that do not have sufficient legal, fiscal, administrative, or archival value in accordance with retention schedules established by the records and

information management program of the Division of Library and Information Services of the Department of State.

No adequate statutory provisions govern the retention of judicial branch records.¹

The Court adopted Rule of Judicial Administration 2.075 regarding retention² of court records in 1981. In re Florida Rules of Civil Procedure, 403 So. 2d 926 (Fla. 1981). This rule is limited to “court records.” Administrative records are beyond the scope of this rule. Rule 2.075 establishes a schedule for the retention of court records and authorizes the clerk to destroy or dispose of records at the expiration of the time periods established in the rule.³

While the rule authorizes the clerk to dispose of records according to the schedule, the rule also provides that disposal of court records is “subject to obtaining any consent required by law from the Division of Library and Information Services of the Department of State.” Rule 2.075(b).⁴ The Court has, however, reiterated that, under separation of powers, the records of the judicial branch are controlled by the judicial branch:

We conclude that the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and

¹Section 39.0132, Florida Statutes, does provide for retention of juvenile dependency cases for seven years. This conflicts with Rule of Judicial Administration 2.075 which provides for retention of these records for five years.

²The term “retention” is used in this report as shorthand for “maintenance, control, destruction, disposal, and disposition” of records.

³It is not clear whether this rule applies only to trial courts or also includes appellate courts.

⁴It should be noted that the 2000 Legislature amended section 257.36(6), Fla. Stat. and eliminated the requirement for approval from the Division of Library and Information Services for the destruction of public records in the executive branch.

other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and

control of the Supreme Court of Florida, rather than the legislative branch.

Times Publishing Co. v. Ake, 660 So.2d 255, 257 (Fla. 1995).

A comprehensive schedule for retention of administrative records in the judicial branch has not previously been adopted. The judicial branch currently has only a Supreme Court-approved retention schedule for trial court records. Each District Court of Appeal and the Supreme Court have separate schedules for retention of appellate court records. The Office of the State Court Administrator developed a records retention schedule in 1997 but never submitted it to the Court for approval. The Florida Bar and the Florida Board of Bar Examiners also have retention schedules which were approved within those bodies. In the absence of a Supreme Court-approved retention schedule for the judicial branch, some entities have in good faith developed their own schedule, some are utilizing the schedule for executive branch agencies, General Records Schedule for State and Local Government Agencies (Schedule GS 1), some other entities are disposing of records when they no longer have legal, fiscal, administrative, or archival value, and other entities may be retaining records indefinitely.

Recommendation

The Public Records Workgroup recommends that the Court adopt a Rule of Judicial Administration establishing a records retention schedule for administrative records for the judicial branch:

(1) utilizing the legislatively authorized Department of State schedules, as appropriate, and adapting those schedules to the judicial branch of government;

(2) providing that where the subject schedules do not address specific records, the entity of the judicial branch of government shall submit a proposed schedule to the Court for approval; and

(3) further providing that at any time that such utilized schedules, as may be supplemented by proposed schedules submitted by entities of the judicial branch and approved by the Court, may require further supplementation or modification,

the entity of judicial branch of government shall submit a proposed schedule or item for such further supplementation or modifications to the Court for approval.

A proposed Judicial Branch Records Retention Schedule for Administrative Records is attached as Appendix C. It is the Workgroup's intent that the Court adopt a uniform schedule for the judicial branch and that all entities within the branch use the same schedule. If an entity determines that it needs to keep a record longer than the stated period, it could do so. The schedule authorizes destruction of the record at the end of the retention period. The Workgroup anticipates that amendments to the schedule should be rare because the suggested model is essentially the schedule that has been utilized by executive branch agencies for many years.⁵

The Public Records Workgroup recommends that the Court amend Rule of Judicial Administration 2.075 to include a retention schedule for appellate court records. At the appellate level, the majority of the record on appeal is returned to the trial court. It is not clear whether Rule 2.075 currently applies to appellate court records that are not returned to the trial court. A clear and consistent rule should apply to these records. Amending Rule 2.075 will clarify the length of time that an appellate court should retain court records and will provide consistency among the district courts of appeal. The clerks of the appellate courts, including the Clerk of the Supreme Court, agree with this approach.

3. FEES FOR COPIES OF ADMINISTRATIVE RECORDS

This Court has never articulated whether fees can be charged for copies of administrative records in the judicial branch. The Workgroup determined that the Court has the authority to establish fees for copies of administrative records in the judicial branch as a means to defray the expenses associated with providing copies of records and that this Court should make it clear that fees can be charged.

