The Florida Senate

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Committee on Governmental Oversight and Productivity Senator James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION IN HOUSING ASSISTANCE PROGRAM (S. 119.07(3)(BB), F.S.)

SUMMARY

The Open Government Sunset Review Act provides for the repeal of a public records exemption 5 years after it is initially enacted unless it is reviewed and reenacted by the Legislature. The act establishes a process for identifying those exemptions that are subject to review in a particular year and also provides the standard of review for the exemptions that are subject to review.

Section 119.07(3)(bb), F.S.,[1] was identified by the Division of Statutory Revision as being subject to review during the interim. Unless the Legislature abrogates the statutory language that sunsets the exemption, the exemption contained in this section will repeal on October 2, 2003.

Based upon a review of the exemption, staff finds that the efficient and effective administration of a governmental program, the housing assistance program, would be significantly impaired without the continuation of the exemption. This finding is one of those required by the Open Government Sunset Review Act to maintain an exemption. Staff recommends, however, that the exemption be amended to narrow and clarify it.

BACKGROUND

Florida has a long history of permitting the public to inspect and copy records of governmental entities. The tradition began in 1909 when the Legislature passed a law that guaranteed access to the records of public agencies.[2] Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's first comprehensive Public Records Act, which is contained within ch. 119, F.S., was enacted in 1967.[3] The act has been subject to frequent amendment since its original enactment.

In November of 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded open government. Article I, s. 24(a) of the State Constitution states:

(a) Every person has the right to inspect or copy any public records 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.

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment "grandfathered" exemptions that were in effect on July 1, 1993, until they are repealed.[4]

The State Constitution, the Public Records Law,[5] and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by

[1] This section was the former s. 119.07(3)(cc), F.S.; it was renumbered as a result of an amendment to the section that passed the Legislature during the 2002 regular session.

[2] Section 1, ch. 5942, 1909; RGS 424; CGL 490.

[3] Chapter 67-125 (1967 L.O.F.)

[4] Article 1, s. 24(d) of the State Constitution.

[5] Chapter 119, F.S.

the Legislature according to the process and standards required in the State Constitution. Section 119.07(1)(a), F.S., requires:

> 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 or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency[6] records are to be 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.[7]

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.[8] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[9]

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[11] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."[13] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[14]

Exemptions to open government requirements are subjected to a review and repeal process five years after their initial enactment.[15] An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended under the act if it ". . . expands the scope of the exemption to include more records or information or to include meetings as well as records."[16]

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[6] 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."

[7] Section 119.011(1), F.S.

[8] *Shevin v. Byron, Harless, Schaffer, Reid and Associations, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

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

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

[11] Attorney General Opinion 85-62.

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

[13] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

[14] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied *sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

[15] An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

[16] Section 119.15(3)(b), F.S.

The Open Government Sunset Review Act of 1995[17] establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must certify to the President of the Senate and the Speaker of the House, the language and statutory citation of each exemption scheduled for repeal the following year.[18] If the division fails to include an exemption on the certified list that should have been listed, that exemption ". . . is not subject to legislative review and repeal under this section."[19] If the division later determines that an exemption should have been certified, it ". . . shall include the exemption in the following year's certification after that determination."[20]

As part of the review process, the Legislature is to consider:

(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?[21]

Under s. 119.15(4)(b), F.S., 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. The three specified criteria, one of which must be met by the exemption, are if the exemption:

> (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.[22]

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, as the Florida Supreme Court has ruled in a series of cases, one session of the Legislature cannot bind another.[23] The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but if it falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. 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 an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Section 119.07(3)(bb), F.S. - During the 1998 legislative session, the Committee Substitute for House Bill 1613 by the Committee on Governmental Operations and Representative Dawson-White (similar to Senate Bill 140 by Senator Forman) passed the Legislature and became law without the Governor's signature. Section 119.07(3)(bb), F.S.,[24] provides:

[17] Section 119.15, F.S.
[18] Section 119.15(3)(d), F.S.
[19] *Ibid.*
[20] *Ibid.*
[21] Section 119.15(4)(a), F.S.
[22] Section 119.15(4)(b), F.S.
[23] *Neu v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1985); *Kirklands v. Town of Bradley*, 139 So. 144, 145 (Fla. 1932).
[24] See s. 1, ch. 98-259, L.O.F.; the provision was formerly s. 119.07(3)(cc), F.S.

