The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

GOVERNMENTAL OVERSIGHT AND ACCOUNTABILITY
Senator Ring, Chair
Senator Siplin, Vice Chair

MEETING DATE: Tuesday, September 20, 2011
TIME: 1:30 —3:30 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Ring, Chair; Senator Siplin, Vice Chair; Senators Benacquisto, Bogdanoff, Dean, Flores, Garcia, Latvala, Margolis, Montford, and Wise

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1		Presentation of Interim Project 2012-124: Transparency of Local Government Retirement Plans' Financial Data	
2		Presentation of Mandatory Review 2012-306: Open Government Sunset Review of Section 627.3121, F.S., Florida Workers' Compensation Joint Underwriting Association, Inc.	
3		Presentation of Mandatory Review 2012-307: Open Government Sunset Review of Section 364.107, F.S., Personal Identifying Information of Lifeline Assistance Plan Participants	
4		Presentation of Mandatory Review 2012-308: Open Government Sunset Review of Section 119.071(1)(g), F.S., U.S Census Bureau Address Information	

The Florida Senate

Interim Report 2012-124 *July 2011*

Committee on Governmental Oversight and Accountability

TRANSPARENCY OF LOCAL GOVERNMENT RETIREMENT PLANS' FINANCIAL DATA

Issue Description

During the 2011 Regular Session, the Florida Senate undertook an effort to address the long-term sustainability of local government pension plans, and passed Senate Bill 1128 as a result of that effort. Though pension funding and benefits were the primary foci of the bill, the transparency of pension plan data was also a concern, and a provision that did not remain in the final version of the bill would have created a task force to examine the transparency of local pension plan data. Currently, financial data from local government retirement plans is reported to the Department of Management Services' Division of Retirement (division), while data related to city finances is reported to the Department of Financial Services, and required audit reports are submitted to the Auditor General. Taxpayers, retirement plan members, and policy-makers may find it difficult to synthesize relevant financial data to understand the comprehensive financial picture of a municipality and its retirement plans, or to make meaningful comparisons between the retirement plans of different municipalities. Though SB 1128 will require that some data is presented in a way to increase transparency and facilitate comparisons between plans, the purpose of the project leading to this report is to determine what, if any, steps ought to be taken to enhance the transparency of local government pension plan data.

Background

There are numerous statutory reporting requirements related to local government pension plans, and broader local government financial data.

Local Plan Reporting Requirements to the Department of Management Services Related to Pension Liabilities

Section 112.63, F.S., Actuarial Reports and Statements of Actuarial Impact

Each retirement system or plan subject to the provisions of the "Florida Protection of Public Employee Retirement Benefits Act[1]" must have regularly scheduled actuarial reports prepared and certified by an enrolled actuary. The actuarial report must consist of, but shall not be limited to, the following:

- Adequacy of employer and employee contribution rates in meeting levels of employee benefits provided in the system and changes, if any, needed in such rates to achieve or preserve a level of funding deemed adequate to enable payment through the indefinite future of the benefit amounts prescribed by the system, which must include a valuation of present assets, based on statement value, and prospective assets and liabilities of the system and the extent of unfunded accrued liabilities, if any.
- A plan to amortize any unfunded liability pursuant to s. 112.64 and a description of actions taken to reduce the unfunded liability.
- A description and explanation of actuarial assumptions.
- A schedule illustrating the amortization of unfunded liabilities, if any.
- A comparative review illustrating the actual salary increases granted and the rate of investment return realized over the 3-year period preceding the actuarial report with the assumptions used in both the preceding and current actuarial reports.

[1] Part VII of Ch. 112, F.S.

- A statement by the enrolled actuary that the report is complete and accurate and that in his or her opinion the techniques and assumptions used are reasonable and meet the requirements and intent of this act.

The actuarial cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved in the Employee Retirement Income Security Act of 1974 and as permitted under regulations prescribed by the Secretary of the Treasury.

The frequency of actuarial reports must be at least every 3 years commencing from the last actuarial report of the plan or system. The results of each actuarial report must be filed with the plan administrator within 60 days of certification. Thereafter, the results of each actuarial report must be made available for inspection upon request. Additionally, each retirement system or plan covered by this act which is not administered directly by the Department of Management Services (DMS) must furnish a copy of each actuarial report to DMS within 60 days after receipt from the actuary. The requirements of this section are supplemental to actuarial valuations necessary to comply with the requirements of s. 218.39, F.S.

A unit of local government may not agree to a proposed change in retirement benefits unless the administrator of the system, prior to adoption of the change by the governing body, and prior to the last public hearing thereon, has issued a statement of the actuarial impact of the proposed change upon the local retirement system, consistent with the actuarial review, and has furnished a copy of such statement to the division.

Upon receipt of an actuarial report or a statement of actuarial impact, DMS must acknowledge such receipt, but shall only review and comment on each retirement system's or plan's actuarial valuations at least on a triennial basis. If the department finds that the actuarial valuation is not complete, accurate, or based on reasonable assumptions or otherwise materially fails to satisfy the requirements of this part, if the department requires additional material information necessary to complete its review of the actuarial valuation of a system or plan or material information necessary to satisfy the duties of the department pursuant to s. 112.665(1), F.S., or if the department does not receive the actuarial report or statement of actuarial impact, the department must notify the administrator of the affected retirement system or plan and the affected governmental entity and request appropriate adjustment, the additional material information, or the required report or statement.

Beginning July 1, 2011, the actuarial report must include a disclosure of the present value of the plan's accrued vested, nonvested, and total benefits, as adopted by the Financial Accounting Standards Board, using the Florida Retirement System's assumed rate of return, in order to promote the comparability of actuarial data between local plans.[2] The current FRS assumed rate of return is 7.75%.[3]

Section 112.661, F.S., Investment Policies

The investment policy of any local retirement system or plan must require that, for each actuarial valuation, the board of trustees determine the total expected annual rate of return for the current year, for each of the next several years, and for the long term thereafter. This determination must be filed promptly with DMS and with the plan's sponsor and the consulting actuary. The department must use this determination only to notify the board, the plan's sponsor, and consulting actuary of material differences between the total expected annual rate of return and the actuarial assumed rate of return.