⁵The Workgroup initially used the 1996 GS-1 Schedule for the development of the proposed Judicial Branch Records Retention Schedule. The Secretary of State amended that schedule in January 2001. The proposed Judicial Branch Records Retention Schedule in Appendix C uses the January 2001 schedule and adjustments have been made as appropriate.

In Petition of Florida State Bar Association, 40 So.2d 902, 906 (Fla. 1949), the Court found that the doctrine of implied powers carries with it the power to impose a membership fee in order to defray the expenses of an integrated bar. The Court addressed the question of whether the power to integrate the bar carries with it the power to impose a membership fee and found that since:

the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a membership fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expense. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction.

The Court also has imposed fees for the Florida Board of Bar Examiners, finding that fees were justified by the expenses incurred. Florida Board of Bar Examiners re Amendment to Rules of the Supreme Court Relating to Admissions to the Bar, 676 So.2d 372, 375 (Fla. 1996).

Because the Court has the power to impose fees for members of the Bar in order to defray the expenses of an integrated bar, similarly, the Court also has the authority to impose a fee for copies of records in order to defray the expenses associated with providing those copies.

Access to public records in the judicial branch is mandated by the Florida Constitution, article I, section 24. In order to meet this constitutional obligation, fees can be imposed under the authority of article V, Florida Constitution. The Court would not be imposing a tax. Rather, it would be defraying the cost of providing records which the judicial branch is required to do.

Opinions from the District Courts of Appeal have questioned the power of the trial courts to impose, collect or retain fees, costs or charges in the absence of legislative authority. See, Broward County v. Michaelson, 674 So. 2d 152, 153 (Fla. 4th DCA 1996) (finding a fee set by administrative order was void because there was no constitutional or statutory authority for the imposition, collection, or retention of the fee). See also Reyes v. State, 655 So. 2d 111, 120 (Fla. 2d DCA 1995) (striking an assessment to the Hillsborough County Court Improvement Fund because it was not supported by an authorizing statute); Williams v. State, 596 So.

2d 758 (Fla. 2d DCA 1992)(finding it is well established that a court lacks the power to impose costs through an administrative order); Watson v. State, 662 So. 2d 969 (Fla. 1st DCA 1995)(reversing a \$5 fee imposed by administrative order).

These cases can all be distinguished on at least two important grounds. First, these cases involved a trial court attempting to impose a fee and not action by this Court as the body having administrative supervision over all courts under article V of the Florida Constitution. Further, these cases all involve criminal proceedings where an additional fee or cost was imposed upon a criminal defendant as an additional penalty upon the defendant or a fee was charged in order to obtain a continuance.

If the Court determines that it should not exercise its inherent authority and impose a fee to defray the expenses for copying records, a possible source of authorization for fees for copies of administrative records is section 119.07(1)(a), Florida Statutes.⁶ It provides that if a fee is not prescribed by law, a records custodian can charge not more than 15 cents per page for duplicating public records. However, in a different context, this Court determined that chapter 119 does not apply to the judicial branch. The Florida Bar In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes, 398 So. 2d (Fla. 1981); Times Publishing Co. v. Ake, 660 So.2d 255, 257 (Fla. 1995). In Ake, the Court found that section 119.12, Florida Statutes, did not provide a basis for assessing attorneys fees against the clerk because this chapter does not apply to the judicial branch. However, in WFTV v. Wilken, 675 So.2d 674 (Fla. 4th DCA 1996), the court noted in dicta that absent statutory authorization for fees for copies of court records, the provisions of section 119.07(1)(a), Florida Statutes, would apply.

⁶Fees for copies of court records are provided for in statutory provisions governing the clerks of court. See section 28.24, Fla. Stat., (requires the clerk of the circuit court to charge \$1 per page); section 35.22(3), Fla. Stat., (adopts the fee schedule of section 28.24, Fla. Stat., for the District Courts of Appeal); and Section 25.241(3), Fla. Stat., (requires the Clerk of the Supreme Court to assess \$1 per page).

Recommendation

The Public Records Workgroup recommends that fees for copies of administrative records of the judicial branch be charged in the same manner that fees are charged for copies of public records in the executive branch. This should include the authority to charge for extensive use of information technology or extensive clerical or supervisory assistance, or both.

Rule of Judicial Administration 2.051 should be amended to authorize judicial branch entities to charge fees for copies of administrative records.

4. EXEMPTIONS FROM ACCESS TO PUBLIC RECORDS

Article I, section 24(c) and (d), Florida Constitution, provide for exemptions from access to public records. There are three basic sources of authority for exemptions:

STATUTES IN EFFECT IN 1993

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

COURT RULES IN EFFECT IN 1992

Rules of court that were in effect on the date of adoption article I, section 24, that limit access to records remain in effect until they are repealed.

