The Florida Senate

Interim Project Report 2003-221 *December 2002*

Committee on Health, Aging and Long-Term Care | Senator, James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION OF APPLICATION INFORMATION FOR THE FLORIDA KIDCARE PROGRAM (S. 409.821, F.S.)

SUMMARY

Section 409.821, F.S., makes any information in an application for determination of eligibility for the Kidcare program, obtained by the Florida Kidcare Program, confidential and exempt from disclosure requirements for public documents. The section makes information obtained through quality assurance activities and patient satisfaction surveys which identifies program participants confidential and exempt. The section additionally prohibits release by program staff or agents of confidential information to any state or federal agency, private business, person or any other entity, without the written consent of the applicant or the parent or guardian of the applicant. This section of the law is subject to the Open Government Sunset Review Act of 1995, and will expire on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S., provides that an exemption is to be maintained only if the exempted record or meeting is of a sensitive, personal nature concerning individuals, the exemption is necessary for the effective and efficient administration of a governmental program, or the exemption affects confidential information concerning an entity. The Open Government Sunset Review Act of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption meets the requirements for reenactment. The review indicated, however, that the exemption is not consistent with current agency practice and federal requirements. The exemption therefore should be modified to allow exchange of information between agencies responsible for the Kidcare program and to comply with the federal requirements for safeguarding records.

BACKGROUND

Constitutional Access to Public Records and Meetings

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies (Section 1, ch. 5945, 1909; RGS 424; CGL 490). Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967 (Chs. 67-125 and 67-356, L.O.F.). These statutes have been amended numerous times since their enactment. In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice.

Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. (*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *(Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)).

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

1. Must state with specificity the public necessity justifying the exemption;
2. Must be no broader than necessary to accomplish the stated purpose of the law;
3. Must relate to one subject;
4. Must contain only exemptions to public records or meetings requirements; and
5. May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida's citizens to discover the actions of their government. (*Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997)). 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. (*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)).

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 a record 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. (Attorney General Opinion 85-62.) If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances. (*Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991)).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. (*Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985)). For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant. (*B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999)). The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records. (*Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act of 1995, an exemption is to be maintained only if:

(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
(b) The exemption is necessary for the effective and efficient administration of a governmental program; or
(c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

(a) What specific records or meetings are affected by the exemption?
(b) Whom does the exemption uniquely affect, as opposed to the general public?
(c) What is the identifiable public purpose or goal of the exemption?
(d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act of 1995, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

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

Further, the exemption must be no broader than is necessary to meet the public purpose it serves (*Memorial Hospital –West Volusia, Inc. v. News-Journal Corporation*, 2002WL 390687 (Fla.Cir.Ct)). In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

The Kidcare Program

Florida's Kidcare program was created by the 1998 Legislature to make affordable health insurance available to low and moderate income Florida children. Kidcare is an "umbrella" program that currently includes the following four components: Medicaid for children; Medikids; the Healthy Kids Program; and the Children's Medical Services (CMS) network, which includes a behavioral health component. The Florida Healthy Kids program component of Kidcare is administered by the non-profit Florida Healthy Kids Corporation (FHKC), established in s. 624.91, F.S. Florida's Healthy Kids program existed prior to the

implementation of the federal Title XXI child health insurance program. Florida was one of three states to have the benefit package of an existing child health insurance program grandfathered in as part of the Balanced Budget Act of 1997, which created the federal Child Health Insurance Program. Medicaid and Medikids are administered by the Agency for Health Care Administration (AHCA) and the CMS network is administered by the Department of Health (DOH).

The Healthy Kids Corporation contracts with a fiscal agent which performs initial eligibility screening for the program, and final eligibility determination for children who are not Medicaid eligible. The fiscal agent refers children who appear to be eligible for Medicaid to the Department of Children and Family Services for Medicaid eligibility determination, and children who appear to have a special health care need to Children's Medical Services for evaluation. The Healthy Kids Corporation fiscal agent generates bills for copayments for those participants who are required to pay a portion of the premium for their coverage. The eligibility processing system checks other agency databases for factors which might exclude a child from eligibility, such as being the child of a state employee, or a child in an immigration status which the program is not permitted to serve.

Current Enrollment in the Kidcare Program

As of October 1, 2002, the Florida Kidcare program was providing coverage to approximately 295,000 children in the Title XXI-funded Kidcare program, plus 1.1 million children in the Title XIX Medicaid program. The Title XXI-funded enrollment includes the following:

Kidcare Program Component	Enrollment
Healthy Kids Corporation	252,565
Children's Medical Services	7,791
Medikids Program	31,189
Medicaid Title XXI	3,268
Total	294,813

The Kidcare Public Records Exemption

Section 409.821, F.S., makes any information in an application for the Kidcare program, obtained by the Florida Kidcare Program, confidential and exempt. The section makes information obtained through quality assurance activities and patient satisfaction surveys which identifies program participants confidential and exempt. The section additionally prohibits release by program staff or agents of confidential information to any state or federal agency, private business, person or any other entity, without the written consent of the applicant or the parent or guardian of the applicant.

