



The Florida Senate

Interim Report 2012-314

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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 717.117(8), F.S., UNCLAIMED OR ABANDONED PROPERTY

Issue Description

The Open Government Sunset Review Act provides for the review of exemptions to open records and meetings requirements 5 years after enactment. Section 717.117(8), F.S., is an exemption for social security numbers and property identifiers, other descriptors used to identify the property holder of any unclaimed or abandoned property, held by the Department of Financial Services (DFS). This public records exemption will repeal on October 2, 2012, unless reviewed and saved from repeal.

Background

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

- (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 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.

In addition to the State Constitution, the Public Records Act,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

. . . 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

¹ Section 1390, 1391 F.S. (Rev. 1892)

² Article I, s. 24 of the State Constitution

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- (3) Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla.1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24 (c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(4)(b), F.S.

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Section 717.117(8), F.S., Exemption

The Department of Financial Services (DFS) Bureau of Unclaimed Property (Bureau) administers the Florida Disposition of Unclaimed Property Act (Chapter 717, F.S.), which establishes the statutory procedure for the reversion and disposition of presumed abandoned, real or personal, property to the state. Under s. 717.119, F.S. the holders, including banks and insurance companies, of property that has not been claimed for a certain period of time are required to submit the unclaimed property to DFS. The proceeds from property that remains unclaimed is then deposited into the Department of Education School Trust Fund, except for \$15 million that is retained in a separate account for the prompt payment of verified claims.¹⁷

The Bureau utilizes multiple means to fulfill the state's obligation under s. 717.118, F.S., to notify owners of unclaimed property accounts valued over \$250 in a cost-effective manner. The means utilized include attempts to directly contact the owner and a state website, www.fltreasurehunt.org, where unclaimed property is listed. Section 717.1400, F.S., mandates attorneys, public accountants, private investigators, or private investigative agencies to be certified or licensed within Florida in order to act as a claimant's representative, acquire ownership or entitlement to unclaimed property, and receive a distribution of fees and costs from DFS. A claimant's representative will attempt to locate the owner of unclaimed property and through a power-of-attorney agreement offer assistance in recovering the property in exchange for a fee.

In order to identify the owner of unclaimed property, claimants' representatives will utilize the information contained in the unclaimed property reports filed with the Bureau. Under the exemption in s. 717.117(8)(b), F.S., social security numbers contained in unclaimed property reports are confidential and exempt from public disclosure. In 2007, legislation was enacted that deleted the phrase "financial account numbers" within the exemption and replaced it with "property identifiers," defined as a "descriptor used by the holder to identify the unclaimed property."¹⁸ Property identifiers contained within property reports are confidential and exempt and could include bank account numbers, credit card numbers, or insurance policy numbers. However, s. 717.117(8)(c), F.S., allows the disclosure of property reports, containing social security numbers of unclaimed property owners along with descriptions of the property, for the limited purpose of locating the owners. The property reports can be obtained by registered claimants' representatives from the Bureau's website or compact discs produced by the Bureau.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ Section 717.123, F.S.

¹⁸ Section 717.117(8)(a), F.S.

Findings and/or Conclusions

Under s. 717.117(8), F.S., social security numbers and property identifiers are confidential and exempt. The parties affected by this exemption include owners of unclaimed property, registered claimants' representatives, and other non-registered third parties. Claimants' representatives who meet the statutory criteria and are registered with DFS have access to the exempt information through the Bureau's website or compact discs. The purpose of the exemption is to protect owners of unclaimed property from identity theft and related crimes. Representatives of the Bureau indicate that social security numbers and property identifiers utilized within the unclaimed property reports are not readily available through other means. However, access to an individual's social security number can result in exploitation of their financial, educational, medical, or familial records or forgery of documents.

The general exemption in s. 119.071, F.S., applies to each state agency and exempts from public records social security numbers, bank account numbers, debit or charge card numbers, and credit card numbers. The exemption in s. 717.117(8), F.S., for social security numbers contained in unclaimed property reports is meant to be stronger than the general exemption, since the reports are only released to registered claimants' representatives. Additionally, s. 717.117(8) limits the disclosure of social security numbers for the sole purpose of locating the owners of the unclaimed property, while the general exemption allows disclosure for numerous additional business purposes. However, there have been reports that unregistered persons have received the Bureau's compact discs containing the social security numbers of unclaimed property owners; which are often listed as a Federal Employee Identification Number. This poses a significant threat to the personal and financial information of unclaimed property owners.

Options and/or Recommendations

Based on the Committee staff's review of the exemption under the Open Government Sunset Review Act's criteria, it is recommended that the public records exemption in s. 717.117(8), F.S., for social security and property identifiers contained in unclaimed property reports be reenacted. However, it is recommended to amend the disclosure of unclaimed property reports to registered claimants' representatives to not include social security numbers or Federal Employee Identification Numbers.