



# The Florida Senate

Interim Project Report 2008-205

October 2007

Committee on Children, Families, and Elder Affairs

## OPEN GOVERNMENT SUNSET REVIEW OF SECTION 409.175(16)(a) AND (b), F.S., RELATING TO LICENSED FOSTER PARENTS AND FOSTER PARENT APPLICANTS

### SUMMARY

Section 409.175(16)(a) and (b), F.S., exempts from public disclosure specific information held by the Department of Children and Families (DCF or "the department") regarding foster parent applicants and licensed foster parents, unless otherwise ordered by a court. This exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will repeal on October 2, 2008, unless saved by the Legislature in the upcoming legislative session.

A prospective foster parent is required to provide DCF an extensive amount of information documenting the family's capability to care for a foster child. The availability of this information may jeopardize the safety of the foster parent(s) and foster parent applicants and their families. This may cause a prospective or licensed foster parent to fear the process.

This exemption protects information of a sensitive personal nature concerning individuals, the release of which would jeopardize their safety in compliance with s. 119.15(6)(b)2, F.S.

As the exemption meets the standards of the Open Government Sunset Review Act, staff recommends that the exemption be retained with one modification.

The Legislature may wish to consider repealing the exemption for Social Security numbers in s. 409.175(16)(a) and (b), F.S., as this information is already rendered confidential and exempt under the provisions of s. 119.071(5)(a)5, F.S.

Legislature enacted the first public records law in 1892.<sup>1</sup> 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:

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.<sup>2</sup>

Consistent with this constitutional provision, Florida's Public Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.<sup>3</sup>

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.<sup>4</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received

### BACKGROUND

#### Florida Public Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida

<sup>1</sup> Sections 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Fla. Const. art. I, s. 24(a).

<sup>3</sup> Section 119.07, F.S.

<sup>4</sup> Section 119.011(11), F.S.

by an agency<sup>5</sup> in connection with official business, which are used to “perpetuate, communicate or formalize knowledge.”<sup>6</sup> Unless made exempt, all such materials are open for public inspection as soon as they become records.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.<sup>9</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption or substantially amending an existing exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup>

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.<sup>13</sup> If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>14</sup> If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information.<sup>15</sup>

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<sup>5</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984).

<sup>8</sup> Fla. Const. art. I, s. 24(c).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Pursuant to s. 119.15 (4)(b), F.S., an existing exemption is considered substantially amended if the exemption is expanded to cover additional records.

<sup>12</sup> Fla. Const. art. I, s. 24(c).

<sup>13</sup> *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5<sup>th</sup> DCA), *review denied*, 892 So.2d 1015 (Fla. 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 54.

### **Open Government Sunset Review Act**

Section 119.15, F.S., the Open Government Sunset Review Act, provides for the systematic review of exemptions from the Public Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.<sup>16</sup> 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.<sup>17</sup>

Pursuant to the Open Government Sunset Review Act, an exemption may be created, revised or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves.<sup>18</sup> An identifiable public purpose is served if the exemption meets one of three specified purposes 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. An exemption meets the statutory criteria if it:

(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;

(2) 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 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 would injure the affected entity in the marketplace.<sup>19</sup>

The Act also requires the Legislature to consider six questions that go to the scope, public purpose and

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<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(5)(a), F.S.

<sup>18</sup> Section 119.15(6)(b), F.S.

<sup>19</sup> *Id.*

necessity for the exemption.<sup>20</sup>

### Foster Care

The department is directed to establish and administer a program for dependent children and their families. Included in this program are foster homes and other settings that provide shelter and care to the dependent children when they must be placed away from their families.<sup>21</sup>

All foster homes must be licensed.<sup>22</sup> Section 409.175(5), F.S., directs DCF to adopt rules for the licensure of family foster homes and establishes the minimum requirements for licensure with respect to:

- The operation of the foster family home;
- The provision of food, clothing, supplies and services to the foster children;
- The safety and cleanliness of the premises;
- The ratio and supervision of children;
- The moral character of the personnel; and
- The financial ability of the foster parents to provide care.