Upon adoption by the board, the investment policy shall be promptly filed with DMS and the plan's sponsor and consulting actuary. The effective date of the investment policy, and any amendment thereto, must be the 31st calendar day following the filing date with the plan sponsor.

The investment policy must provide for the valuation of illiquid investments for which a generally recognized market is not available or for which there is no consistent or generally accepted pricing mechanism. If those investments are utilized, the investment policy must include the criteria set forth in s. 215.47(6), except that submission to the Investment Advisory Council is not required. The investment policy shall require that, for each

[2] Section 1, Ch. 2011-216, L.O.F.
[3] July 1, 2010, Florida Retirement System actuarial valuation report.

actuarial valuation, the board must verify the determination of the fair market value for those investments and ascertain that the determination complies with all applicable state and federal requirements. The investment policy shall require that the board disclose to the Department of Management Services and the plan's sponsor each such investment for which the fair market value is not provided.

Sections 175.261 and 185.221, F.S., Annual Reports to the Division of Retirement; Actuarial Valuations

For any municipality, special fire control district, chapter plan, local law municipality, local law special fire control district, or local law plan, the board of trustees for every chapter plan and local law plan must submit the following reports to the division:

- With respect to chapter plans[4], each year, by February 1, the board of trustees of each pension trust fund operating under a chapter plan must file a report with the division which contains:
  - A statement of whether in fact the municipality or special fire control district is within the provisions of s. 175.041.
  - An independent audit by a certified public accountant if the fund has $250,000 or more in assets, or a certified statement of accounting if the fund has less than $250,000 in assets, for the most recent plan year, showing a detailed listing of assets and methods used to value them and a statement of all income and disbursements during the year.
  - A statement of the amount the municipality or special fire control district, or other income source, has contributed to the retirement fund for the most recent plan year and the amount the municipality or special fire control district will contribute to the retirement fund during its current plan year.
  - If any benefits are insured with a commercial insurance company, the report should include a statement of the relationship of the insured benefits to the benefits provided by this chapter as well as the name of the insurer and information about the basis of premium rates, mortality table, interest rates, and method used in valuing retirement benefits.
  - In addition to annual reports provided above, by February 1 of each triennial year, an actuarial valuation of the chapter plan must be made by the division at least once every 3 years, as provided in s. 112.63, commencing 3 years from the last actuarial valuation of the plan or system for existing plans, or commencing 3 years from issuance of the initial actuarial impact statement submitted under s. 112.63 for newly created plans.

- With respect to local law plans[5], each year, on or before March 15, the trustees of the retirement plan must submit the following information to the division in order for the retirement plan of such municipality or special fire control district to receive a share of the state funds for the then-current calendar year:
  - A certified copy of each and every instrument constituting or evidencing the plan.
  - An independent audit by a certified public accountant if the fund has $250,000 or more in assets, or a certified statement of accounting if the fund has less than $250,000 in assets, for the most recent plan year, showing a detailed listing of assets and a statement of all income and disbursements during the year.
  - A certified statement listing the investments of the plan and a description of the methods used in valuing the investments.
  - A statistical exhibit showing the total number of firefighters, the number included in the plan, and the number ineligible classified according to the reasons for their being ineligible, and the number of disabled and retired firefighters and their beneficiaries receiving pension payments and the amounts of annual retirement income or pension payments being received by them.

[4] A "chapter plan" is defined in sections 175.025(2) and 185.02(3), F.S., to mean a separate defined benefit pension plan for firefighters or police officers which incorporates by reference the provisions of Chapters 175 or 186, F.S., and has been adopted by the governing body of a municipality or special district.

[5] A "local law plan" is defined in sections 175.025(11) and 185.02(10), F.S., to mean a defined benefit pension plan for firefighters or police officers, as described in ss. 175.351 and 185.35, F.S., established by municipal ordinance, special district resolution, or special act of the Legislature, which enactment sets forth all plan provisions.

- A certified statement describing the methods, factors, and actuarial assumptions used in determining the cost.
- A certified statement by an enrolled actuary showing the results of the latest actuarial valuation of the plan and a copy of the detailed worksheets showing the computations used in arriving at the results.
- A statement of the amount the municipality or special fire control district, or other income source, has contributed toward the plan for the most recent plan year and will contribute toward the plan for the current plan year.
- In addition to annual reports provided above, an actuarial valuation of the retirement plan must be made at least once every 3 years, as provided in s. 112.63, commencing 3 years from the last actuarial valuation of the plan or system for existing plans, or commencing 3 years from issuance of the initial actuarial impact statement submitted under s. 112.63 for newly created plans. A report of the valuation, including actuarial assumptions and type and basis of funding, shall be made to the division within 3 months after the date of valuation.

Section 175.401 (2) and (10), and 185.50 (2) and (10), F.S., Retiree Health Insurance Subsidy

Any municipality or special fire control district having a firefighters' and police officers' pension trust fund system or plan may, in its discretion, establish by ordinance or resolution, as appropriate, a health insurance subsidy trust fund. Prior to the second reading of the ordinance before the municipal legislative body, or of the resolution before the governing body, an actuarial valuation must be performed by an enrolled actuary as provided in s. 112.63, and copies of the valuation and the proposed implementing ordinance or resolution must be furnished to the division.