1. Medical history records, bank account numbers, credit card numbers, telephone numbers, and information related to health or property insurance furnished by an individual to any agency pursuant to federal, state or local housing assistance programs are confidential and exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution. Any other information produced or received by any private or public entity in direct connection with federal, state, or local housing assistance programs, unless the subject of another federal or state exemption is subject to subsection (1).
2. Governmental agencies or their agents are entitled to access to the records specified in this paragraph for the purposes of auditing federal, state, or local housing programs or housing assistance programs. Such records may be used by an agency, as needed, in any administrative or judicial proceeding, provided such records are kept confidential and exempt, unless otherwise ordered by a court.
3. This paragraph is repealed effective October 2, 2003, and must be reviewed by the Legislature before that date in accordance with s. 119.15, the Open Government Sunset Review Act of 1995.

The Committee Substitute for House Bill 1613 provides that the public necessity for the exemption is that revealing such information could ". . . create the opportunity for fraud and is an unnecessary intrusion into the personal affairs of the program participants."

The Department of Community Affairs (DCA) is designated as the agency responsible for housing and urban development in the state. As such, the DCA coordinates the state and federal efforts designed to improve, rehabilitate and build affordable housing in the state.

Section 420.504(1), F.S., creates within the DCA a public corporation known as the "Florida Housing Finance Corporation." The corporation is organized to promote the public welfare by administering the governmental function of financing or refinancing housing and related facilities in Florida. The corporation is not a department of the executive branch, though it is functionally related to the DCA in which it is placed.

There are numerous federal, state and local programs designed to provide affordable housing to families. The federal agency primarily responsible for oversight of housing initiatives is the Department of Housing and Urban Development (HUD). The DCA authorizes units of local government to administer the housing programs in their respective locales. Many local governments contract with private and not-for-profit entities to screen applications and to determine individual eligibility for low-interest loans and other programs that promote home ownership. Typically, the application for such programs requires personal information of applicants, e.g., bank account numbers, credit and debit card account numbers, employment history, etc. Under state law, such information is available for public inspection.

METHODOLOGY

Staff surveyed agencies to determine which agencies use the exemption found in s. 119.07(3)(bb), F.S. The survey queried agencies regarding their use of the exemption, whether they recommended continuation of the exemption, whether it needed to be amended, as well as whether it met the requirements of the Open Government Sunset Review Act. Further, staff coordinated its review with staff of the Committee on Governmental Operations in the Florida House of Representatives and reviewed the responses to a survey that House staff prepared. Additionally, staff contacted staff of the corporation to obtain additional information and to clarify the corporation's survey responses. Staff also reviewed the exemption in paragraph (bb), other exemptions that overlap with the exemption in paragraph (bb), the statement of public necessity for the exemption, and the program for which the exemption was created. Article I, s. 24 of the State Constitution, ch. 119, F.S., and the case law interpreting it were also examined in the review process.

FINDINGS

As part of the review process, the Open Government Sunset Review Act requires consideration of the specific records that are affected by the exemption. The exemption created in s. 119.07(3)(bb), F.S., applies to:

(1) medical history records;
(2) bank account numbers;
(3) credit card numbers;
(4) telephone numbers; and
(5) information related to health or property insurance

that is furnished by an individual to any agency pursuant to federal, state, or local housing assistance programs.

The act also requires that the person who are affected by the exemption be identified. According to the corporation,

> [a]ny person who applies for residency or is a current tenant of any affordable housing unit located in Florida, regardless of whether the housing unit is owned or operated by a private or government[al] entity. . . .

is affected by the exemption.

The stated goal or purpose of the exemption, based upon the statement of public necessity, is to eliminate the opportunity for fraud and to limit intrusion into the personal affairs of program participants.

Based upon a review of the exemption, staff concludes that the exemption has some deficiencies. For example, the exemption applies to information furnished to an "agency." The definition of "agency" found in s. 119.011(2), F.S., specifically includes ". . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." There are numerous entities that operate housing assistance programs, including private corporations that act on behalf of governmental entities, which would be included within the definition. While it would be quite difficult to designate all of the local entities that operate housing assistance programs, it is possible to designate the state entities that hold such information.

Also, the exemption under review is redundant of a general exemption that applies to agencies and it is also provides less protection. Section 119.07(3)(bb), F.S., only protects bank account numbers and credit card numbers. Current law provides a general exemption for bank account numbers and debit, charge, and credit card numbers.[25] As the general exemption encompasses more financial information than the exemption under review, and as the general exemption applies to all agencies and entities acting on their behalf, the general exemption for financial data is preferable to the provision in s. 119.07(3)(bb), F.S.

