FIRST AMENDMENT FOUNDATION

05 February 2016

Mr. Dominic M. Calabro, President & Chief Executive Officer
Florida TaxWatch
106 North Bronough Street
Tallahassee, FL 32301

Dear Dominic:

First, I would like to thank you and TaxWatch for your report on the 2016 attorney fee bills, HB 1021 and SB 1220. The attention your work has brought to this critically important issue helps, and we're appreciative of your efforts.

We're also pleased with the conclusions in the report that many of the problems highlighted by the League of Cities in the past few months could be successfully addressed by additional open government training, increased transparency, and creation of an effective enforcement mechanism to protect our constitutional right of access to public records short of filing suit in civil court to compel compliance. As I'm sure you're aware, these are issues that we at the First Amendment Foundation have been supporting and promoting for many years.

We also understand the concerns of the League regarding the "predatory" public record requests highlighted in your report. We have worked closely with Senator Simpson for the past two years to find a way to protect government contractors from these sorts of requests. The result of those efforts is HB 273, which passed the Senate just this week. I believe this legislation addresses many – if not all – of the report's recommendations regarding state contractors.

We have also worked with the League of Cities for the past two years to address the problem of specious public record requests and found common ground in compromise language that would have tied the award of attorney fees to notice to the record custodian of the records request. Under language agreed to by both the League and FAF, a requestor would have to provide notice of a public record request to the designated (and identified) record custodian at least two business days before filing suit in civil court. In 2014, then-League president P.C. Wu supported the compromise language in an op-ed that was widely published in Florida's newspapers. The League agreed to the same language again last year, but unfortunately in both cases the bills to which the amendments were drawn failed to pass. We have offered that same language as a compromise amendment to the attorney fee bills this year, but the League has backed off our past agreement and

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is pushing forward with legislation that we believe will eviscerate the public's ability to oversee its government and hold it accountable for its actions.

Of grave concern is the one-sidedness of the League's message. It focuses solely on the handful – I can think of fewer than a dozen and attorneys and citizens who could be considered "predatory" – of those who would scam the system. It fails to recognize or even acknowledge the barriers citizens face daily in trying to access public records.

And sometimes those barriers are insurmountable. Barbara Lemley, for example, is being required to pre-pay the estimated cost of producing the records she has requested from the Lake Shore Hospital Authority. That's perfectly legal under our law, but it's patently absurd to require prepayment of 30 cents. Yet the LSHA is making Barbara drive from her home, pay the 30-cent fee, and then return the following day to pick up her records.

Reporter Jason Parsley made a common public record request for copies of emails sent or received by sheriff deputies in Broward County. He was seeking emails in a short time frame – three months – and asked for only those emails containing six key search words. The Sheriff asked Jason to pay $399,000 for the requested records and told him it would take four years to comply with the request.

I ran into a similar situation when requesting email correspondence from Governor Scott's top five staffers. I was making the request on behalf of the Florida Press Corps, thinking it would be easier for the Governor's Office of Open Government to respond to one request – mine – rather than a dozen requests from the press corps. The plan was to take the emails and place them in Drop Box, allowing access to all those who wanted to see them. I quickly had to abandon the project because of the high costs involved in obtaining the public record emails; I paid $789 to obtain approximately 300 public record emails sent or received by the Governor's communication director in one week.

Stephen Herbits was forced to file suit against his city government when his public records request was ignored even after he repeatedly contacted the city to ask when he could expect a reply – not the records, just a simple reply. He finally retained an attorney and filed a lawsuit to enforce compliance with the law. Within 72 hours of filing the suit, the city produced the records Mr. Herbits requested.

There are many, many such examples, but I think the most compelling story is that of Susan Hewlings who made a simple request for public records from the Orange County animal control office. Orange County continued to fight the court's decision that it had violated the public records law, and the Hewlings case went to the 5th DCA not once, but twice. Here is what the court had to say in Hewlings II:

> *The public records law embodies important public policy. It is designed to provide citizens with a simple and expeditious method of accessing public records. Appellee made a simple request for the records related to the investigation of her dog. She asked for copies of the records and expressed a willingness to pay the costs. Instead of complying with this simple request, Appellant chose to interpose the additional bureaucratic hurdles of forcing her to come to its offices, comb through the records, mark the records in a certain manner, wait for a written estimate of costs, then, after paying the costs, wait again for the records to be mailed to her. This was a violation of the law. Because of Appellant's actions in this case, which are also in direct contravention of the public policy favoring a simple and prompt resolution of public records requests, this litigation has now spanned four years and involved discovery depositions, other discovery, numerous motions hearings, trials, mediations, and two*

> *appeals. To say that Appellant has turned a molehill into a mountain is an understatement.* ***This case provides a textbook example of why the legislature authorized an award of fees against obstinate public entities such as Appellant.***
> http://www.5dca.org/Opinions/Opin2014/120814/5D13-3775.corr.op.pdf (emphasis added)

The League of Cities survey highlights a critical need for education and a better understanding of the requirements and responsibilities imposed by our public records law. For example, the law requires that an agency respond to a public record request "promptly and in good faith." This is separate from the requirement that the requested records be provided within a "reasonable" period of time. The word "reasonable" isn't defined in the statutes, and the courts have said "reasonable" means the time it takes to locate the records, to review those records for exempt information, and to provide a copy. The production requirement, then, means that the time in which the records must be produced will depend completely on the size and complexity of the public record request – the reasonable period of time to produce a copy for last year's budget could be a matter of hours, but it could take weeks if the request is for the budget and all supporting documentation. Under no circumstances does a requestor have an immediate right of access.

And clearly, if government agencies at all levels were more pro-active in embracing transparency by placing the most commonly requested public records on their websites, we would see a huge benefit both in terms of time and costs. Chief Financial Officer Jeff Atwater has set a good example in this area, and we have encouraged other government officials to follow his example.

Finally, we think creation of an effective enforcement mechanism is long overdue and have committed our time and resources to find a viable solution over the interim before the next session. I'm sure you saw the State Integrity report that gave Florida a D- when it came to access and transparency. According to the report, "[t]he problem is not with the laws that make documents public, but the laws that deal with non-compliance." Surely, if the attorney fee bills currently making their way through the legislative process become law and "shall" is changed to "may," Florida will drop to the bottom of the heap.

Again, thank you for issuing this report. While we don't agree with all its conclusions, we fully embrace the conclusion on page 12:

> *If taxpayers have questions about whether they will be awarded attorney fees and other reasonable costs, even if they win, then they may be less likely to file a civil action if their request is not timely and accurately processed.* ***Those who file a civil action with the intent of securing a cash settlement or to overburden a public agency are not likely to be dissuaded by this reinforcement, since their intention is not to go to trial in the first place.*** (emphasis added)

All the best,

Barbara A. Petersen, President

Cc: FAF Board of Directors
FSNE Board of Directors