STATUTORY EXEMPTIONS ADOPTED AFTER 1993

The Legislature may create additional exemptions, provided that such law states with specificity the public necessity justifying the exemption and is no broader than necessary to accomplish the stated purpose of the law.

The Workgroup did not have the time or resources to address exemptions from public access to records of the judicial branch. The Workgroup recognizes that legislative action is probably required in order to enact new exemptions. The Workgroup also recognizes a review of exemptions is in order. Consistent with the recent recommendations from the Governor's Task Force on Privacy and

Technology, it would be appropriate for the judicial branch to review its records and determine where additional exemptions may be needed.

Recommendation

The Supreme Court Workgroup on Public Records recommends that the judicial branch undertake a review of its records and determine where additional exemptions may be needed. The Supreme Court should appoint a successor committee to undertake this task.

5. EDUCATION AND TRAINING OF JUDICIAL BRANCH PERSONNEL

The members of the Public Records Workgroup acknowledge that participation on this Workgroup has increased their understanding of public records issues in the judicial branch and believe that their colleagues would benefit from a greater understanding of public record issues.

The education and training that has occurred on public records issues in the branch has been sparse. Since 1997, there have been three programs for trial judges on public record issues. All of the programs have been in the context of public records issues in criminal proceedings. None of the programs for trial judges has addressed administrative records. There have been three programs that addressed administrative records: one in 2000 for the District Court of Appeal Clerks and Marshals, one in 2000 for the trial court administrators, and a brief program in 1999 for the chief judges.

Recommendation

The Public Records Workgroup recommends that the Court encourage the Florida Court Education Council to provide additional educational opportunities for judges in all tiers of court on public records issues, particularly as it relates to administrative records in the judicial branch.

The Public Records Workgroup recommends that the Court encourage chief judges, trial court administrators and other entities within the judicial branch to

provide training for staff on public record issues. Records custodians should receive specific training on their responsibilities.

The Public Records Workgroup recommends that other practical steps be taken to provide more information on public records issues such as having a list of frequently asked questions (FAQs), providing more information on intranets, developing video training, developing a “train the trainer” course, providing policies and procedures in Volume I of The Florida Judge’s Manual, and providing special training for information technology staff.

The Public Records Workgroup recommends that funding for training on public records issues be provided.

6. COPYRIGHTING OF RECORDS

The Copyright Act of 1976 permits authors of original works to secure copyright protection, but bars such protection for works in the public domain. Federal case law bars state governments from copyrighting statutes, rules, regulations, or court opinions on due process grounds. See e.g., Georgia on behalf of General Assembly v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982), vacated on settlement, 559 F. Supp. 27 (N.D. Ga. 1983)(extending the rule that statutes and opinions are in the public domain to a privately prepared and copyrighted building code adopted by the state). State government works that do not have the force of law do not appear to reach due process considerations, and nothing in the Copyright Act prohibits states from copyrighting such works.

Virtually every state has secured copyright protection in its own publications, either through statute or by registration. A report produced by a subcommittee of the American Bar Association in 1989 stated that at least 28 states claimed copyright on a variety of basic, state-produced materials. See American Bar Association, 1989 Annual Committee Reports, Section of Patent, Trademark and Copyright Law 224 (1989).

No federal court has yet directly addressed the question of whether state government public records that do not have the force of law are in the public domain and therefore ineligible for copyright protection. Nothing in the Copyright

Act expressly bars state governments from securing copyright protection for such works.

The copyrighting of judicial branch works raises two state law questions. First, is statutory authorization required before the judicial branch can secure copyrights on its works. Second, is a copyrighted work subject to article I, section 24, Florida Constitution.

Numerous statutes authorize executive branch agencies and entities to secure copyrights on their works. See, e.g., section 20.43, Fla. Stat. (Department of Health) and section 24.105(12), Fla. Stat. (Department of the Lottery).

Section 286.021, Florida Statutes, in addition, grants to the Department of State, for the use and benefit of the state, the right to hold all rights in and to any copyright owned or held by the state or any of its boards, commission or agencies.⁷ Section 286.031, Florida Statutes, authorizes the department to do and perform any and all things necessary to secure copyrights and to enforce the rights of the state, to license, lease or give consent for use, to take action necessary to protect the copyrighted material from improper or unlawful use or infringement, and to sell and to execute agreements on behalf of the state to consummate such sales. These laws have been interpreted to reflect only the administrative responsibilities of the Department of State when another agency applies for and receives copyright protection, rather than authorization for the department to secure copyright protection for another state agency. AGO 2000-13.