Chapter 65C-13, F.A.C., Substitute Care of Children, contains the administrative rules for licensing of family foster homes. These rules prescribe the minimum standards for licensure of a foster parent applicant.

Section 409.175, F.S., provides specific legislative requirements related to the licensing of foster homes including:

- Background screening requirements;
- Inspections of the homes by the local health departments;
- Pre-service and in-service training requirements;
- The ability of the department to deny, suspend, or revoke a license and grounds for such actions;
- Actions the department may take to ensure compliance with the licensing requirements; and
- The provision of general liability coverage for family foster homes through the Division of Risk Management.

According to DCF, a foster parent applicant must volunteer a number of potentially sensitive documents as a result of these requirements and the department's need to determine the suitability of individuals to be foster parents. These documents include medical history, financial information, and neighbor references. If this information was available to the public potential foster parents may be discouraged from applying for licensure.

Section 409.175(16), F.S., provides an exemption to the public records law for potentially sensitive information pertaining to a foster parent applicant or licensed foster parent and his or her spouse, minor child, and adult household member.

## METHODOLOGY

Staff reviewed the current exemption pursuant to the standards of the Open Government Sunset Review Act, inquired of DCF regarding the current exemption and contacted the First Amendment Foundation for a recommendation on whether the exemption should be retained, retained with amendments, or allowed to sunset.

## FINDINGS

As required by s. 119.15(6)(b)2, F.S., this exemption protects information of a sensitive personal nature concerning individuals, the release of which may jeopardize that individual's safety.

According to the department, a prospective foster parent is required to provide an extensive amount of information through the application and licensing process, documenting the families' ability to provide care to a foster child. The disclosure of this information may jeopardize the safety of a licensed foster parent or a foster parent applicant and their family. As a result, this could have a chilling effect on the department's ability to recruit and retain foster families.<sup>23</sup>

*1. What specific records does the exemption affect?*  
The exempt information includes:<sup>24</sup>

- Home, business, work, childcare and school addresses and telephone numbers;

<sup>20</sup> Section 119.15(6)(a), F.S. See the Findings section of this report for a review of the six questions as they relate to this particular exemption.

<sup>21</sup> Sections 409.145 and 409.165, F.S.

<sup>22</sup> Section 409.175(4), F.S.

<sup>23</sup> Meeting on the OGSR PR Exemption for Licensed Foster Parents and Applicants s. 409.175(16), F.S., Tuesday, July 17, 2007, Department of Children and Families, House Staff, and Senate Staff.

<sup>24</sup> Section 409.175(16), F.S.

- Social Security numbers;
- Birth dates;
- Medical records;
- Floor plan of the home; and
- Photographs.

If a foster parent applicant does not receive a license, the exempt information becomes public five years after the date of application.<sup>25</sup> If a foster parent's license becomes inactive, the exempt information becomes public five years after the expiration date of the foster parent's license. In both cases, Social Security numbers and medical records remain exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.<sup>26</sup>

If a licensed foster parent becomes an adoptive parent, the adoptive parent's information remains exempt after the expiration of the adoptive parent's foster license.<sup>27</sup>

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

The exemption applies to specific information held by DCF regarding a foster parent applicant or licensed foster parent and his or her spouse, minor child, and other adult household member.

