The Florida Senate

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Committee on Domestic Security Senator Alex Diaz de la Portilla, Chair

OPEN GOVERNMENT SUNSET REVIEW OF CERTAIN INFORMATION EXEMPT FROM DISCLOSURE, S. 311.13, F.S.

SUMMARY

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Chapter 2000-292, L.O.F., created a public records exemption for seaport security plans of a seaport authority created by the Legislature or of a county or municipal seaport department. Materials that depict critical seaport operating facilities are also exempt if the seaport authority or department determines that such items contain information that is not generally known and that could jeopardize seaport security. The exemption does not apply to information relating to real estate leases, layout plans, blueprints, and information related thereto.

BACKGROUND

Government in the Sunshine

The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians approved an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the State Constitution provides:

> (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 Law[1] specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

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 the 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 permits exemptions to 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 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 meetings requirements and must relate to one subject.

Section 286.011, F.S., requires all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, city, or political subdivision at which official acts are to be taken to be public, and held after reasonable notice, with minutes taken.

[1] Chapter 119, Florida Statutes.

Open Government Sunset Review Act

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 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 must 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:

(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.[2]

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?

[2] s. 119.15(2), F.S.

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(4)(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 any 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.

Seaport Security Law – Confidentiality of Security Plans

In its final report issued in November of 1999, the Florida Legislative Task Force on Illicit Money Laundering recommended the establishment of minimum security standards for the state's seaports. The 2000 Legislature directed the Governor's Office of Drug Control Policy to develop a statewide security plan based on the Florida Seaport Security Assessment. The Office of Drug Control was directed to develop statewide minimum seaport

security standards and each of Florida's seaports was required to develop individual security plans based on the statewide standards.[3] Section 311.12, F.S., provides statewide minimum security standards for fourteen deepwater seaports.

Section 311.13, F.S., provides public records exemption for the seaport security plans of a seaport authority created by act of the Legislature or of a seaport department of a county or municipality that operates an international seaport. In addition, photographs, maps, blueprints, drawings, and similar materials that depict critical seaport operating facilities are exempt if the seaport authority or department determines that such items contain information that is not generally known and that could jeopardize the security of the seaport. This exemption does not include information relating to real estate leases, layout plans, blueprints, or information relating thereto.

Florida statutory provisions contain other public records exemptions relating to security plans. Under s. 119.071, F.S., a security system plan or portion thereof for any property owned by or leased to the state or… subdivisions; or any privately owned or leased property which plan or portion thereof is in the possession of any agency is confidential and exempt… 'security system plan' includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems; threat-assessments conducted by any agency…or any private entity; threat response plans; emergency-evacuation plans; sheltering arrangements; or manuals for security personnel, emergency equipment, or security training…Information…may be disclosed by the custodial agency to another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those persons who are responsible for such attempts or acts and the confidential and exempt status of such information shall be retained while in the possession of the receiving agency…." Section 286.0113 provides that those portions of any meeting which would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(1) are exempt from (the Sunshine Law)…."

Federal Maritime Law

The Maritime Transportation Security Act of 2002 (MTSA)[4] was signed into law by President Bush on November 25, 2002. The MTSA requires owners and operators of facilities and vessels to conduct assessments that will identify their security vulnerabilities and to develop security plans to address those vulnerabilities. These security plans must include such items as measures for access control, responses to security threats, and drills and exercises to train staff and test the plan.[5] Such security plans must be approved by the U.S. Coast Guard.

The regulations implementing the provisions of MTSA[6] established a new framework for maritime security. The primary elements of the framework include National, Area, Facility, and Vessel Security Plans. The local Captain of the Port (COTP) is responsible for security within his designated zone. Each COTP zone is required to have an Area Maritime Security Plan to include security plans for all identified maritime facilities including private terminal operations. Each private or public maritime facility must complete a facility security assessment and plan and file it with the Captain of the Port.

Freedom of Information Act - Exemption of Security Sensitive Information

In 1966, Congress passed the Freedom of Information Act (FOIA) to increase public access to federal government documents. All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. However, the FOIA does <u>not</u> provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records.[7] Records of federal agencies in Florida are not covered by the state's Public Records Law.[8]

The Transportation Security Administration (TSA), within the U.S. Department of Homeland Security, has issued regulations under 49 CFP Part 1520 that designates information obtained or developed in carrying out security requirements that would be detrimental to the security of transportation as Sensitive Security Information (SSI).[9]

Vessel, Facility, Area and National Maritime Security plans required under the Maritime Transportation Security Act have been designated by TSA as Security Sensitive

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[3] Chapter 2000-360, Laws of Florida.

[4] Public Law 107-295.

[5] U.S. General Accounting Office. *Maritime Security: Better Planning Needed to Help Ensure an Effective Port Security Assessment Program;* GAO-04-1062 (Washington, D.C.; September 2004).

[6] 33 CFR Subchapter H – Maritime Security.

[7] U.S. Department of Justice, *Freedom of Information Act Reference Guide,* (November 2003).

[8] Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide.*

[9] U.S. Coast Guard, Department of Homeland Security. *Sensitive Security Information, 49 CFR Part 1520,* Maritime Industry Small Entity Compliance Guide at http://www.uscg.mil/hq/g-m/mp/pdf/GuideSSI.pdf.

Information. Information designated as Security Sensitive Information is generally exempt under the Freedom of Information Act.

The regulations authorize the handling of SSI materials by a "covered person" with a "need to know." For purposes of SSI regulations, a "covered person" includes, but is not limited to: each person for which a vulnerability assessment has been directed, created, held, funded, or approved by the Department of Homeland Security; each owner, charterer, or operator of a vessel or maritime facility that is required to have a security plan under the MTSA; and each person participating in a National or Area Maritime Security Committee established in accordance with the MTSA. Under the regulations, a person has a "need to know" SSI when the person is conducting maritime transportation security activities that are approved, accepted, funded, recommended, or directed by the DHS and meets other specified criteria in 49 CFR Part 1520.

METHODOLOGY

To complete this review, committee staff researched applicable statutory provisions and federal laws and regulations. Additionally, staff interviewed the Department of Law Enforcement and seaport authorities concerning the use and need for the exemption.

FINDINGS

The 2000 Legislature found that seaports constitute a major point of entry for illicit drugs and other contraband and are potential target for terrorist activities. The exemption from public disclosure for seaport security plans and certain photographs, maps, blueprints, drawings, and similar materials that depict critical seaport operating facilities is narrowly tailored to serve a public purpose and is necessary to ensure the safety and security of seaports.

As discussed in the "Background" section of this report, the Open Government Sunset Review Act prescribes that a public records exemption may be maintained only if it serves an identifiable public purpose, and the statute provides conditions supporting a public purpose finding. It is found that the exemption contained in s. 311.13, F.S., meets the specified criteria set forth in s. 119.15(4)(b)3, F.S., as it protects confidential information concerning entities, disclosure of which could be detrimental to the safety and security of the state's seaports.

RECOMMENDATIONS

Committee staff recommends the exemption found in s. 311.13, F.S., be reenacted. The exemption provided for seaport security plans continues to be sufficiently compelling to override the strong public policy of open government.