Section 119.07(3)(bb), F.S., also makes confidential and exempt the telephone numbers of participants in housing assistance programs. As drafted, the telephone numbers that are exempt appear to include personal and other telephone numbers, such as telephone numbers at places of employment. The basis for exempting telephone numbers is unclear. The original statement of public necessity does not contain a statement that provides a basis for protecting telephone numbers. Further, the bill analyses for the original bill do not provide any information regarding the need for including telephone numbers in the exemption. Staff of the corporation were queried regarding the need for protecting participant telephone numbers. Other than a generalized statement regarding the personal privacy of applicants, the staff offered that some of its applicants are victims of domestic violence and their telephone numbers should not be available. Victims of domestic violence, however, are protected by other provisions of law.[26] These exemptions provide protection for the address and telephone numbers of victims of domestic violence. Since these individuals are already protected elsewhere, this should not be the basis for including telephone numbers in this particular exemption. Further, it should be noted that the exemption does not exempt the address of applicants or participants. Thus, as currently drafted, the exemption would permit the physical location of a participant to be identified, but not permit discovery of less intrusive means of contact, a result that is somewhat incongruous.

As currently drafted, there are some problems that could arise in the implementation of the exemption. For example, it might be argued under a facial reading of the exemption that information is exempt only if it is "furnished by an individual" to an agency. If, as the statement of public necessity reads, one purpose of the exemption is to limit ". . unnecessary intrusion into the personal affairs of the program participants . . . " it should not matter *who* provides information to an agency. Further, as agencies that hold this information do not limit application of the exemption based upon its source, the current language is misleading.

The exemption also contains an unnecessary phrase related to the status of other information that is not made exempt. Specifically:

> [a]ny other information produced or received by any private or public entity in direct connection with federal, state, or local housing assistance programs, unless the subject of another federal or state exemption is subject to subsection (1).

[25] Section 119.07(3)(dd), F.S.

[26] *See*, for example, ss. 741.465 and 787.03, F.S.

This phrase is unnecessary and could be confusing. Under Florida law, all information not made exempt by the Legislature is automatically open for public inspection and copying.

While the foregoing provision could be improved by amendment, other parts of the exemption meet the requirements of the State Constitution and Open Government Sunset Review Act. For example, s. 119.07(3)(bb), F.S., also makes information related to health and property insurance confidential and exempt. Health insurance information falls within the type of information that is typically understood to be sensitive personal information as it may detail a person's health treatments. Property insurance may contain information about valuables that a participant may have in his or her residence. Publication of that information could make a resident vulnerable as a robbery target. As such, exempting these two types of information may be supported.

The exemption also makes medical history records confidential and exempt. This information is collected from some applicants because some housing assistance programs have been created for persons with illnesses or other medical problems. Historically, medical records have been considered to be sensitive personal information that should not be available for public inspection or copying. Exempting medical history records is consistent with constitutional standards and practice.

As noted previously, a record may be made exempt or it may be made exempt and confidential. When information is merely exempt, an agency has more ability to share that information in the performance of its duties or for other purposes. When information is made confidential and exempt, an agency is limited in its release of that information to those entities named in statute or upon court order.[27] The section under review is made exempt and confidential. In its review, staff was concerned that the exemption did not permit adequate sharing of information among various agencies because the exemption also authorizes access by other agencies *only* for the limited purpose of performing an audit. According to staff of the corporation, this limited exception to the exemption is sufficient because the various housing assistance programs do not share information. Each time an applicant applies for a different program, the application process begins anew and the applicant provides the information. As a result, the limitation on sharing information for other purposes besides conducting an audit, does not inhibit housing assistance program implementation.

RECOMMENDATIONS

Based upon the foregoing findings, staff recommends that the repeal of s. 119.07(3)(bb), F.S., be abrogated, and that the exemption be amended to narrow and clarify it. Specifically, staff recommends that the exemption be amended to:

(1) Identify the state agencies that implement housing assistance programs;
(2) Remove references to bank account and credit card numbers as the general exemption in s. 119.07(3)(bb), F.S., applies and is more comprehensive;
(3) Eliminate telephone numbers from the exemption as they are readily available from other sources and, in the case of victims of domestic violence, other statutes provide protection for telephone numbers, as well as addresses;
(4) Remove language regarding the source of the information, i.e., an "individual" who furnishes information to an agency;
(5) Delete a provision that states that any other information that is received is subject to open government requirements because that provision reiterates the current state of the law and, as drafted, is confusing and unnecessary.

[27] *See*, AGO 85-62; Inf. Op. to Chiaro, January 24, 1997.