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

In 1998, this exemption was created to protect the personal information of a licensed foster parent and his or her spouse, child, and other household members.<sup>28</sup>

In 2003, the Legislature found that it was a public necessity to expand the public records exemption found in s. 409.175(16), F.S., to include the personal information of a foster parent applicant and information regarding a foster parent applicant's spouse, child, and other adult household.<sup>29</sup>

The Legislature also found that a public records exemption for the medical records of potential applicants and those who were already licensed foster parents was a public necessity because matters of personal health are traditionally private and confidential. According to the Legislature, the public availability of medical records could lessen the willingness of prospective caregivers to reveal medical

information, thus hindering the department's ability to assess foster parent applicants and licensed foster parents and hindering the department's attempts to make appropriate placements for foster children.<sup>30</sup>

In addition, the Legislature found that it was a public necessity to provide foster parent applicants with the same public records exemption afforded licensed foster parents under s. 409.175(16), F.S., in order to encourage persons to apply to become licensed foster parents and avoid a potential chilling effect on the recruitment of such persons.<sup>31</sup> According to the department, this finding is still valid.<sup>32</sup>

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

Some of the information exempted by s. 409.175(16), F.S., can be obtained through alternative means but not readily. Section 409.175(16), F.S., provides that the information is not exempt from public disclosure if otherwise ordered by the court. In addition, s. 39.701(5), F.S., identifies foster parents as a party to which a notice of a judicial review hearing must be served. As such, there is a possibility that they may be identified as being noticed to all the parties to the court proceeding.

## ***5. Is the record protected by another exemption?***

The exempted information includes a foster parent applicant or licensed foster parent and his or her spouse, minor child, and other adult household member's Social Security number. This exemption is duplicative of the Social Security number exemption found in s. 119.071(5)(a)3, F.S. The remainder of the information is held exempt only pursuant to s. 409.175(16), F.S.

## ***6. Are there multiple exemptions for the same type of record that would be appropriate to merge?***

Under the provisions of s. 119.071(5)(a)5, F.S., all Social Security numbers held by an agency are confidential and exempt from s. 119.07(1), F.S., and

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<sup>25</sup> Section 409.175(16)(a), F.S.

<sup>26</sup> Section 409.175(16)(b), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> Chapter 98-29, 1998 Laws of Florida.

<sup>29</sup> Chapter 2003-83, 2003 Laws of Florida.

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<sup>30</sup> *Id.* See also Health Insurance Portability & Accountability Act (HIPAA) of 1996 (August 21), Public Law 104-191. While HIPAA was created to improve the efficiency and effectiveness of the healthcare system, it was also meant to protect the security and privacy of health care information by setting standards regarding its use and disclosure.

<sup>31</sup> *Id.*

<sup>32</sup> Meeting on the OGSR PR Exemption for Licensed Foster Parents and Applicants s. 409.175(16), F.S., Tuesday, July 17, 2007, Department of Children and Families, House Staff, and Senate Staff.

s. 24(a), Art. I of the State Constitution. Therefore, the Social Security number exemption provided for in s. 409.175(16)(a) and (b), F.S., is duplicative.

The exemption provided for in s. 409.175(16)(a) and (b), F.S., meets the criteria stipulated in s. 119.15, F.S., for reenactment.<sup>33</sup> However a modification may be needed to address the removal of a person's Social Security number from the list of information exempt from s. 409.175(16)(a) and (b), F.S., since this is duplicative and redundant.

## **RECOMMENDATIONS**

Based upon the Open Government Sunset Review of s. 409.175(16)(a) and (b), F.S., it is recommended that the exemption for the specific information held by DCF regarding a foster parent applicant or licensed foster parent and his or her spouse, minor child, and other adult household member be retained. If the exemption is not re-enacted, the safety of the foster parents, their family and the foster children in their care may be jeopardized. In addition, repeal of the exemption may negatively influence the department's ability to recruit and retain foster families and, thus, limit the ability to match foster children with the most appropriate family settings.

The Legislature may wish to consider repealing the exemption for Social Security numbers in s. 409.175(16)(a) and (b), F.S., as this information is already rendered confidential and exempt under the provisions of s. 119.071(5)(a)5., F.S.

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<sup>33</sup> Section 119.15, F.S., describes the exemption review process used by the Legislature. According to this section, an exemption may be created, revised, or maintained only if it serves an identifiable public purpose. The identifiable public purpose of this exemption is to protect information of a sensitive personal nature concerning individuals, the release of which may jeopardize his or her safety.