The Florida Senate

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Committee on Health Policy

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 409.821, F.S., PUBLIC RECORDS EXEMPTION FOR THE FLORIDA KIDCARE PROGRAM

SUMMARY

Section 409.821, F.S., specifies that, notwithstanding other laws to the contrary, any information identifying a Florida Kidcare program applicant or enrollee held by the Agency for Health Care Administration (AHCA), the Department of Children and Family Services (DCF), the Department of Health (DOH), or the Florida Healthy Kids Corporation (FHKC) is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Such information may be disclosed to another governmental entity only if disclosure is necessary for the entity to perform its duties and responsibilities under the Florida Kidcare program and shall be disclosed to the Department of Revenue for purposes of administering the state Title IV-D program. Such information may not be released to any person without the written consent of the program applicant. A violation of this section is a misdemeanor of the second-degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

Section 2. of ch. 2003-104, Laws of Florida (L.O.F.), provides that s. 409.821, F.S., is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2008, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S. (2004), provides that an exemption may be maintained only if the exemption: protects information of a sensitive, personal nature concerning individuals; allows the state or its political subdivisions to effectively and efficiently administer a governmental program; or protects confidential information concerning an entity.

Based upon the review of the exemption and the legislatively-stated public necessity for the exemption, professional staff recommends that the public records exemption in s. 409.821, F.S., be retained with modifications. Professional staff also recommends repealing the public records exemption in s. 624.91, F.S., as it pertains to information maintained by the FHKC, because this exemption may be contrary to the exemption in s. 409.821, F.S.

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.[1] 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.[2] 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,[3] which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

[1] Section 1390, 1391 F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.
[3] Chapter 119, F.S.

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency[4] 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.[5]

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.[6] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[7]

Only the Legislature is authorized to create exemptions to open government requirements.[8] 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.[9] A bill enacting an exemption[10] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[11]

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.[12] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[13]

The Open Government Sunset Review Act [14] provides for the systematic review, through a 5-year cycle ending October 2 of the 5th 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. The three statutory criteria are if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration

[4] 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution.

[5] Section 119.011(11), F.S.

[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

[7] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

[8] Article I, s. 24(c) of the State Constitution.

[9] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

[10] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

[11] Art. I, s. 24(c) of the State Constitution.

[12] Attorney General Opinion 85-62.

[13] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[14] Section 119.15, F.S.

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.[15]

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.[16] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), 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.

The Florida Kidcare Program

The Florida Kidcare program provides health care coverage to over 1.3 million children in Florida. Florida Kidcare was established in 1998 as a combination of Medicaid expansions and public/private partnerships, with a wrap-around delivery system serving children with special health care needs. Family income level, age of the child, and whether the child has a serious health condition are the eligibility criteria that determine which component serves a particular child.

The Florida Kidcare program is an "umbrella" program, the components of which include Medicaid for children, the Florida Healthy Kids program, Medikids, and the Children's Medical Services Network (CMSN). The program is jointly administered by the AHCA, the FHKC, the DOH, and the DCF. When the Kidcare program was established, this structure allowed the state to link existing public and private programs to implement provisions of the new federal State Children's Health Insurance Program (SCHIP) and to begin receiving federal funds under Title XXI of the Social Security Act.

Open Government Sunset Review of s. 409.821, F.S., Florida Kidcare Program Public Records Exemption

Section 409.821, F.S., specifies that, notwithstanding other laws to the contrary, any information identifying a Florida Kidcare program applicant or enrollee held by the AHCA, the DCF, the DOH, or the FHKC is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such information may be disclosed to another governmental entity only if disclosure is necessary for the entity to perform its

[15] Section 119.15(6)(b), F.S.
[16] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

duties and responsibilities under the Florida Kidcare program and shall be disclosed to the Department of Revenue for purposes of administering the state Title IV-D program. The receiving governmental entity must maintain the confidential and exempt status of the information. Such information may not be released to any person without the written consent of the program applicant. A violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

Section 2. of ch. 2003-104, L.O.F., provides that s. 409.821, F.S., is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2008, unless reviewed and saved from repeal through reenactment by the Legislature.

METHODOLOGY

Florida Senate Committee on Health Policy professional staff worked in consultation with the Senate Committee on Governmental Operations and the Florida House of Representatives Committee on State Affairs to determine whether the provisions of s. 409.821, F.S., making identifying information of Florida Kidcare program applicants or enrollees held by the Kidcare administrative entities confidential and exempt from the Public Records Law, should be continued or modified. Professional staff obtained information through written surveys and follow-up interviews with Florida Kidcare program administrators to identify the records affected by the exemption and to determine the administrators' justification for reenacting the exemption. Professional staff also interviewed representatives of the Florida First Amendment Foundation to identify any concerns or suggested changes.

FINDINGS

The consensus of all Florida Kidcare program administrators is that the public records exemption in s. 409.821, F.S., should be retained indefinitely. The identifying information protected by this exemption includes: family names, dates of birth, Social Security numbers, health information, names, and locations of employers, broad financial information, and citizen status. There is a public necessity to retain this information as confidential and exempt to ensure that the information is not used to physically or financially harm the applicant or the enrollee. Also, families may be resistant to providing the information, or even applying for health coverage at all, if they are not assured that their identifying information is protected. The end result of repealing this exemption could be an increase in the number of uninsured in the state.

Although stakeholders agree the exemption should be retained indefinitely, there are several modifications that could be adopted to clarify the exemption and to remove redundancies in Florida Statutes.

