The Florida Senate

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Committee on Communications and Public Utilities — Senator Lee Constantine, Chair

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR PROPRIETARY CONFIDENTIAL BUSINESS INFORMATION OBTAINED FROM A TELECOMMUNICATIONS COMPANY OR FRANCHISED CABLE COMPANY BY A LOCAL GOVERNMENTAL ENTITY RELATING TO IMPOSING FEES FOR OCCUPYING THE PUBLIC RIGHTS-OF-WAY OR ASSESSING THE LOCAL COMMUNICATIONS SERVICES TAX, S. 202.195, F.S.

SUMMARY

The public records exemption set forth in section 202.195, F.S., for proprietary confidential business information obtained from a telecommunications company or franchised cable company by a local government entity relating to imposing fees for occupying public rights-of-way or assessing the local communications services tax pursuant to s. 202.19, F.S., or otherwise relating to the regulating of the public rights-of-way will be repealed on October 1, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

The exemption protects franchised cable and telecommunications companies' proprietary confidential business information, protects competitive advantages in the marketplace, and helps safeguard network security. As such, it is recommended that the exemption be reenacted with amendments.

BACKGROUND

Article I, s. 24, of the Florida Constitution provides every person 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 and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, commissioners, or entities created pursuant to law or the Florida Constitution.

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 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 final inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and established the means by which these exemptions are to be established. Under Article I, s. 24(c), of the Florida Constitution, the legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meeting requirements and must relate to one subject.

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 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 five 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 of the fifth year, unless the Legislature acts to reenact the exemption.

In the year before the 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 the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

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

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

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

What specific records or meetings are affected by the exemption?

1. Whom does the exemption uniquely affect, as opposed to the general public?
2. What is the identifiable public purpose or goal of the exemption?
3. 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, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. 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;
2. 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
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 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. 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.

Under s. 119.15(3)(e), F.S., notwithstanding s. 768.28, F.S., 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 liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain

an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

METHODOLOGY

Committee staff sent local governmental entities a questionnaire inquiring as to whether they currently held any proprietary confidential business information as defined in s. 202.195, F.S. Committee staff then analyzed the type of proprietary confidential business information obtained by local governmental entities. Legislative history of the 2000 law was reviewed, as well as relevant statutory provisions. Discussions were held with industry personnel, who were asked whether the exemption is justified under the criteria specified in s. 119.15, F.S.

FINDINGS

The exemption

Section 202.195, F.S., provides that any proprietary business information obtained from a telecommunications company or franchised cable company by a local governmental entity relating to imposing fees for occupying the public rights-of-way or assessing the local communications services tax (CST) pursuant to s. 202.19, F.S., or otherwise relating to regulating public rights-of-way is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may be used only for the purposes of imposing such fees or assessing such tax or regulating such rights-of-way, and may not be used for any other purposes, including, but not limited to, commercial or competitive purposes.

"Proprietary confidential business information" is defined to include maps, plans, billing and payment records, trade secrets, or other information relating to the provision of or facilities for communications service that is intended to be and is treated by the company as confidential and is not otherwise publicly available to the same extent and in the same format as requested by the local governmental entity. Proprietary confidential business information does not include schematics indicating the location of facilities for a specific site that are provided in the normal course of the local governmental entity's permitting process.

The exemption will be repealed on October 1, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

Information gathered

The exemption, as currently defined, applies in three different circumstances. It applies to proprietary confidential business information relating to a) imposing fees for occupying the public rights-of-way; b) assessing the local communication services tax; or c) otherwise relating to regulating the public rights-of-way. However, after discussion with industry representatives, it is apparent that the documents and records at issue almost exclusively concern permitting for the use of rights-of-way and franchising agreements. In practice, CST-related records are usually pertinent under the exemption only in rare instances, such as in audits of pass-through providers and situations where a cable provider only operates in one county. For example, the Florida Telecommunications Industry Association stated that telecommunication providers made filings with local governments primarily in the context of permitting for the use of public rights-of-way. Further, the Florida Cable Telecommunications Association stated that cable providers made filings with local governments mainly in the context of franchising agreements, in addition to permits.

Committee staff sent out a detailed questionnaire to the local governmental entities. The first question asked if any records in its files were covered by the exemption. If the answer to the first question was "yes," the questionnaire requested additional responses as to the nature of the exempted records. However, if the answer to the first question was "no," the local governments were not required to answer any further questions. Of the approximately four hundred questionnaires sent out, seventy-six local governments responded. Out of the seventy-six returned questionnaires, only two were from counties. No large cities responded. A majority of the responses indicated that the local government did not hold any records covered by the exemption. However, this response may have been due to a misunderstanding of the records included in the exemption.

The exemption is located in Chapter 202 which is entitled the Communications Services Tax Simplification Law. The laws contained within the chapter are intended to reform the tax laws to provide a uniform method for taxing communications services sold in the state of Florida. The chapter essentially restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the convergence of service offerings. Thus, it is reasonable to assume that the laws within Chapter 202

were all intended to exclusively focus on CST-related information. However, the law creating Chapter 202, F.S., also extensively amended the statute on local governments' regulation of rights-of-way, s. 337.401, F.S. (Ch. 2000-260, Laws of Fla., SB 1338.) As a result, the public records exemption created by s. 202.195, F.S., also addressed both CST and rights-of-way. Yet, in reality, the records covered by the exemption primarily involve regulation of the public rights-of-way, not CST. Thus, the presence of the s. 202.195, F.S., public records exemption in the Communication Services Tax chapter is understandably confusing and may have led the local governmental entities to focus solely on CST-related information when answering the questionnaire.