The board of trustees, or the plan trustees in the case of local law plans, shall be solely responsible for administering the health insurance subsidy trust fund. As part of its administrative duties, no less frequently than every 3 years, the board must have an actuarial valuation of the retiree health insurance subsidy trust fund prepared as provided in s. 112.63 by an enrolled actuary, covering the same reporting period or plan year used for the pension plan, and must submit a report of the valuation, including actuarial assumptions and type and basis of funding, to the division. By February 1 of each year, the trustees must file a report with the division, containing an independent audit by a certified public accountant if the fund has $250,000 or more in assets, or a certified statement of accounting if the fund has less than $250,000 in assets, for the most recent plan year, showing a detailed listing of assets and methods used to value them and a statement of all income and disbursements during the year.

Retirement reporting by the Department of Management Services

Section 112.665(1), F.S., specifies DMS reporting requirements related to governmental retirement systems. DMS must provide an annual report to the Legislature detailing Division of Retirement activities, findings, and recommendations concerning all governmental retirement systems, including legislation proposed to carry out such recommendations, and submit an annual report to the Special District Information Program of the Department of Community Affairs that includes the participation in and compliance of special districts with the local government retirement system provisions in s. 112.63, and the state-administered retirement system provisions as specified in part I of chapter 121.

Effective July 1, 2011, DMS is required to provide a fact sheet for each participating local government defined benefit pension plan summarizing the plan's actuarial status.[6] The fact sheet should provide a summary of the plan's most current actuarial data, minimum funding requirements as a percentage of pay, and a 5-year history of funded ratios. The fact sheet must include a brief explanation of each element in order to maximize the transparency of the local government plans. These documents must be posted on the DMS website. Plan sponsors that have websites must provide a link to the DMS website.

[6] Section 3, Ch. 2011-216, L.O.F.

Local Government Annual Financial Reports to the Department of Financial Services

Reporting to DFS

Section 218.32, F.S., specifies the requirements for local governmental entities to provide annual financial reports to the Department of Financial Services (DFS). Each local governmental entity that is determined to be a reporting entity, as defined by generally accepted accounting principles, and each independent special district as defined in s. 189.403, must submit to DFS a copy of its annual financial report for the previous fiscal year in a format prescribed by the department.

Each local governmental entity that is required to provide for an audit in accordance with s. 218.39(1) must submit the annual financial report with the audit report. A copy of the audit report and annual financial report must be submitted to the department within 45 days after the completion of the audit report but no later than 12 months after the end of the fiscal year. Each local governmental entity that is not required to provide for an audit report in accordance with s. 218.39 must submit the annual financial report to DFS no later than April 30 of each year.

Entities required to submit the annual financial report must do so through the Local Government Electronic Reporting (LOGER) system, consistent with rules adopted in Chapter 69I-51, F.A.C. Pension expenditures are reported only as a single lump sum line item.[7]

DFS Reporting

DFS must annually by December 1 file a verified report with the Governor, the Legislature, the Auditor General, and the Special District Information Program of the Department of Community Affairs showing the revenues, both locally derived and derived from intergovernmental transfers, and the expenditures of each local governmental entity, regional planning council, local government finance commission, and municipal power corporation that is required to submit an annual financial report. The report must include, but is not limited to:

- The total revenues and expenditures of each local governmental entity that is a component unit included in the annual financial report of the reporting entity.
- The amount of outstanding long-term debt by each local governmental entity. The term “long-term debt” means any agreement or series of agreements to pay money, which, at inception, contemplate terms of payment exceeding 1 year in duration.

Annual Financial Audit Reports to the Auditor General

Pursuant to s. 218.39, F.S., if, by the first day in any fiscal year, a local governmental entity, district school board, charter school, or charter technical career center has not been notified that a financial audit for that fiscal year will be performed by the Auditor General, each of the following entities shall have an annual financial audit of its accounts and records completed within 12 months after the end of its fiscal year by an independent certified public accountant retained by it and paid from its public funds:

- Each county.
- Any municipality with revenues or the total of expenditures and expenses in excess of $250,000.
- Any special district with revenues or the total of expenditures and expenses in excess of $100,000.
- Each district school board.
- Each charter school established under s. 1002.33.
- Each charter technical center established under s. 1002.34.
- Each municipality with revenues or the total of expenditures and expenses between $100,000 and $250,000 that has not been subject to a financial audit pursuant to s. 218.39(1), F.S., for the 2 preceding fiscal years.
- Each special district with revenues or the total of expenditures and expenses between $50,000 and $100,000 that has not been subject to a financial audit pursuant to s. 218.39(1), F.S., for the 2 preceding fiscal years.

[7] Account code 518.00.

A management letter must be prepared and included as a part of each financial audit report. By definition, a "financial audit" must be conducted in accordance with generally accepted auditing standards and government auditing standards as adopted by the Board of Accountancy and as prescribed by rules of the Auditor General.[8] The Auditor general has promulgated the Local Government Audit Report Review Guidelines to assist auditors in complying with generally accepted government auditing standards (GAGAS), generally accepted accounting principles (GAAP), and applicable laws, rules, and regulations.

Pursuant to s. 11.45(7), F.S., the Auditor General must review all audit reports, request any significant items that were omitted, and notify the Legislative Auditing Committee if any entity does not comply with the reporting requirements of s. 218.39, F.S. The Auditor General customarily posts all annual financial reports on the Auditor General's internet website. The Auditor General must also annually report to the Legislature a summary of significant findings identified in the audit reports.[9]

Generally Accepted Accounting Principles and Pension Reporting Requirements

The Governmental Accounting Standards Board (GASB) is responsible for establishing the generally accepted accounting principles for state and local governments. The current GASB statements that prescribe reporting requirements for pension plans and other postemployment benefits include:

- GASB Statement No. 25 – Financial Reporting for Defined Benefit Pension Plans and Note Disclosures for Defined Contribution Plans;
- GASB Statement No. 27 – Accounting for pensions by State and Local Government Employers;
- GASB Statement No. 43 – Financial Reporting for Postemployment Benefit Plans Other than Pension Plans;
- GASB Statement No. 45 – Accounting and Financial Reporting by Employers for Postemployment Benefits Other than Pensions; and
- GASB Statement No. 50 – Pension Disclosures.

