The Florida Senate

Interim Report 2012-304 *September 2011*

Committee on Communications, Energy, and Public Utilities

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 556.113, F S., SUNSHINE STATE ONE-CALL

Issue Description

Chapter 556, F.S., provides for underground facility damage prevention and safety. Sunshine State One-Call of Florida, Inc., (One-Call) is as a not-for-profit corporation. Any person who furnishes or transports materials or services by means of an underground facility in this state must be a member of the corporation and must use and participate in the system. The corporation maintains and operates a free-access notification system, the purpose of which is to receive notification of planned excavation or demolition activities and to notify member operators so they may mark underground facilities to avoid damage to those underground facilities.

Section 556.113, F.S., provides that proprietary confidential business information held by One-Call for the purpose of a member either using the member ticket management software system or describing the extent and root cause of damage to an underground facility is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The term "proprietary confidential business information" means information provided by:

- A member operator which is a map, plan, facility location diagram, internal damage investigation report or analysis, dispatch methodology, or trade secret as defined in s. 688.002, F.S., or which describes the exact location of a utility underground facility or the protection, repair, or restoration thereof, or
- An excavator in an internal damage investigation report or analysis relating to damage to underground utility facilities, and:
    - Is intended to be and is treated by the member operator or the excavator as confidential;
    - The disclosure of which would likely be, or reasonably likely be, respectively, used by a competitor to harm the business interests of the member operator or excavator or could be used for the purpose of inflicting damage on underground facilities; and
    - Is not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as provided to Sunshine State One-Call of Florida, Inc.

This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and stands repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. The purpose of this project is to review the exemption and determine whether it should be maintained.

Background

A. Public Records and Meetings

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:

[1] Section 1390, 1391 Florida Statutes. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.

> (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 current 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:

> 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] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[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]

---

[3] Chapter 119, F.S.

[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."

[5] s. 119.011(12), 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] Art. 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).

The Open Government Sunset Review Act (the 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 Sunshine 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, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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 that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration 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 the Legislature to consider 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 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. 778.28 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.

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

B. Information from One-Call[17]

The Florida Legislature created One-Call in 1993 as a not-for-profit corporation to be the administrator of Chapter 556, F. S., the "Underground Facility Damage Prevention and Safety Act." The chapter requires that every owner/operator of underground facilities in the state of Florida, with some exceptions, must be a member of, use, and participate in the indented excavation notification system.[18] In brief, the system requires that before any person digs a hole in Florida, with some exceptions, the person must notify One-Call of the intended excavation, and One-Call must then notify member operators whose facilities are in the vicinity of the proposed excavation.[19] Every member/operator so notified, with some exceptions, must locate their underground facilities and mark their horizontal location with paint or flags of a prescribed color.[20]

The member ticket management software system referred to in the exemption statute is a highly proprietary software system that automates the notification process.[21] One-Call purchased the software in 2002 for $349,000 for the purpose of allowing any of its members to use the software at a reduced cost. Prior to the purchase of the software from IRTH Solutions (IRTH), any member who wished to use it had to purchase the software directly from IRTH at significant cost to each user. The purchase price paid by One-Call, plus recurring annual maintenance charges, are rolled into the billing to each member and constitute a small fraction of the overall billing. The charge is much less than the charge that would be paid to IRTH for an individual software package purchased directly.

The information referred to in the exemption statute resides in the software system on a One-Call server used by its members. All the information is accessible by One-Call, even though in practice it is never accessed without first receiving a member's request to do so for one reason or another. The status of confidential and proprietary information and the exemption should be maintained for the following reasons.[22]

- As to the member ticket management software system, members fear that, without the exemption, anyone, including competitors could access their information. For example, it would be advantageous for a participant in the communications industry to know what technology its competitors were using in different locations as the type of service that can be provided frequently depends on technology used. This statement is borne out by the fact that until passage of the exemption statute, few members used the One-Call software; usage has gone from virtually zero to 127 members since adoption of the public records exemption.
- As to the damage-related information, it too could provide information to competitors that could be used to the detriment of the owner of the damaged facility. Reporting damage is voluntary and only a few members do it; however, prior to the public records exemption, almost no one did.

Reenactment of the exemption is also supported under the public purpose of allowing the state to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption. The purpose of this government-created program is to prevent damage, promote safety, and, as a One-Call representative put it, "to promote the continued provision of safe and reasonably priced utility service for all the citizens of the state." As stated above, members did not use the One-Call software to fully automate the notification system until after passage of the exemption statute. Additionally, many of the current 127 users of the ticket management software could not afford an individual purchase arrangement and could not provide needed services at reasonable cost without the help of One-Call and its arrangement with IRTH. Many of the members

[17] Information taken from document prepared by Dave Erwin, General Counsel, Sunshine State One-Call of Florida, Inc., and from conference call between legislative staff and One-Call representatives Dave Erwin, General Counsel; Mark Sweet, Executive Director; and Mike Moore, lobbyist, on August 17, 2011.
[18] s. 556.104, F.S.
[19] s. 556.105, F.S.
[20] s. 556.103(1), F. S.
[21] While participation in the notification system is mandatory, participation by use of the automated version of the notification system using this software is voluntary.
[22] The potential for misuse of such information was also recognized by the Legislature in enacting s. 556.105(1)(d), F.S., which provides "member operators shall use the information provided to the system by other member operators only for the purposes stated in this chapter and not for sales or marketing purposes."

are small cities and counties and small utilities who can provide safer and better service using the ticket management system provided by One-Call.

This echoes statements made at the time the exemption was enacted. According to a bill analysis, at that time a One-Call representative said that "the member ticket management system is not being used by member operators to file tickets because potential excavators do not want the confidential information on ticket applications being stored on One-Call's system which is subject to public disclosure" and "without the exemption the system will continue to not be used."[23] Further, "members are not filing damage reports, also subject to open record requirements to One-Call, because they don't want the public to be aware of problems during excavations" as "damage reports can raise negative public opinion and can harm the reputation of an excavator."[24]

As to other specific statutory questions, One-Call stated:

- the exempt information cannot be obtained by any other means except the appropriate use of a subpoena in a lawsuit or other proceeding;
- it does not believe that the records are protected by any other exemption, so there are not multiple exemptions for such records;
- as long as the protected information protected relates to in-use underground facilities or to current business practices, maps, plans, drawings or other business information, it could not eventually be made available for public inspection and copying; and
- protected information is not knowingly discussed at public meetings of SSOCOF or its committees, so no meeting exemption is necessary.

C. Information from First Amendment Foundation

The First Amendment Foundation "is not opposed to reenactment of the exemption in its current form."[25]

Findings and/or Conclusions

Based on the information above, the public records exemption contained in s. 556.113, F.S.:

- serves an identifiable public purpose in that it
    - protects information of a confidential nature concerning One-Call's members 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 them in the marketplace, and
    - allows One-Call to effectively and efficiently administer its governmental program, which administration would be significantly impaired without the exemption;
- the exemption is no broader than is necessary to meet the public purpose it serves; and
- the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Options and/or Recommendations

It is recommended that the exemption statute be reenacted in its current form.

[23] Professional Staff Analysis and Economic Impact Statement, SB 1510, April 13, 2007, page 5.
[24] *Id*.
[25] Letter from Barbara A. Peterson, President, First Amendment Foundation, to The Honorable Jeremy Ring, Chair, Senate Governmental Oversight and Accountability Committee (July 18, 2011) (RE: 2012 Open Government Sunset Reviews).