Section 409.821, F.S., was established in Committee Substitute for Senate Bill 1230 passed during the 1997 session of the Legislature. In the bill the Legislature found that:

> "…exempting identifying information contained in applications for eligibility determination under the Florida Kids Health program, including medical information and family financial information, and any information obtained through quality assurance activities and patient satisfaction surveys which identifies program participants, is a public necessity. The harm caused to program applicants by release of such personal and sensitive information outweighs any public benefit derived from releasing such information. Further, maintaining the confidentiality of such information is necessary to enable the Department of Children and Family Services, the Department of Health, and the Agency for Health Care Administration to effectively and efficiently administer the Florida Kids Health program. If such information is not kept confidential, the administration of the program could be significantly impaired because the applicants would be less inclined to apply to the program if personal medical and financial information were made available to the public."

Kidcare Application

The Kidcare program uses a simplified one-page application to determine eligibility. The information required on the application is the name, age, sex, street and mailing address, telephone number, Social Security numbers of children and their parents, due dates of unborn children, family income, child care providers, and health status information.

Quality Assurance/Participant Satisfaction

The Kidcare agencies and their contractors conduct regular quality assurance and participant satisfaction surveys. The information collected includes demographic and identifying information, health status and health care information, the names of medical providers, reasons for disenrollment from the program, and other personal information used to determine the adequacy of care provided and the satisfaction of participants with program services and operations.

METHODOLOGY

To complete this review, Senate staff interviewed staff of the state agencies responsible for administration of the Kidcare program, and staff of the Florida Healthy Kids program. Results of a survey completed by agency staff regarding the necessity for continuation of the current public records exemption were also reviewed.

FINDINGS

There are currently several public records exemptions pertaining to records held by public agencies administering the Kidcare program.

Agency for Health Care Administration
Section 408.061(8), F.S., which pertains to data collection by the Agency for Health Care Administration, makes portions of patient records obtained or generated by the Agency for Health Care Administration containing identifying information, confidential and exempt from public records disclosure.

Department of Children and Family Services
Although there is not a specific public records exemption for DCF eligibility records, DCF staff believe that the public records exemption in 408.061(8), F.S., applies to eligibility records of Kidcare participants which are held by DCF.

Department of Health Children's Medical Services
There is not a specific public records exemption which applies to Kidcare records held by DOH. DOH staff believe, however, that Kidcare records held by DOH and the CMS network are "patient records" and subject to the restrictions of s. 456.057, F.S.

Florida Healthy Kids Corporation
Subsection (7) of s. 624.91, F.S., permits the FHKC to have access to medical records of a student with permission of a parent or guardian of the student. Identifying information, including medical records and family financial information obtained by the Corporation pursuant to the subsection is confidential and exempt. A violation of the subsection is a second degree misdemeanor.

Federal Requirements for Safeguarding Information
Medicaid is a medical assistance program that pays for health care for the poor and disabled. The program is jointly funded by the federal government, the state, and the counties. The federal government, through law and regulations, has established extensive requirements for the Medicaid program. Under s. 409.902, F.S., the Agency for Health Care Administration is the single state agency responsible for the Florida Medicaid Program. The federal authority for Medicaid program operations is the Social Security Act, which requires states to submit a "Medicaid State Plan" in which the state describes its compliance with federal law and regulations.

Federal regulations at 42 CFR 431 Subpart F require state Medicaid agencies to restrict the disclosure of information about applicants and recipients to purposes directly connected with the administration of the program. Subpart F requires that state Medicaid agencies have criteria which will ensure the safekeeping of identifying information about Medicaid recipients including medical services provided, social and economic information, Medical services and conditions, and information received from sources outside the agency which has been used to verify income eligibility. Federal Regulations at 42 CFR 431.301 require statutory legal sanctions for inappropriate disclosure of information concerning applicants and recipients of medical assistance. Federal regulations applicable to state child health insurance programs (42 CFR 1110) require that states ensure that the privacy protections of 42 CFR 431 Subpart F will apply to participants in child health insurance programs.

Exchange of Information Between Kidcare Agencies
As noted earlier, Kidcare is an umbrella program, which encompasses the operations of four separate agencies, each of which has its own eligibility requirements in terms of age and income. There are additional eligibility standards applicable to children with special health care needs.