GASB promulgates new standards through statements that go through a public process, including issuance of exposure drafts for which public comment is solicited and considered. GASB has issued two exposure drafts proposing changes to the financial reporting on pensions by state and local governments. Among other things, the proposals would require that unfunded pension liabilities be reported on the employer's financial statements (statements of net position and changes in plan net position), instead of just a footnote; allow only one actuarial method for calculating pension costs; modify requirements for discount rates used to calculate unfunded pension liabilities; and require governments in all types of covered pension plans to present more extensive note disclosures and required supplementary information.[10]

Reponses to the exposure drafts are due to GASB by September 30, 2011; the issuance of the statements is estimated for June 2012. Assuming this timetable remains accurate, local governments would be required to implement the improved pension reporting requirements for the 2013-14 fiscal year.[11]

Findings and/or Conclusions

As discussed above, a significant amount of data related to municipal finances generally, and municipal pension finances specifically, is currently reported to relevant state agencies, which subsequently make that information publically available. Thorough data related to local pension plans resides in DMS's annual reports on every local government retirement system. Voluminous appendices to the report detail such information as the financial and

[8] Section 218.31(17), F.S.

[9] The most recent of those reports, Report No. 2011-195, made four findings with respect to 2008-09 audit reports: Some reports were not submitted at all, or submitted untimely; some audit firms did not hold licenses at the time of the report; there were some instances of noncompliance with certain requirements; there were several instances of noncompliance with generally accepted government auditing standards and generally accepted accounting principles.

[10] Exposure Draft, Proposed Statement of the Governmental Accounting Standards Board, Accounting and Financial Reporting for Pensions an amendment of GASB Statement No. 27, No. 34-E June 27, 2011, available at http://www.gasb.org.

[11] The information related to the GASB standards was provided via email communication with staff of the Auditor General.

contribution data, benefit data, market value of assets, funding progress, actuarial data, population data, and funding progress.[12]

A report released by the Collins Institute in February 2011 recommended that localities should improve the accessibility of funding, actuarial reporting, and liabilities information to its taxpayers.[13] The report suggested requiring cities and special districts to make information about their pensions easily accessible to the public on the city's webpage, in a clear and easily understood manner using terminology and data that are uniform across the state's cities. The report also notes, however, that such requirements reduce local autonomy.

Section 12 of Ch. 2011-216, L.O.F., requires DMS to develop a plan for creating standardized ratings for classifying the financial strength of all local government defined benefit pension plans, and submit the plan to the Legislature by January 1, 2012. In the course of doing its due diligence in order to create such a plan, it is possible that DMS may have suggestions as to additional data reporting requirements for local government pension plans. As this report was being written, DMS was still working on its plan.

If the Legislature were to impose new reporting requirements on local governments, such a change should be considered in conjunction with attendant financial costs.

Options and/or Recommendations

Given the amount of local government retirement plan data that already exists, there may not be a need for additional reporting requirements, but there may be room for improving the dissemination of existing data. To that end, the Legislature could require that existing actuarial reporting and investment policies be provided on local government internet websites.

The Legislature could also consider whether existing reporting requirements into state entities- DMS, DFS, and the Auditor General, could be made into one entity, which would act a repository for both public access and agency use of the data.

The Legislature may also receive useful input concerning financial data when DMS provides its plan for creating standardized ratings for classifying the financial strength of all local government defined benefit pension plans.

[12] The Florida Local Government Retirement Systems report.
[13] *Trouble Ahead: Florida Local Governments and Retirement Obligations*, Leroy Collins Institute, February 2011.

The Florida Senate

Interim Report 2012-306 *September 2011*

Committee on Governmental Oversight and Accountability

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 627.3121, F.S., FLORIDA WORKERS' COMPENSATION JOINT UNDERWRITING ASSOCIATION, INC.

Issue Description

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market.

Section 627.3121, F.S., provides that certain records and meetings held by the JUA are confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution, and from the public-meetings requirements found in s. 286.011, F.S., and Article I, Section 24(b) of the Florida Constitution. The public-records and –meetings exemption specifies circumstances under which the protected information may be disclosed.

This public-records and –meetings exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public-records and –meetings exemption for specified records and meetings held by the JUA in accordance with the Open Government Sunset Review Act.

Background

Florida Public-Records and -Meetings Law

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.

[1] Section 1390, 1391 Florida Statutes. (Rev. 1892).

[2] Article I, s. 24 of the State Constitution.

In addition to the State Constitution, the Public Records Act,[3] which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency[4] 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 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]

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.[8] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[9] A bill enacting an exemption[10] 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

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[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."

[5] s. 119.011(12), 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] Art. 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.

made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[13]

The Open Government Sunset Review Act (the Act)[14] provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine 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, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- 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 the Legislature to consider the following:

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

While the standards in the 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(8), F.S., makes explicit that:

> … notwithstanding s. 778.28 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.

Florida Workers' Compensation Joint Underwriting Association, Inc.

