



# FIRST AMENDMENT FOUNDATION

336 East College Avenue, Suite 101 Tallahassee, FL 32301

www.floridafaf.org

02 April 2013

The Honorable Carolyn Egan  
General Counsel, Florida State University  
424 Westcott Building  
222 South Copeland Street  
P.O. Box 3061400  
Tallahassee, Florida 32306-1400

Dear Mrs. Eagan:

It has come to our attention that FSU Instructor Farhood Basiri, in his role as an instructor of a mobile technology class in the FSU School of Library and Information Studies, made a public records request for information and data pertaining to the FSU Tranz App. Your office and the Office of Business Services denied Mr. Basiri's request based on two grounds, claiming that the "live feed" data processing software (API) does not qualify as a public record under section 119.011(12), F.S., and that the information falls under the public record exemption for sensitive agency-produced data processing software found in section 119.071(1)(f), F.S. It is our position that FSU's reliance on the two asserted grounds fails for at least three reasons. First, data processing software is a public record. Second, the information collected by the FSU Tranz App fails to meet the statutory definition of "sensitive" agency-produced data processing software in 119.011(14), Florida Statutes. Finally, even assuming that the FSU Tranz App data can be classified as "sensitive", section 119.071(1)(f) cannot be interpreted to prohibit the sharing of data processing software and public record information between different departments of the same university. Furthermore and most troubling, the refusal to share this information violates the educational mission of a research institution, which is to provide its students and faculty with the tools to succeed in the 21<sup>st</sup> century world.

## FACTUAL BACKGROUND

Mr. Basiri teaches a mobile technology class at Florida State University's School of Library and Information Studies. On January 8, 2013 Mr. Basiri first made a public records request for information and data pertaining to the FSU Tranz App including a request for the application program interface (API) or "live feed data."

As an educator and as a professional, Mr. Basiri plans to put the information to good use. On one level, he wants to create his own improved FSU parking app. Second, he wants to discuss the mobile app building process with his students so that they can see a real world project as it happens. In his public records request, Mr. Basiri wrote, "[w]e'll be using the data in my mobile app class."

The FSU Tranz App is a freely available product developed and distributed by Florida State University's Office of Business Services. A First Amendment Foundation open records request revealed that there is no licensing agreement for the FSU Tranz App. Funding for the FSU Tranz app comes primarily from general student transportation fees. FSU's parking services website says that the FSU Tranz App is not a money making venture, and that anyone, regardless of affiliation with the university, may download the app free of charge.

The FSU Tranz App uses data and various software programs, including an application program interface (API) or "live feed data", to process data from FSU parking facilities and convert that data into a format that app users can understand – in this case, a "gas gauge" showing the current capacity of all FSU-owned parking garages. As part of

his public records request, Mr. Basiri specifically requested the API or live feed data, which is basically a data processing software program. *See generally Application Program Interface Definition*, DICTIONARY.COM (last visited March 12, 2013). With the help of the API, FSU Tranz App gives users real-time parking information, assisting users in finding a parking spot on the university campus. FSU Tranz attempts to facilitate a user's participation in the great Florida State University educational experience by making it easier to find campus parking.

## LAW AND ANALYSIS

### Data Processing Software is a Public Record

FSU's general counsel's office informed Mr. Basiri that the app's "live data feed," does not constitute a public record. Respectfully, this interpretation directly contradicts the plain language of section 119.011(12), F.S., as well as established legal opinions that clearly state that non-final automated data processing software is a public record.

The statutory definition of "public record" in s. 119.011(12), F.S., "specifically includes 'data processing software' and establishes that a record made or received in connection with official business is a public record, regardless of physical form, characteristics, 'or means of transmission.'" *2013 Government-in-the-Sunshine Manual*, page 57 [citing s. 119.011(12), F.S.]. For example, in AGO 90-04, Attorney General Robert A. Butterworth wrote that "[a]gency-produced data processing software which collects, stores, retrieves, and processes voter registration information pursuant to s. 98.211, F.S., is a public record." In fact, the Florida Supreme Court wrote that "[t]he most significant change to section 119.011(1) occurred in 1995 when the Legislature amended the definition of 'public records' to include 'data processing software' and information regardless of 'means of transmission.'" *State v. City of Clearwater*, 863 So. 2d 149, 152 (Fla. 2003).

The fact that the information or data is not yet in its final form does not make it outside the scope of chapter 119, Florida Statutes. *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980); AGOs 90-102, AGO 90-04. "There is no 'unfinished business' exception to the public inspection and copying requirements of Ch. 119, F.S." *2013 Government-in-the-Sunshine Manual*, page 55. The *Shevin* Court held that "public record" means "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin*, supra, at 640.

Likewise, in AGO 90-102, Attorney General Butterworth opined that data processing software held by a county government was a public record despite its non-final or unfinished form:

Public records are not restricted to those documents which have been reduced to final form or otherwise represent the ultimate product of a public official or agency. Only those records made confidential or exempt from disclosure by law are exempt from the disclosure provisions.

AGO 90-102. The attorney general opinion stressed that when a government entity is using data processing software in the course of its business, the data processing software is a public record. This opinion was codified in 1995 when the Florida Legislature amended the statutory definition of "public record" to specifically include "data processing software." *See* s. 119.011(12), F.S.

