The Florida Senate

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

OPEN GOVERNMENT SUNSET REVIEW OF s. 119.071, F.S., SECURITY SYSTEMS PLANS

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 2001-361, L.O.F., as amended by Chapter 2003-16. L.O.F., created a public records exemption for the security system plans of any property owned by or leased to the state or any of its political subdivisions or any privately owned or leased property security system plans which are held by any agency as defined in s. 119.011, F.S. Security system plans include all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations relating directly to the physical security of a facility. The exemption also applies to threat assessments, threat response plans, emergency evacuation plans, sheltering arrangements, or manuals for security personnel, emergency equipment, or security training.

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 hereunder; 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* have been defined by the Legislature in s. 119.011(11), 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

[1] Chapter 119, Florida Statutes.

public, and held after reasonable notice, with minutes taken.

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), 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(6) (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.

The Committee Substitute for Senate Bill 1144 amended the act so that consideration also must be given to whether a record or meeting is protected by another exemption and whether it would be appropriate to merge the exemptions.[3]

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(8), 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.

Confidentiality of Security Plans

[3] The CS for SB 1144 takes effect October 1, 2005, and therefore, does not technically apply to reviews conducted prior to that time.

In creating s. 119.071, F.S., the Legislature found the public necessity to exempt security plans because they contain components that address safety issues for public and private property on which public business is conducted and address the security of private property on which a large segment of the public relies.[4] The finding further stated that the public relies on radio and television towers, telephone and cable lines, power plants and grids, oil and gas pipelines, and many types of privately owned infrastructure to provide necessary services. To coordinate the response of the public sector and the private sector in an emergency, such as an act of terrorism, public agencies must be able to review security-system plans for public and private property. If the information in security-system plans is available for inspection and copying, terrorists could use this information to hamper or disable emergency-response preparedness, thereby increasing injuries and fatalities. Although some skill would be required to use such information to further an act of terrorism, ample evidence exists of the capabilities of terrorists to conduct complicated acts of terrorism. The September 11, 2001 attack on the World Trade Center and the Pentagon, as well as the intentional spread of anthrax in this country and state, which resulted in the death of one Floridian, provide evidence that such capabilities exist. These events also have shown the importance of a coordinated response to acts of terrorism and the need for the review of public and private security-system plans. Consequently, the Legislature found that security-system plans and meetings related thereto must be kept exempt and confidential.

The bombing of four crowded commuter trains in Madrid on March 11, 2004 and three subway trains and a bus in London on July 7, 2005 illustrate that international terrorists are as capable and motivated today as they were at the time the Legislature found the exemption necessary in 2001.

Exempted Security System Plans

Section 119.071 defines "security system plan" to include 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 response plans; emergency evacuation plans; sheltering arrangements; or manuals for security personnel, emergency equipment, or security training.

Because the statute has not been tested, the Department of Law Enforcement and the Department of Health have expressed concern that the definition could be narrowly interpreted to include only those security plans relating directly to physical facilities. The departments are concerned that entity operational information relating to security policy, response capability, defense techniques, organizational structure, intelligence information as well as sources and methods, and similar non-facility categories may not be covered by the exemption. The departments believe that clarification relating to security operations information would be appropriate.

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 not 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.[5] Records of federal agencies in Florida are not covered by the state's Public Records Law.[6]

The Transportation Security Administration (TSA), within the U.S. Department of Homeland Security, has issued regulations under 49 CFR Part 1520 that designate information obtained or developed in carrying out security requirements that would be detrimental to the security of transportation as Sensitive Security Information (SSI).[7]

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

[4] Chapter 2001-361, Laws of Florida.

[5] U.S. Department of Justice, *Freedom of Information Act Reference Guide,* (April 2005).