"Notwithstanding Any Other Law To The Contrary. . ." Language Could Be Removed

Interviews and survey responses indicated that there are both federal and state laws that overlap the privacy and confidentiality exemption found in s. 409.821, F.S. Program administrators reported that these laws are not necessarily contradictory, but can be more or less restrictive in certain aspects of program administration.

At the federal level, both 42 U.S.C. 1396a(a)(7) and 42 C.F.R. 431 subpart F, call for the safeguarding of Medicaid applicant and recipient information. The provisions of 42 U.S.C. 1396a(a)(7) require that each State Plan for Medicaid must provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with: a) the administration of the plan; and b) at State option, the exchange of information necessary to verify the certification of eligibility of children for free or reduced price breakfasts under the Child Nutrition Act of 1966 [42 U.S.C. 1771 et seq.] and free or reduced price lunches under the Richard B. Russell National School Lunch Act [42 U.S.C. 1751 et seq.], in accordance with section 9(b) of that Act [42 U.S.C. 1758 (b)], using data standards and formats established by the State agency.

Similarly, the provisions of 42 C.F.R. 431 subpart F, require that a State Plan for Medicaid must provide safeguards that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan. This subpart specifies State Plan requirements, the types of information to be safeguarded, the conditions for release of safeguarded information, and restrictions on the distribution of other information. The section goes on to restrict an agency's ability to exchange information in order to verify the income and eligibility of applicants and recipients only to the extent necessary to assist in the valid administrative needs of the program receiving the information, and information received under section 6103(l) of the Internal Revenue Code of 1954 is exchanged only with agencies authorized to receive that information under that section of the code. Finally,

the provision requires that the information is adequately stored and processed so that it is protected against unauthorized disclosure for other purposes. The other federal law that relates to this state public records exemption is the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191).

In general, the provisions of s. 409.821, F.S., are seen as more restrictive than these federal laws. For example, the state law requires the consent of the Florida Kidcare applicant prior to any disclosure, regardless of the purpose for which the disclosure is requested. However, some program administrators responded that the federal laws could still provide sufficient protection in the event that the Legislature chose to allow the law to be repealed.

Program administrators also identified a state law that may be contrary to this public records exemption. Section 624.91, F.S., establishes confidentiality and public records exemptions for information maintained by the FHKC. This exemption is more restrictive than the exemption under review because it explicitly prohibits the sharing of the information without the written consent of the participant or the parent or guardian of the participant *to any state or federal agency, to any private business or person, or to any other entity*. The exemption in s. 409.821, F.S., allows the sharing of the information with other governmental entities without written consent if the disclosure is necessary for the entity to perform its duties and responsibilities under the Florida Kidcare program.

Some administrators have recommended that the exemption under s. 624.91, F.S., be repealed while maintaining the exemption under s. 409.821, F.S., thus reducing any potential conflict in state law. At that point, removing the "notwithstanding" language from s. 409.821, F.S., may allow the program administrators to more easily share information in the performance of their duties and responsibilities under the Florida Kidcare program, in certain circumstances. Federal law would retain the same applicability regardless of the changes.

Criminal Penalties For Unauthorized Disclosure Does Not Require A Willful and Knowing Violation Standard

Section 409.821, F.S., provides that the information retained by the Florida Kidcare program administrators may not be released to any person without the written consent of the program applicant. A violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.[17]

While no respondent to the surveys or in interviews could identify a case of inappropriate disclosure of information or any criminal prosecutions as a result, most agreed that the penalty for an inadvertent disclosure of identifying information could be too punitive and that a "willful and knowing" violation standard should be added if the exemption is saved from repeal. This standard would make it clear that a violation only occurs when there was specific intent to disclose information contrary to the law.[18]

The Exemption Is not Efficiently Structured

The statutory structure of the public records exemption in s. 409.821, F.S., can be confusing. Professional staff with the Senate Governmental Operations Committee and the House State Affairs Committee suggested structural changes that clearly delineate the exemption into three subsections: 1) the actual exemption; 2) requirements for authorized release of the exempted information; and 3) any penalties for violation of this section. Senate staff discussed these statutory changes with the Florida Kidcare program administrators. No concerns or complications were identified by any interviewees.

RECOMMENDATIONS

Staff has reviewed the exemptions in s. 409.821, F.S., pursuant to the Open Government Sunset Review Act of 1995 (2004), and finds that the exemptions meet the requirements for reenactment with some changes.

The exemption, viewed against the open government sunset review criteria, protects identifying information of a sensitive, personal nature concerning individuals, and allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the Florida Kidcare program. The exemption allows Florida Kidcare program administrators to effectively and efficiently process eligibility applications and enrollment information to ensure families can obtain health coverage for their children

[17] No more than 60 days in prison and a $500 fine per violation.

[18] The Florida First Amendment Foundation generally opposes penalties for disclosure. However, representatives of the foundation responded that the inclusion of a "willful and knowing" standard would make the provision more acceptable.

without fear that their personal information could be used against them.

Accordingly, professional staff recommends that the exemption in s. 409.821, F.S., be revived and readopted, and amended to: 1) improve statutory structure; 2) include a "willful and knowing" standard to determine whether a violation of the section has occurred; and 3) remove the "notwithstanding any law to the contrary" language to simplify the administration of the program.

Professional staff further recommends repealing the public records exemption in s. 624.91, F.S., as it pertains to information maintained by the FHKC, because this exemption may be contrary to the exemption in s. 409.821, F.S.