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market.[17]

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[13] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[14] s. 119.15, F.S.
[15] s. 119.15(6)(b), F.S.
[16] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[17] Florida Workers' Compensation Joint Underwriting Association, Inc., *Welcome*, http://www.fwcjua.com/ (last viewed

Public-Records and -Meetings Exemption Under Review

Section 627.3121, F.S., provides that the following records and portions of meetings held by the JUA are confidential and exempt from constitutional and statutory public-records and –meetings requirements:

- Underwriting files, except that a policyholder or an applicant is authorized access to his or her own underwriting files;
- Claims files until the termination of all litigation and settlement of all claims arising out of the same accident, except that portions of the claims files may remain confidential or exempt if otherwise provided by law;
- Records obtained or generated by an internal auditor until the audit is completed, or if the audit is part of an investigation, until the investigation is closed or ceases to be active;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;
- Medical records, which include information relating to the medical condition or medical status of an individual;
- All records relative to the participation of an employee in an employee assistance program, except as otherwise provided in s. 440.102(8), F.S.;
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until the investigation is closed or ceases to be active;
- Information secured from the Department of Revenue regarding payroll information and client lists of employee leasing companies authorized under ss. 440.381 and 468.529, F.S.;
- A public record prepared by an attorney retained by the JUA to protect or represent the interests of the JUA or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association;
- That portion of a meeting of the JUA's board of governors or any subcommittee thereof at which the confidential and exempt records are discussed; all exempt portions must be recorded and transcribed and preserved for a minimum of 5 years; and
- The transcript and minutes of exempt portions of meetings; those portions of the transcript or the minutes pertaining to a confidential and exempt claims file are no longer confidential and exempt upon termination of all litigation with regard to that claim.

The public-records and public-meetings exemption authorizes the release of underwriting files and claims files to a carrier who is considering underwriting a risk insured by the JUA, a producer seeking to place such risk with such a carrier, or another entity seeking to arrange voluntary market coverage for association risks. Before such release, the carrier, producer, or other entity must agree in writing to maintain the confidentiality of the files until that entity agrees to underwrite the risk or provide voluntary market coverage. The exemption also allows the protected records to be released, upon written request, to another agency in the performance of that agency's official duties and responsibilities.

The public necessity statement for the public-records exemption provides, in part, that:

> … the exemption from public records requirements for open claims files of the association is necessary for the effective and efficient administration of an entity created to provide workers' compensation and employer's liability insurance as described in s. 627.311(5), Florida Statutes. Claims files contain detailed information concerning the claim, medical information, and other sensitive personal information concerning the claimant, and also contain information detailing the evaluation of the legitimacy of the claim, the extent of incapacity, and a valuation of the award. Information in a claims file that that is held by the association includes the medical records and other information related to the medical condition or medical status of a claimant. The Legislature finds that the claimants' medical records and other medical-related information are personal and sensitive. Matters of personal health are traditionally a private and confidential concern. The release of the medical records would violate the privacy of an individual or could cause unwarranted damage to the name or reputation of that individual. The

> Legislature finds that information relating to the medical, mental, or behavioral condition of an employee of the association is private and that matters of personal health are traditionally a private and confidential concern. The Legislature finds that the association must conduct ongoing negotiations for financing, reinsurance, contractual services, or related matters to perform the duties assigned to the association. If such information were made public prior to the conclusion of the negotiations, the association's bargaining position would be severely damaged, resulting in additional cost to the association and the public. The Legislature also finds that, because the association will investigate insurance fraud, criminal investigations of insurance fraud would be harmed if reports of suspected fraudulent activity were made public. The Legislature has also recognized a need for the Department of Revenue to provide payroll information and client lists of employee leasing companies to the association in the furtherance of its duties and responsibilities. Such information is proprietary business information and traditionally is private. The Legislature finds that the internal audit process, and therefore accountability to the public, will be damaged if records relating to an incomplete internal audit or investigation are made public. The Legislature finds that although the association is an agency within the meaning of the public records and open meetings laws, the association essentially operates as a private business. Its core function is to engage in the business of providing workers' compensation insurance coverage, as distinguished from an agency whose core functions are governmental in nature. The association does not exercise the authority or perform the functions of a department or political subdivision, and lacks the power to enforce laws. The Legislature further finds that the general exemptions in chapters 119 and 286 relating to records created by attorneys and communications with attorneys are designed to address the needs of agencies providing governmental functions and are generally limited to matters relating to litigation and adversarial administrative matters … According, the Legislature finds that the association would not be able to carry out its core business functions effectively without the free and confidential exchange of attorneys' mental impressions, conclusions, litigation strategies, and legal theories, both as to business matters and as to litigation and administrative matters.[18]

The public necessity for the public-meetings exemption provides, in part:

> … Closing access to meetings of the board of directors of the association, or a subcommittee of the board, wherein confidential and exempt records are discussed is essential to preserving the confidentiality of those records. Further, it enables the association to carry out its statutory duty of providing workers' compensation coverage. Furthermore, the Legislature finds that minutes and transcripts of exempt portions of meetings should be made confidential and exempt from public records requirements. Release of those records would defeat the purpose of holding a closed meeting.[19]

This public-records and –meetings exemption will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.[20]

Findings and/or Conclusions

The public-records and –meetings exemption that is at issue under this Open Government Sunset Review makes confidential and exempt from public disclosure specified information held by the JUA and specified portions of meetings of the JUA's board of governors or any subcommittee of the board.

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:

- **What specific records or meetings are affected by the exemption?** The exemption protects specified records and portions of meetings held by the JUA.
- **Whom does the exemption uniquely affect, as opposed to the general public?** The exemption uniquely affects the JUA, companies doing business with the JUA, and workers insured by JUA policies.
- **What is the identifiable public purpose or goal of the exemption?** The identifiable public purpose or goal of the exemption as stated in the statement of public necessity is to protect the personal identifying information

[18] Chapter 2007-202, s. 2, L.O.F.
[19] Chapter 2007-202, s. 3, L.O.F.
[20] Chapter 2007-202, s. 1, L.O.F.

of workers insured by JUA policies, to promote the effective and efficient administration of the JUA, and to protect information of a proprietary business information nature of companies doing business with the JUA.