Ensuring compliance with federal and state law regarding placement of a child in the appropriate program component, and efficient use of state funds, requires that a child's initial application and subsequent updates of that information be screened by state agencies to determine the appropriate placement in a Kidcare program component. The agencies screen each application to either rule out or confirm eligibility factors which would render the applicant ineligible for the program entirely (such as being the dependant of a state employee) or suggest that an applicant might be eligible for one of the Kidcare program components

(such as a child with special health care needs who should be enrolled in the CMS program).

In addition, since the inception of the program, the agencies which operate Kidcare have made continual efforts to smooth the flow of applications through and between their programs in an effort to reduce the time it takes to process an application and to enroll eligible children, to increase the accuracy of placement of a child in the appropriate Kidcare component, and to reduce the chances of a break in coverage when a family's circumstances change. Most recently, the Florida Healthy Kids Corporation contracted with Maximus to perform an in-depth evaluation of the Kidcare enrollment process. The study yielded 28 recommendations, many of which were geared toward making the internal processing of applications and the exchange of data about participants between the Kidcare agencies more transparent and efficient. A number of the recommended strategies involved making the exchange of applicant data between the agencies faster and less prone to error. The Kidcare agencies have coordinated operations to begin implementation of most of the recommendations in the study, particularly those geared toward smoothing the information flow among them.

Continued Necessity for the Exemption

Responses received in a survey regarding the exemption and subsequent interviews of agency staff indicated that the information made confidential and exempt is of a personal sensitive nature, and includes the addresses and income of the applicant family, the names, and ages and Social Security numbers of family members, and information about the health status and insurance coverage of children in the family. Staff of agencies administering the Kidcare program believe that losing the ability to guarantee that information about Kidcare participants would not be disclosed would make parents more hesitant to submit applications to enroll in the program and to participate in quality assurance and participant satisfaction activities.

Agency staff report that continuation of the public records exemption is necessary, since they receive requests from the public to disclose the information which is currently protected. These requests have come from non-custodial parents, individuals claiming to be relatives, and individuals interested in marketing goods and services to participants. Generally the information requested is the address of the participant and information as to insurance status of the child.

Conclusions

Kidcare applications, updates of applications and supporting documents contain information such as names, addresses, and ages of children, medical information, and information regarding family social and economic circumstances. Quality assurance documents and patient satisfaction surveys contain personal identifying information about participants, information about health status, and the medical care provided. These records therefore contain information that is of a sensitive, personal nature, which, if publicly available, could jeopardize the safety of Kidcare participants. This information is not otherwise readily obtainable by alternative means.

The protection of Kidcare records is important to assure families that sensitive information will not be released to the public. This assurance is necessary for the state to achieve the goal of enrolling eligible children in the program so that they can receive needed health care services

The current exemption is not overly broad, applying only to information contained in applications for the program and information obtained in quality assurance activities and patient satisfaction surveys which identifies program participants. Federal regulations at 42CFR 431 Subpart F require a broader protection than that provided by the current Florida exemption.

RECOMMENDATIONS

Florida's Kidcare public records exemption should be continued. Federal regulations governing Medicaid and Kidcare require states to safeguard information about applicants and participants.

Additionally, safeguards about applicant and participant information are important to potential participants in the Kidcare program. Disclosure of identifying information about applicants and participants would negatively affect enrollment in the program and would hinder quality improvement efforts by the agencies administering the Kidcare program.

The Kidcare public records exemption should be modified to encompass all identifying information about Kidcare participants held by state agencies, to comply with federal requirements. The current exemption applies only to information contained in applications for determination of eligibility, quality assurance activities and patient satisfaction surveys. Federal regulations, however, require that states

safeguard specific identifying information collected about applicants and recipients, without regard to whether or not the information is in an application or in quality reviews or satisfaction surveys.

The Kidcare public records exemption should be modified to include legal sanctions. Federal regulations for state child health insurance programs require that state standards for protection of information about participants include legal sanctions for the release of protected information. Although the Florida Healthy Kids Corporation public records exemption at 624.91(7), F.S., imposes such sanctions, the public records exemption in 409.821, F.S. does not.

The Kidcare public records exemption should be modified to remove the prohibition against sharing information among entities administering the program. The current Kidcare public records exemption prohibits release of information to state or federal agencies or other entities without the written consent of the parent or guardian of the applicant. Since the administration of the Kidcare program requires a free interchange of data between the agencies operating the program, and between the agencies and the entities providing coverage, this prohibition should be modified to allow the exchange of information for purposes connected with the administration of the program.