For example, several of the responses from the local governments commented that the language of exemption was unclear. Moreover, several of the local governments had Finance Directors fill out the questionnaire. This could lend credence to the assumption that it was the local governments' understanding that the records covered by the exemptions were predominantly CST-related. Thus, the local governments may not have been looking for rights-of-way records that are also included in the exemption. It seems that the local governments' responses to the questionnaire may have been affected by confusion over what records are covered by the exemption.

Follow-up telephone calls were made to the local governments to determine if this assessment was accurate. Of the seventy-six respondents, twenty-five were called at random. Staff did not receive responses from most of the calls, yet the responses that staff did receive seemed to support this premise. Therefore, the discrepancy between the majority of the local governments' responses to the questionnaire and the industries' position that records covered by the exemption are currently in the possession of the local governments can be reconciled.

Staff received a response from the First Amendment Foundation, which indicated that the exemption should be refined to clarify the public's right of access to nonproprietary information without impairing competition in the communications industry. The Foundation proposed limiting the records covered by the exemption to those whose "disclosure would be reasonably likely to be used by a competitor to harm the business interests of the provider and which is not otherwise known or cannot otherwise be legally obtained by the competitor."

The exemption as currently written includes any proprietary business information obtained from a telecommunications company or franchised cable company by a local governmental entity relating to assessing the communications services tax or occupying the public rights-of-way. The relevant public purpose for the exemption is the protection of information used to protect or further a business advantage over those who do not know how to use it, the disclosure of which would injure the affected entity in the marketplace. The proposed language appears to narrow the scope of the exemption to include only those records that, in reality, fall within the public purpose and could harm competition in the marketplace if disclosed.

Review of the exemption

Section 119.15, F.S., provides that when the Legislature is reviewing an exemption before its scheduled repeal it is to consider as part of the review process the following questions:

1. *What specific records are affected by the exemption?*

The telecommunications and franchised cable companies file information regarding franchising agreements and permitting for the use and regulation of rights-of-ways. This information often takes the form of location maps, plans, and schematics. However, while maps are expressly protected from disclosure by the exemption, schematics are expressly excluded from coverage. Yet, there is a danger that, if compiled, these individual schematics could effectively function as a map, thereby allowing a competitor to piece together the extent, capacity, and direction of the affected provider's services.

2. *Whom does the exemption uniquely affect, as opposed to the general public?*

Telecommunication and franchised cable companies.

3. *What is the identifiable public purpose or goal of the exemption?*

As discussed in more detail below, the public purpose behind the exemption is to protect proprietary confidential business information from being acquired by competitors.

Additionally, while it is not set forth in s. 119.15, F.S., as criteria for an identifiable public purpose, the exemption also addresses concerns for network security and public safety.

4. *Can the information contained in the records be readily obtained by alternative means? If so, how?*

No.

Section 119.15, F.S., also provides that an exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the purposes discussed below and 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.

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.*

The exemption is necessary for the effective administration of regulation of public rights-of-ways and franchising cable companies. Because of the exemption, telecommunication providers are willing to provide information, such as maps regarding the location of facilities that are necessary for the permitting, maintenance and management of the public rights-of-ways. Furthermore, the absence of the exemption could potentially make franchising agreements between the local governments and the cable companies more difficult. At the very least, not having the exemption would seemingly make these transactions less efficient.

2. *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. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted.*

No.

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 which is used to protect or further a business advantage over those who do not know how to use it, the disclosure of which information would injure the affected entity in the marketplace.*

Industry representatives state that the information filed in connection with a franchise agreement or a permit for the use of a public right-of-way contains proprietary confidential business information. The cable providers stated that franchising agreements are extensive documents that contain significant amounts of information on confidential business matters. Thus, a competitor could gain a business advantage if this information was obtained.

Individual schematics currently are not covered by the exemption. If, however, these individual schematics were compiled, as some local governments require, this could give advance knowledge to competitors as to where providers may offer service. It is unclear whether such a compilation would constitute a protected map. The disclosure of such information would injure the affected entity in the marketplace.

Based on the above discussion, the exemption serves an identifiable public purpose.

Finally, the exemption as written is broader than necessary to meet this purpose. The current language detailing the scope of the exemption should be narrowed to ensure that only records that could reasonably be used by a competitor to harm the business interests of a provider would be exempt. This would help defend against a charge of overbreadth and would meet the requirements of s. 119.15, F.S. The current provision is also unclear as to what types of records are exempted in regards to protected maps and unprotected schematics. As such, it is recommended that the statute be amended to clarify the scope of the exemption and to clarify the types of records included in the exemption.

RECOMMENDATIONS

Based on the above findings, the public purpose for the exemption contained in s. 202.195, F.S., is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without this exemption. The exemption should be reenacted with amendments.