- **Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?** It is unlikely because the protected information is not otherwise provided to governmental entities.
- **Is the record or meeting protected by another exemption?** The public-records exemption in s. 119.071(1)(b), F.S., protects specified records related to competitive solicitations; however, JUA staff stated that subsection (1)(g) of the exemption under review protects negotiations which are not associated with competitive solicitations.[21] Subsection (1)(j) of the exemption under review, which protects specified public records prepared by an attorney for the JUA, is more expansive in scope than the general public-records exemption for attorney-generated records found in s. 119.07(1)(d)1., F.S.[22] Although the JUA has used subsection (4)(a) of the exemption under review to exempt that portion of a meeting at which a systems security audit was discussed, which would also be protected under s. 286.0113(1), F.S., JUA staff stated that there may be other instances which would not be protected by s. 286.0113(1), F.S., but which would be protected by subsection (4)(a) of the exemption under review.[23]
- **Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?** No.

Options and/or Recommendations

Senate professional staff recommends that the Legislature reenact the public-records exemption established in s. 627.3121, F.S., which makes specified information held by the JUA, confidential and exempt from disclosure. This recommendation is made in light of the information gathered for this Open Government Sunset Review which indicates that there is a public necessity to continue to protect the specified information in order to promote the efficient and effective administration of a governmental program, to protect information of a sensitive personal nature concerning individuals, and to protect information of a confidential nature concerning entities, as required by the Open Government Sunset Review Act.

The Legislature may wish to consider amending s. 627.3121(1)(e), F.S., from its current language to "Medical information" to remove redundant language. The JUA receives information from medical records, not medical records specifically,[24] so such an amendment would narrow the scope of the exemption to something already protected by the statute.

[21] Email correspondence with JUA (August 6, 2011), on file with the Senate Governmental Oversight and Accountability Committee. Reinsurance commutation agreements, for example, involve contracts by which the JUA and a reinsurance company agree to terminate an existing reinsurance agreement. Additionally, pursuant to s. 627.311(5)(c)13.a., F.S., contracts valued at less than $25,000 are not subject to competitive solicitation.

[22] The public-records exemption in s. 119.071(1)(d)1., F.S., protects only specified records that are prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that is prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings.

[23] Email correspondence with JUA (August 6, 2011), on file with the Senate Governmental Oversight and Accountability Committee. As an example, JUA staff gave the possibility that the board of governors or one of its subcommittees could be called upon to discuss potential fraudulent activities by someone with whom the JUA does business. Section 286.0113(1), F.S., provides that "that portion of a meeting that would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(3)(a)" is exempt from public-meetings requirements.

[24] Telephone conference with JUA (July 18, 2011).

The Florida Senate

Interim Report 2012-307 *September 2011*

Committee on Governmental Oversight and Accountability

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 364.107, F.S., PERSONAL IDENTIFYING INFORMATION OF LIFELINE ASSISTANCE PLAN PARTICIPANTS

Issue Description

The Lifeline Assistance Plan is part of a federal program designed to enable low-income households to afford basic local telephone service. Plan participants are eligible for a monthly credit. In Florida, oversight of plan services is handled by the Public Service Commission. To enroll in the plan, a telecommunications customer must submit an application to the Public Service Commission that requires certain personal identifying information.

Section 364.107, F.S., provides that personal identifying information of a participant in a telecommunications carrier's Lifeline Assistance Plan held by the Public Service Commission is confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution. The public-records exemption specifies circumstances under which the protected information may be disclosed and provides a penalty for the unauthorized intentional disclosure of the protected information by any officer or employee of a telecommunications carrier.

This public-records exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public-records exemption relating to personal identifying information of Lifeline Assistance Plan participants in accordance with the Open Government Sunset Review Act.

Background

Florida Public-Records Law

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 the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

[1] Art. I, Section 1390, 1391 Florida Statutes. (Rev. 1892).
[2] Art. I, s. 24 of the State Constitution.
[3] Chapter 119, F.S.

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

Unless specifically exempted, all agency[4] 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 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] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[9] A bill enacting an exemption[10] 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 Act (the Act)[14] provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine 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, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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. The three statutory criteria are that the exemption:

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[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."

[5] s. 119.011(12), 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] Art. 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] s. 119.15, F.S.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- 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 the Legislature to consider the following:

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

While the standards in the 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(8), F.S., makes explicit that:

> … notwithstanding s. 778.28 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.

Lifeline Assistance Plan

The Universal Service program, created by the Federal Telecommunications Act of 1996,[17] is intended in part to increase access to telecommunications services at reasonable rates, including those in low income, rural, insular, and high cost areas.[18] To fulfill the goals of the act, the Federal Communications Commission established four programs, one of which is the Low Income program.

The Lifeline Assistance Plan, which is part of the Low Income Program, is designed to enable low-income households to afford basic local telephone service.[19] Plan participants in Florida are entitled to receive a basic telephone service discount of $13.50 a month.[20]

In Florida, oversight of Lifeline Assistance Plan services is handled by the Public Service Commission (PSC).[21] To enroll in the plan, a telecommunications customer must submit an application to the PSC that requires his or her name, address, telephone number, service provider, and the last four digits of his or her social security number.[22] In addition,

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[15] s. 119.15(6)(b), F.S.
[16] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[17] Public Law 104-104.
[18] Federal Communications Commission, *Universal Service*, http://transition.fcc.gov/wcb/tapd/universal_service/ (last viewed August 12, 2011).
[19] *Id*.
[20] Telephone conference with PSC staff (July 7, 2011).
[21] Section 364.10, F.S.
[22] Florida Public Service Commission, *Lifeline and Link-Up Florida On-line Self Certification Form*,

any state agency that determines a person is eligible for Lifeline Assistance Plan service is required to immediately forward that person's information to the PSC to ensure that the person is automatically enrolled in the Lifeline program.[23]

Public-Records Exemption Under Review

Section 364.107, F.S., provides that personal identifying information of a participant in a telecommunication carrier's Lifeline Assistance Plan held by the Public Service Commission is confidential and exempt from disclosure under the public-records requirements of s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution.