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

[7] 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.

recommended, or directed by the DHS and meets other specified criteria in 49 CFR Part 1520.[8]

Cooperative Efforts between Florida and Other States and Agencies

The federal Department of Homeland Security (DHS) has designated 97 critical infrastructure sites in Florida. Many of these locations, such as power plants and stadiums are privately owned. Through the federally funded Buffer Zone Protection Plan (BZPP), DHS agents have been working with the owners as well as state and local law enforcement and response agencies to assure that best practices and proper protection and response plans are developed. For security reasons, as determined by the federal government, the list of sites is not publicly available.

The work being done for the BZPP is part of a larger national strategy, the Interim National Infrastructure Protection Plan (NIPP). The NIPP was released in February 2005 to assure that all designated critical infrastructure is protected from terrorist activity.

The BZZP and the NIPP are illustrative of many cooperative programs between federal, state, and local agencies to prepare for and protect against terrorist attacks. In addition, Florida cooperates with adjacent states by sharing information about safety and security planning and disaster preparedness. For example, multi-state and federal security and response teams have worked together in Florida for the Super Bowl, the Free Trade Area of the Americas (FTAA) and Organization of American States (OAS) meetings while Florida has provided support to Georgia and the federal government for the G-8 Conference in Savannah.

During the hurricanes of 2004, Florida received assistance from over 35 other states and Florida regularly sends firefighting teams to assist western states during the wildfire season. Florida has already dispatched several Disaster Medical Assistance Teams and Urban Search and Rescue Teams to assist our neighboring states in response to Hurricane Katrina through an Emergency Management Assistance Compact with these states. These cooperative efforts are critical to the state's successful management of major events and require the sharing of infrastructure and security systems information in order to be effective.

FDLE and DOH staff reported that without the ability to keep certain security information protected, cooperative efforts with outside agencies and other states would be hampered.

Efforts to Limit Disclosure

Prior to the September 11, 2001 events, widespread public access existed to information that is now routinely protected. For example, precise locations of hazardous chemicals stored on university campuses was published on the Internet Public school diagrams likewise are another example of formerly readily obtainable information that is now limited in publication. The need to protect similar information as it related to security system planning was recognized and efforts have been undertaken by custodians to remove it from public access.

As a result, security system information and plans exempted by s. 119.071, F.S., are no longer readily obtainable through other public access means.

METHODOLOGY

To complete this review, committee staff researched applicable statutory provisions and federal laws and regulations. Additionally, staff interviewed and surveyed , in conjunction with House of Representatives staff, the Department of Law Enforcement, the Department of Health, the Agency for Health Care Administration, the Department of Management Services, and the Division of Emergency Management concerning the use and need for the exemption. In addition, staff spoke with a representative of the First Amendment Foundation regarding reenactment.

FINDINGS

The 2001 Legislature found that exemptions for security plans are a public necessity because they contain components that address public safety and security. The exemption allows the State or its political subdivisions to effectively and efficiently provide protections against terrorist attacks and prepare for response to such attacks, the effectiveness of which would be significantly impaired without the exemption. The exemption from public disclosure for security plans and certain records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, consultations, and threat response plans, emergency evacuation plans, sheltering arrangements or manuals for security personnel, equipment, and security training is narrowly tailored to serve a public purpose and is necessary to ensure the safety of the public.

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. 119.071, F.S., meets the specified criteria set forth in s. 119.15(6)(b)1, F.S., as it protects confidential information concerning entities, disclosure of which could be detrimental to the safety and security of the public.

Entity operational information relating to security policy,

[8] Id.

response capability, defense techniques, organizational structure, intelligence information as well as sources and methods, and similar non-facility categories may not be covered by the exemption. Clarification relating to security operations information would be appropriate.

RECOMMENDATIONS

Committee staff recommends the exemption found in s. 119.071, F.S., be reenacted. The exemption provided for security system plans continues to be sufficiently compelling to override the strong public policy of open government.

Staff further recommends that the reenacted statute be renumbered and incorporate other security related public records exemptions found in ss. 381.95 and 395.1056, F.S.