State officers may not obtain or hold copyrights on works produced by their offices in the absence of express statutory authority, where the officers' powers are fixed by statute and the authority to copyright is not necessarily implied from their express powers. See AGO 86-94 (clerk of the circuit court was not authorized to copyright computer programs for the office's financial and accounting functions); AGO 88-23 (state attorney's office did not have authority to copyright and sell training videotape in the absence of statutory authority). See also AGO 78-67 (board of trustees of community college did not have authority to contract for the

⁷The statute also encompasses trademarks and patents.

purchase of an exclusive copyright license and the right to use, distribute, and sell a videotape educational series).

Under the inherent powers and separation of powers doctrines, the judicial branch possesses the power to accomplish all objectives naturally within its realm, thereby making it possible to carry out its constitutional responsibilities as an independent branch of government. See Sun Insurance Office, Ltd. v. Clay, 133 So.2d 735, 742 (Fla. 1961)(each department of government has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department).⁸ Express grants of authority conferred upon the judiciary therefore carry the inherent powers to facilitate the exercise of such grants. Id.

In accordance with the separation of powers doctrine and the powers granted in article V, Florida Constitution, the judicial branch has the exclusive right to control access to its own records. The Florida Bar In re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes, 398 So.2d 446 (Fla. 1981)(Florida Bar investigative files are subject to the control and direction of the Court and not to either of the other branches of the government).⁹ If the branch possesses exclusive authority to control its records, it logically possesses the authority to establish a proprietary interest in those records through copyright.

This authority is consistent with protecting the public treasury. Where tax dollars have been used to create records, it does not seem appropriate to allow private vendors to obtain the benefit of that work and exploit it for profit. For instance, if Information Systems Services develops a new computer program for managing court files, a private vendor should not be able to obtain that program under the public records law and sell that same program for profit.

⁸The legislative branch apparently relies upon its inherent powers to secure copyright protection for its works. No statutory authorization to copyright legislative works exists. For an example of a copyrighted legislative document, see the Legislature's home page at www.leg.state.fl.us.

⁹Whether article I, section 24 in any way diminished or altered the judicial branch's exclusive authority to control its own records has not been addressed by the courts.

A copyrighted public record is still subject to article I, section 24, Florida Constitution. Under federal preemption principles, custodians of copyrighted public records are obligated to permit inspection of records, but prohibited from permitting reproduction, copying or distribution in the absence of express permission from the copyright owner. See AGO 97-48; AGO 90-102; AGO 82-63. But see Department of Health and Rehabilitative Services v. Southpoint Pharmacy, 636 So.2d 1377 (Fla. 1st DCA 1994)(agency had a statutory obligation to release copyrighted transcript). The article I, section 24(a) mandate to permit access to public records is stated in the alternative. The public has the right to “inspect or copy” public records. If custodians permit inspection of copyrighted materials, but do not permit copying or distribution absent permission of the copyright holder, they would appear to act in compliance with the constitutional access requirement.¹⁰

Recommendation

The Public Records Workgroup determined that the judicial branch has the inherent authority to copyright records in the judicial branch except to the extent that due process rights are implicated. Copyrighted records are still subject to inspection under the public records law.

7. TECHNOLOGY ISSUES

The Workgroup recognizes that the changes in technology bring new challenges for addressing public record issues. It does not appear possible to fashion new rules or recommendations that can effectively address the issues that will arise with new technology. Technology is constantly changing. Rules fashioned to address new, and, as yet, unknown technology may be out of date before the rule can be applied. The better approach is to apply existing principles of public records law to any new technology.

Recommendation

¹⁰Section 119.07(1)(a), Fla. Stat., requires custodians to permit records to be inspected and copied.

The Public Records Workgroup recommends that the Court adopt a policy that the application of new electronic systems in the judicial branch must consider:

(1) Whether the record the system is creating meets the test for a “record of the judicial branch.” It is possible that some of the records created are merely precursors to records of the judicial branch or do not perpetuate, communicate or formalize knowledge.

(2) How the technology can be applied to facilitate timely public access to non-exempt information. Electronic systems must be designed so that exempt information can be deleted, redacted or otherwise not made available to the public prior to providing access to non-exempt information.

The Public Records Workgroup recommends that the Court adopt the following policies regarding existing systems.

(1) The policies and procedures for each judicial branch entity should be designed to ensure that the public is provided access to non-exempt records of the judicial branch to the greatest extent feasible given current systems design and should recognize that existing electronic systems may need to be redesigned to separate exempt information from non-exempt information.

(2) Electronic feeds or electronic tie-ins to judicial branch electronic systems, if provided at all, should not be provided until procedures are developed to ensure that exempt information is not disclosed and that privacy concerns are not compromised.

The Supreme Court should direct that the appropriate committee or workgroup develop such procedures.