This public-records exemption specifies that the protected information may be released to the applicable telecommunications carrier for purposes directly connected with eligibility for, verification related to, or auditing of a Lifeline Assistance Plan.[24] The exemption also authorizes an officer or employee of a telecommunications carrier to intentionally disclose the information only as:

- Authorized by the customer;
- Necessary for billing purposes;
- Required by subpoena, court order, or other process of court;
- Necessary to disclose to an agency as defined in s. 119.011 or a governmental entity for purposes directly connected with implementing service for, or verifying eligibility of, a participant in a Lifeline Assistance Plan or auditing a Lifeline Assistance Plan; or
- Otherwise authorized by law.

The exemption provides that any officer or employee of a telecommunications carrier who otherwise intentionally discloses the protected information commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

A public-records exemption must serve an identifiable public purpose and may be no broader than necessary to meet the public purpose it serves.[25] The statement of public necessity offered by the Legislature when it created the public-records exemption under review provided, in part, that:

> Allowing qualified low-income households to receive this credit permits them to maintain local telephone service. Participation in Lifeline Assistance Plans has remained at approximately 12 percent of eligible Florida households despite extensive efforts to make eligible citizens aware of the plan. Protecting the personal identifying information of participants in a Lifeline Assistance Plan will encourage qualified citizens to apply for the credit offered under the plan. The Public Service Commission must be able to maintain the confidentiality of that information because disclosure could create a chilling effect on participation. There is a strong likelihood that participants might choose not to avail themselves of the plan because the information submitted would identify them as qualified recipients of low-income program benefits. Finally, without the exemption, the effective and efficient administration of a government program would be hindered.[26]

This public-records exemption will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.[27]

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https://secure.floridapsc.com/(S(rj4i4z45i2ihmm45v3viku45))/public/lifeline/lifelineapplication.aspx (last viewed August 12, 2011).

[23] Section 364.10(3)(h)(2), F.S.

[24] Federal Communications Commission rules require at least twice-yearly verification that a participant still qualifies for the plan.

[25] Art. I, s. 24(c) of the State Constitution.

[26] Chapter 2007-247, s. 2, L.O.F.

[27] Chapter 2007-247, s. 1, L.O.F.

Findings and/or Conclusions

The public-records exemption that is at issue under this Open Government Sunset Review makes confidential and exempt from public disclosure personal identifying information of Lifeline Assistance Plan participants held by the Public Service Commission (PSC).

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:

- **What specific records or meetings are affected by the exemption?** The exemption protects personal identifying information of Lifeline Assistance Plan participants held by the PSC.
- **Whom does the exemption uniquely affect, as opposed to the general public?** The exemption uniquely affects participants in the Lifeline Assistance Plan.
- **What is the identifiable public purpose or goal of the exemption?** The identifiable public purpose or goal of the exemption as stated in the statement of public necessity is to protect the personal identifying information of Lifeline Assistance Plan participants and to promote the effective and efficient administration of the Lifeline Assistance Plan program.
- **Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?** It is unlikely because the protected information is also confidential and exempt when held by the Department of Children and Family Services, the only agency currently forwarding the information to the PSC for use in Lifeline Assistance Plan enrollment.[28]
- **Is the record or meeting protected by another exemption?** The records are not covered by another exemption when held by the PSC.
- **Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?** No.

Options and/or Recommendations

Senate professional staff recommends that the Legislature reenact the public-records exemption established in s. 364.107, F.S., which makes personal identifying information of a Lifeline Assistance Plan participant held by the Public Service Commission confidential and exempt from disclosure. This recommendation is made in light of the information gathered for this Open Government Sunset Review which indicates that there is a public necessity to continue to protect information of a sensitive personal nature concerning the participants and that without the exemption, the effective and efficient administration of a governmental program would be impaired.

The Legislature may also wish to consider amending subsection (3)(c) of the exemption under review to provide that an officer or employee of the Public Service Commission who intentionally discloses the protected information in violation of the exemption's provisions is subject to the provided penalty, in addition to the officers and employees of a telecommunications carrier who are already subject to the penalty.

[28] Section 364.10(3)(h)2, F.S., requires any state agency that determines a person is eligible for Lifeline services to immediately forward that person's information to the PCS to ensure that the person is automatically enrolled in the program with the appropriate eligible telecommunications carrier. PSC staff stated that the only agency forwarding such information to the PSC is the Department of Children and Family Services (DCF) (telephone conference, July 7, 2011). DCF staff stated that the personal identifying information made confidential and exempt by the exemption under review when held by the PSC is also protected when held by the DCF (telephone call, August 25, 2011). *Also see* 45 C.F.R. 205.50(a)(1) (providing that disclosure of identifying information of an applicant for or recipient of state financial assistance under title IV-A of the Social Security Act is prohibited except under specified circumstances) and s. 414.295, F.S. (providing that personal identifying information of a temporary cash assistance program participant, a participant's family, or a participant's family or house hold member, except for information identifying a parent who does not live in the same home as the child, held by the DCF and other specified entities is confidential and exempt).

The Florida Senate

Interim Report 2012-308 *September 2011*

Committee on Governmental Oversight and Accountability

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071(1)(G), F.S., U.S. CENSUS BUREAU ADDRESS INFORMATION

Issue Description

Section 119.071(1)(g), F.S., provides that United States Census Bureau address information held by an agency pursuant to the Local Update of Census Address Program (LUCA Program) is confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution. The public-records exemption authorizes release of the protected information to another agency or governmental entity in the furtherance of its duties and responsibilities under the LUCA Program. The exemption also provides that an agency performing duties and responsibilities under the LUCA Program shall have access to any other confidential or exempt information held by another agency if such access is necessary in order to perform its duties and responsibilities under the program.