In this specific situation, it is clear that the information and data processing software Mr. Basiri has requested is a public record. With parking a major concern at Florida State University, the FSU Tranz App is an integral part of the business of the University and was created by those acting on behalf of the University. It informs FSU students, employees, visitors, and administrators about the parking situation, and undoubtedly is a valuable tool that university decision-makers use to evaluate the parking issues on campus. The fact that some of the material that Mr. Basiri has requested is in non-final form is immaterial because just like the data processing software in AGO 90-102, the FSU Tranz APP data processing software is being used by the university in its official capacity of supplying parking

information to the Florida State University community. Despite the automated nature of the information, such automation “must not erode the right of access to” public records. Therefore, the FSU Tranz App data processing software and the information it “collects, stores, retrieves, and processes” is a public record that the University must make available to Mr. Basiri and his students barring a specific statutory public record exemption.

**FSU Tranz App fails to meet the definition of “Sensitive” in s. 119.011(14), F.S.**

Government bears the burden of proof when asserting that a public record is exempt from disclosure and that the proffered exemption actually applies to the requested record. *See, generally, Christy v. Palm Beach County Sheriff’s Office*, 698 So. 2d 1365 (Fla. 4th DCA 1997); and *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985). Here, Florida State University fails to sustain that burden because the FSU Tranz App program does not meet the statutory definition of “sensitive” agency-produced software in s. 119.011(14), F.S.:

“Sensitive,” for purposes of defining agency-produced software that is sensitive, means only those portions of data processing software, including the specifications and documentation, which are used to:

- (a) Collect, process, store, and retrieve information that is exempt from s. 119.07(1);
- (b) Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or
- (c) Control and direct access authorizations and security measures for automated systems.

Clearly, not all agency-produced software meets this narrow definition and thus cannot be classified as “sensitive” under chapter 119, F.S. *Compare* AGO 91-61 *with* AGO 90-04. In AGO 91-61, the City of Miami Beach conceded that a software program produced by the City was not “sensitive” within the meaning of chapter 119, F.S. In contrast, in AGO 90-04, the attorney general determined that the an agency-produced software program that collected voter data met the statutory definition of “sensitive” because of the public record exemption pertaining to voter information in s. 98.211, F.S. Read together, AGOs 91-61 and 90-04 establish that in order to show that an agency-produced software meets the statutory definition of “sensitive,” an agency must rely on a specific public record exemption, and prove that the data processing software collects, processes, stores, and retrieves exempt information or financial management information, or that the data processing software controls and directs access authorizations and security measures for automated systems. Such is not the case with the FSU Tranz App software requested by Mr. Basiri.

Because the exemption for sensitive data processing software does not apply, the University bears the burden of identifying a statutory exemption that would otherwise apply.

**The Exemption in s. 119.071(1)(f), F.S., does not prohibit the University from sharing the FSU Tranz App**

The University’s general counsel’s office informed Mr. Basiri that s. 119.071(1)(f), F.S., prohibits the sharing of the software and data. Assuming for argument’s sake that the data processing software and information requested by Mr. Basiri is “sensitive” (which we assert it is not), the university’s position is untenable because it directly contradicts the plain language of s. 119.071(1)(f), F.S..

Section 119.071(1)(f), F.S., stipulates that the “[t]he designation of agency-produced software as sensitive *shall not prohibit an agency . . . from sharing or exchanging such software with another public agency.*” (emphasis added). In AGO 90-04, Attorney General Butterworth wrote that just because a supervisor of elections designated a voter software program as “sensitive,” that “designation does not prohibit the supervisor of elections from sharing such information with other public agencies.”

Section 119.071(1)(f), F.S., makes it crystal clear that a “sensitive” classification of the FSU Tranz App data

processing software does not prohibit one university department from sharing the requested software with another department within the same university – in this particular instance, an instructor who is training FSU students to become the developers and mobile technology innovators of tomorrow. Florida State University's interpretation and application of the exemption in denying Mr. Basiri's public records request represents a misuse and misinterpretation of Florida's public records law.

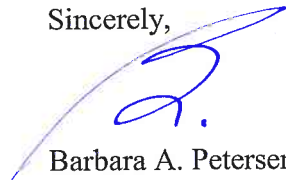
It is unclear why Florida State University would deny this request since Mr. Basiri plans to use the data to make a valuable contribution to the Florida State University community. Mr. Basiri wants to use the information to create an improved parking app that better serves the needs of all drivers. He has a proven record of developing user-friendly mobile applications and he is confident that he can transform the information in the public records into a great parking app.

Furthermore, the University's denial of the Mr. Basiri's request and its refusal to share the FSU Tranz App violates the educational mission of Florida State University, which is "is the development of new generations of citizen leaders." *About Florida State*, FSU.edu/about (last retrieved March 12, 2013). Here, the use of the exemption is troubling because it impedes the educational development of FSU students.

### CONCLUSION

For the above reasons, we ask that your office immediately provide Mr. Basiri with access to the FSU Tranz App and its data. We greatly appreciate your attention to our concerns, Ms. Eagan. Should you have any questions or need additional information or clarification, please don't hesitate to contact me.

Sincerely,



Barbara A. Petersen, President

Cc: The Honorable Dr. Eric J. Barron, President, Florida State University  
David Coburn, Special Assistant to the President  
Harvey Buchanan Jr., Director, FSU Office of Business Services  
Charles T. Friedrich II, Senior Associate Director, FSU Office of Business Services  
Robyn Blank Jackson, Associate General Counsel, Florida State University  
Jon Kaney, General Counsel, First Amendment Foundation