The Florida Senate

Interim Project Report 2008-201 *September 2007*

Committee on Agriculture

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 500.148, F.S., DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES REPORTS AND DISSEMINATION OF INFORMATION

SUMMARY

Article I, s. 24 of the State Constitution permits any person to inspect or copy public records, but also permits the Legislature to create exemptions to this substantive right. Section 500.148, F.S., exempts from public disclosure certain confidential federal records which are provided to the Department of Agriculture and Consumer Services (department) during a joint food safety or food illness investigation. The goal of this exemption is to allow federal and state agencies to share information and fully participate together to achieve timely resolutions of causal or contributing factors to outbreaks. The result of this exemption has been a safer and more secure food supply for the consuming public. This section will automatically repeal on October 2, 2008, unless the Legislature reviews and reenacts it.

Senate staff has reviewed s. 500.148, F.S., pursuant to the Open Government Sunset Review Act and finds that the exemption meets the requirements for reenactment. Accordingly, staff recommends that the exemption in s. 500.148, F.S., be reenacted and thereby saved from repeal.

BACKGROUND

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892. One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.

Article I, s. 24 of the State Constitution, provides that:

(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 Act, which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency. Section 119.07(1)(a), F.S., states:

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.

Unless specifically exempted, all agency records are 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.

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

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.
The Open Government Sunset Review Act provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that 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. An exemption meets the three statutory criteria if it:

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;

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

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.

The act also requires consideration of the following:

What specific records or meetings are affected by the exemption?
Whom does the exemption uniquely affect, as opposed to the general public?
What is the identifiable public purpose or goal of the exemption?
Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
Is the record or meeting protected by another exemption?
Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature, because one session of the Legislature cannot bind another. The Legislature is only limited in its review process by constitutional requirements.

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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed $500. Further, under paragraph (b) of

that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates 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.

Food Safety and Foodborne Illnesses

A foodborne disease outbreak is defined as the occurrence of two or more cases of a similar illness resulting from the ingestion of a common food. Outbreak investigations are a critical means of identifying new and emerging pathogens and maintaining awareness about ongoing problems. Prompt and thorough investigations of foodborne outbreaks aid in the timely identification of etiologic agents and lead to appropriate prevention and control measures.

Investigations of food safety and foodborne illnesses require close collaboration and cooperation among multiple state and federal agencies. In addition to the Department of Agriculture and Consumer Services' (department) basic obligation to maintain a safe and wholesome food supply, its responsibilities include assisting state and federal governments with foodborne illness outbreaks that involve Florida firms or farms. The data gathered by the federal agencies are considered confidential under federal law. In 2003, the Legislature passed SB 1230 which included a statement of public necessity that the harm caused by release of this federal data substantially outweighs any minimal public benefit derived from disclosure of the information. The bill allows confidential federal records which are provided to the department for assistance during a joint food safety or food illness investigation to remain confidential and exempt from public records requirements. The disclosure of such information is prohibited unless a federal agency has found that the record is no longer entitled to protection or unless ordered by a court. With the ability to confidentially review these documents, the department can resolve outbreaks as efficiently and quickly as possible. Further, in carrying out its contract and partnership agreements to conduct federal Food and Drug Administration inspections, the department is obligated to review Hazard Analysis Critical Control Point plans that are required under federal regulations and are considered confidential. This legislation eliminated the requirement that the review be carried out on site, resulting in more efficient use of inspectors' time. It also eliminated the potential that such documents could be acquired by a firm's competitors. Additionally, some aspects of federal rulemaking are not subject to disclosure under the Freedom of Information Act and as such, draft proposed rules are confidential under federal law. Many times federal agencies want the department to review and comment on these proposed rules, but until the legislation was passed, federal agencies would not provide early drafts to the department for fear that the proposed rules would become public records. The 2003 changes allow the department to participate in the early stages of federal rulemaking concerning important food safety issues.