This public-records exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public-records exemption relating to United States Census Bureau address information held by an agency pursuant to the LUCA program in accordance with the Open Government Sunset Review Act.

Background

Florida Public-Records Law

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 the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

[1] Section 1390, 1391 F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.
[3] Chapter 119, F.S.

Unless specifically exempted, all agency[4] 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 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] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[9] A bill enacting an exemption[10] 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 Act (the Act)[14] provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine 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, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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

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[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."

[5] s. 119.011(12), 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] Art. 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] s. 119.15, F.S.

- 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 the Legislature to consider the following:

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

While the standards in the 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(8), F.S., makes explicit that:

> … notwithstanding s. 778.28 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.

Local Update of Census Addresses Program

The Local Update of Census Addresses Program (LUCA Program) was a decennial census geographic partnership program designed to allow the United States Census Bureau to benefit from local knowledge in developing its Master Address File[17] for the 2010 census.[18] The LUCA Program was made possible by the Census Address List Improvement Act of 1994, which authorizes designated representatives of local and tribal governments to review the Master Address File. [19]

The LUCA Program required that participating governments designate a LUCA liaison to review the portion of the census address list covering the area under the participating government's jurisdiction.[20] The LUCA liaison was subject to the same confidentiality requirements as census workers and was prohibited from disclosing census information.[21]

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[15] s. 119.15(6)(b), F.S.

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

[17] The Master Address File is an inventory of all addresses and physical/location descriptions assembled by the Census Bureau, including their geographic locations, and serves as the source of addresses for mailing and delivering decennial census forms and for physically locating the addresses when necessary. *See* Prepared Statement of Robert M. Groves, Director of the U.S. Census Bureau, *2010 Census: Master Address File, Issues and Concerns*, http://www.census.gov/newsroom/releases/pdf/Groves_House_Testimony_10-21_Final.pdf (last viewed August 10, 2011).

[18] U.S. Census Bureau, *2010 Decennial Census Local Update of Census Addresses (LUCA),* http://www.census.gov/geo/www/luca2010/luca.html (last viewed August 10, 2011).

[19] Public Law 103-430.

[20] U.S. Census Bureau, *Overview of the 2010 Decennial Census LUCA Program*, http://www.census.gov/geo/www/luca2010/luca_ov.html (last viewed August 10, 2011).

[21] Federal law requires the U.S. Census Bureau to maintain the confidentiality of certain information that it collects. This confidentiality helps to ensure that the bureau maintains the most accurate data possible. To uphold the law, the bureau requires that all individuals who work with the confidential information must abide by a confidentiality and security agreement. Title 13 of the United States Code provides for the confidential treatment of census-related information. Census information includes: everything on a completed or partially completed questionnaire or obtained in a personal or telephone interview; individual addresses maintained by the LUCA Program liaisons review; and maps that identify the location of individual housing units and/or group quarters.

LUCA Program participants were required to review a set of security guidelines and to sign a confidentiality agreement promising to protect the confidential address list, which included corresponding maps and address tallies.[22]

The LUCA Program provided clear guidelines for local government participation and confidentiality; however, the federal law was less clear regarding confidentiality at the state level. Therefore, the Florida Legislature created the public-records exemption under review.[23]

Public-Records Exemption Under Review

Section 119.071(1)(g), F.S., provides that United States Census Bureau address information held by an agency pursuant to the LUCA Program is confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution. The public-records exemption authorizes release of the protected information to another agency or governmental entity in the furtherance of its duties and responsibilities under the LUCA Program. The exemption also provides that an agency performing duties and responsibilities under the LUCA Program shall have access to any other confidential or exempt information held by another agency if such access is necessary in order to perform its duties and responsibilities under the program.

The stated public necessity for exempting United States Census Bureau address information held by an agency pursuant to the LUCA Program is based upon a legislative finding that the exemption was necessary to allow agencies to participate in the LUCA Program.[24] The statement of public necessity notes

> … Pursuant to the Local Update Census Addresses Program, Title 13, United States Code, Pub. L. No. 103-430, United States Census Bureau address information must be kept confidential. Further, all individuals directly involved in reviewing such information and any individuals with access to such information are required to sign a confidentiality agreement to preserve the confidentiality of the address information. Without this exemption, agencies would be prevented from participating in the program. As such, the effective and efficient administration of the Local Update of Census Addresses Program would be hindered at the federal level. …

The statement of public necessity also notes that prevention of agency participation could result in a negative fiscal impact on the state.[25]

This public-records exemption will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.[26]

Findings and/or Conclusions

The LUCA Program officially ended as of March 31, 2010.[27] Therefore, there is no need to continue the associated public-records exemption for United States Census Bureau address information held by an agency pursuant to the LUCA Program.

The United States Census Bureau is currently working on a Geographic Support System Initiative in support of the 2020 Census to improve address coverage, continually update spatial features, and enhance quality assessment and measurement.[28]

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[22] U.S Census Bureau, *Overview of the 2010 Decennial Census LUCA Program*, http://www.census.gov/geo/www/luca2010/luca_ov.html (last viewed August 10, 2011).
[23] Chapter 2007-250, L.O.F.
[24] Chapter 2007-250, s. 2, L.O.F.
[25] *Id*.
[26] Chapter 2007-250, s. 1, L.O.F.
[27] U.S. Census Bureau, *LUCA Closeout Phase*, http://www.census.gov/geo/www/luca2010/luca_co.html, (last viewed August 10, 2011).
[28] U.S. Census Bureau, *Geographic Support System (GSS) Initiative*, http://www.census.gov/geo/www/gss/index.html (last viewed August 10, 2011).

Options and/or Recommendations

Based upon the review findings that the LUCA Program is no longer in existence and that there is therefore no need to continue the associated public-records exemption, Senate professional staff recommends repeal of the public-records exemption for United States Census Bureau address information held by an agency pursuant to the LUCA Program.