Statement of Public Necessity

In SB 1230, the 2003 Legislature provided the following statement of public necessity for the exemption to the public records and public meetings laws in s. 500.148, F.S.:

The Legislature finds that it is a public necessity that information concerning investigations of food safety or foodborne illness which are otherwise confidential under federal law remain confidential and exempt when shared with the Department of Agriculture and Consumer Services. It is essential that the department have access to information provided by federal and other state agencies in order to conduct investigations and carry out contracts and partnership agreements. The Legislature further finds that federal agencies are reluctant to seek the department's review on important regulatory matters if information that is confidential under federal law would be subject to disclosure. Therefore, the Legislature finds that the harm caused by the release of such information substantially outweighs any minimal public benefit derived from disclosure of federal records that are otherwise confidential.

Federal Public Information Exemptions

Part 20.61 of Title 21 of the Code of Federal Regulations provides that data and information submitted or divulged to the Food and Drug Administration which fall within the definitions of a trade secret or confidential commercial or financial information are not available for public disclosure. A trade secret may consist of any commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end

product of either innovation or substantial effort. Commercial or financial information means valuable data or information which is used in one's business and is of a type customarily held in strict confidence or regarded as privileged and not disclosed to any member of the public by the person to whom it belongs.

Part 20.62 of Title 21 of the Code of Federal Regulations provides that all communications within the Executive Branch of the Federal government which are in written form or which are subsequently reduced to writing may be withheld from public disclosure except that factual information which is reasonably segregable is available for public disclosure.

Part 20.64 of Title 21 of the Code of Federal Regulations provides for withholding records or information compiled for law enforcement purposes from the public. The information may be withheld from the public to the extent that disclosure of such records or information: 1) could reasonably be expected to interfere with enforcement proceedings; 2) would deprive a person to a right to a fair trial or an impartial adjudication; 3) could reasonably be expected to constitute an unwarranted invasion of personal privacy; 4) could reasonably be expected to disclose the identity of a confidential source which furnished information on a confidential basis; 5) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions; or 6) could reasonably be expected to endanger the life or physical safety of any individual.

Part 20.88 of Title 21 of the Code of Federal Regulations provides exemptions from public disclosure of certain communications between the Food and Drug Administration and State and local government officials. The Food and Drug Administration may disclose confidential commercial information to State government officials as part of cooperative law enforcement or regulatory efforts, provided that: 1) the State government agency has provided both a written statement establishing its authority to protect confidential commercial information from public disclosure and a written commitment not to disclose such information; and 2) the Commissioner of Food and Drugs makes certain specified determinations.

Section 552 of the United States Code Annotated Title 5 provides general public information requirements for federal agencies. Section 552(b) exempts the following information from public access: 1) information established by an Executive order to be kept secret in the interest of national defense of foreign policy; 2) internal personnel rules and practices of an agency; 3) information exempted by statute; 4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; 5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; 6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; 7) records or information compiled for law enforcement purposes under certain circumstances; 8) certain information used in the regulation or supervision of financial institutions; and 9) geological and geophysical information and data, including maps, concerning wells.

METHODOLOGY

Staff reviewed the provisions and applicable law pursuant to the criteria specified in the Open Government Sunset Review Act to determine if the provisions of s. 500.148, F.S., making information provided to the Department of Agriculture and Consumer Services by the federal government during a joint food safety or food illness investigation exempt from the Public Meetings Law and Public Records Law, should be repealed, amended, or saved from repeal through reenactment. Results of a survey completed by agency staff regarding the necessity for continuation of the current public records exemption were also reviewed.

FINDINGS

Section 119.15(6)(a), F.S., requires that the following questions be answered as part of the review process for a public records or meetings exemption.

What Specific Records Or Meetings Are Affected By The Exemption?

- Documents in the possession of the United States Food and Drug Administration (FDA) associated with foodborne illness outbreak investigations;
- Certain FDA food surveillance assignments;
- Certain laboratory methods, results and other data associated with food defense contracts/agreements;
- Hazard Analysis and Critical Control Point plans (see below for description); and

- Certain documents associated with proposed federal rule making.

Whom Does The Exemption Uniquely Affect, As Opposed To The General Public?
The exemption affects the United States Food and Drug Administration (FDA), the Centers for Disease Control and Prevention (CDC) and the United States Department of Agriculture (USDA).

What Is The Identifiable Public Purpose Or Goal Of The Exemption?
The goal of this exemption is to allow federal and state agencies to share any information which will ensure the safest and most secure food supply to the consuming public. This is achieved through three primary mechanisms.

First, the department is able to participate with the FDA, CDC, and USDA in joint foodborne illness outbreak investigations. These have included investigations associated with salmonella in Florida tomatoes and trace-back investigations of both domestic and imported food products distributed in the state. Participating with the involved federal partners allows the department to effectively contribute its expertise relative to Florida food operations, enables it to quickly respond to "routine" illness outbreak investigations and provides the in-state capability to respond to food terrorism events. In addition, the department can communicate more effectively with the public regarding the status and significance of an investigation, thereby preventing the loss of public confidence in the government's ability to respond and react.

Second, critical aspects of this exemption are the significant fiscal and scientific gains associated with the department's participation in the FDA, USDA and CDC Food Emergency Response Network (FERN) and CDC's Laboratory Response Network (LRN). FERN is comprised of elite federal and state laboratories throughout the United States. The department and its food laboratories are founding members of this network. In order to participate in the network and to maintain the integrity of our national food defense system, the state's ability to maintain confidentiality of laboratory data, sampling information and laboratory methods is an absolute requirement. In addition to access to critical analytical methods and data, participation in the FERN has resulted in annual grant monies from the federal government in excess of $400,000 annually for three years. (We are currently in year two of this grant.)

Third, an important function of the exemption is the improved efficiency associated with certain inspections involving the review of federally and state mandated Hazard Analysis and Critical Control Point plans. These food management plans often contain confidential information concerning:

- food safety protection programs;
- recipe development;
- ingredients or menu formation;
- equipment design and use; and
- other food processes considered trade secrets that are specific to the firm in question and which have bearing on the ways in which the firm prevents or mitigates the potential for food contamination.

Without the ability to receive and retain the confidentiality of these plans, inspectors would have to remain on site or return to the firms numerous times to review plans and complete detailed inspection reports. This would result in the loss of valuable inspection time and cost the state more in travel reimbursements.

Current statutory language is sufficient for the goals of the exemption to be achieved. Repeal of the explicit authority to maintain confidentiality of information that these federal agencies have deemed confidential under federal law will result in the loss of more than $400,000 annually in grant monies, as well as the in-state ability to conduct laboratory analyses during a terrorism event.

Can The Information Contained In The Records Or Discussed In The Meeting Be Readily Obtained By Alternative Means? If So, How?
No. This exemption covers ONLY information that is provided by a federal agency. This information will be made available to the department only if it can be demonstrated that the information can be retained as confidential.

Is The Record Or Meeting Protected By Another Exemption?
No.

Are There Multiple Exemptions For The Same Type Of Record Or Meeting That Would Be Appropriate To Merge?
No.

RECOMMENDATIONS

Senate staff has reviewed the exemption in s. 500.148, F.S., pursuant to the Open Government Sunset Review Act, and finds the exemption from the public records law meets the statutory criteria for reenactment. Subparagraph 119.15(6)(b)(1), F.S., allows the state to effectively and efficiently administer a governmental program, which would be significantly impaired without the exemption. Information provided to the Department of Agriculture and Consumer Services by the federal government allows the department to effectively contribute its expertise relative to Florida food operations and to affect a more timely resolution of causal or contributing factors to foodborne illness outbreaks. This ensures the safest and most secure food supply to the consuming public. Accordingly, staff recommends that the exemptions in s. 500.148, F.S., be reenacted and thereby saved from repeal.