



The Florida Senate

Interim Report 2012-307

September 2011

Committee on Governmental Oversight and Accountability

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 364.107, F.S., PERSONAL IDENTIFYING INFORMATION OF LIFELINE ASSISTANCE PLAN PARTICIPANTS

Issue Description

The Lifeline Assistance Plan is part of a federal program designed to enable low-income households to afford basic local telephone service. Plan participants are eligible for a monthly credit. In Florida, oversight of plan services is handled by the Public Service Commission. To enroll in the plan, a telecommunications customer must submit an application to the Public Service Commission that requires certain personal identifying information.

Section 364.107, F.S., provides that personal identifying information of a participant in a telecommunications carrier's Lifeline Assistance Plan held by the Public Service Commission is confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution. The public-records exemption specifies circumstances under which the protected information may be disclosed and provides a penalty for the unauthorized intentional disclosure of the protected information by any officer or employee of a telecommunications carrier.

This public-records exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public-records exemption relating to personal identifying information of Lifeline Assistance Plan participants in accordance with the Open Government Sunset Review Act.

Background

Florida Public-Records Law

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 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:

¹ Art. I, Section 1390, 1391 Florida Statutes. (Rev. 1892).

² Art. 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 agency⁴ 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 exemption¹⁰ 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 (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:

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).

¹⁴ s. 119.15, F.S.

- 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.

Lifeline Assistance Plan

The Universal Service program, created by the Federal Telecommunications Act of 1996,¹⁷ is intended in part to increase access to telecommunications services at reasonable rates, including those in low income, rural, insular, and high cost areas.¹⁸ To fulfill the goals of the act, the Federal Communications Commission established four programs, one of which is the Low Income program.

The Lifeline Assistance Plan, which is part of the Low Income Program, is designed to enable low-income households to afford basic local telephone service.¹⁹ Plan participants in Florida are entitled to receive a basic telephone service discount of \$13.50 a month.²⁰

In Florida, oversight of Lifeline Assistance Plan services is handled by the Public Service Commission (PSC).²¹ To enroll in the plan, a telecommunications customer must submit an application to the PSC that requires his or her name, address, telephone number, service provider, and the last four digits of his or her social security number.²² In addition,

¹⁵ s. 119.15(6)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ Public Law 104-104.

¹⁸ Federal Communications Commission, *Universal Service*, http://transition.fcc.gov/wcb/tapd/universal_service/ (last viewed August 12, 2011).

¹⁹ *Id.*

²⁰ Telephone conference with PSC staff (July 7, 2011).

²¹ Section 364.10, F.S.

²² Florida Public Service Commission, *Lifeline and Link-Up Florida On-line Self Certification Form*,

any state agency that determines a person is eligible for Lifeline Assistance Plan service is required to immediately forward that person's information to the PSC to ensure that the person is automatically enrolled in the Lifeline program.²³

Public-Records Exemption Under Review

Section 364.107, F.S., provides that personal identifying information of a participant in a telecommunication carrier's Lifeline Assistance Plan held by the Public Service Commission is confidential and exempt from disclosure under the public-records requirements of s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution.

This public-records exemption specifies that the protected information may be released to the applicable telecommunications carrier for purposes directly connected with eligibility for, verification related to, or auditing of a Lifeline Assistance Plan.²⁴ The exemption also authorizes an officer or employee of a telecommunications carrier to intentionally disclose the information only as:

- Authorized by the customer;
- Necessary for billing purposes;
- Required by subpoena, court order, or other process of court;
- Necessary to disclose to an agency as defined in s. 119.011 or a governmental entity for purposes directly connected with implementing service for, or verifying eligibility of, a participant in a Lifeline Assistance Plan or auditing a Lifeline Assistance Plan; or
- Otherwise authorized by law.

The exemption provides that any officer or employee of a telecommunications carrier who otherwise intentionally discloses the protected information commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

A public-records exemption must serve an identifiable public purpose and may be no broader than necessary to meet the public purpose it serves.²⁵ The statement of public necessity offered by the Legislature when it created the public-records exemption under review provided, in part, that:

Allowing qualified low-income households to receive this credit permits them to maintain local telephone service. Participation in Lifeline Assistance Plans has remained at approximately 12 percent of eligible Florida households despite extensive efforts to make eligible citizens aware of the plan. Protecting the personal identifying information of participants in a Lifeline Assistance Plan will encourage qualified citizens to apply for the credit offered under the plan. The Public Service Commission must be able to maintain the confidentiality of that information because disclosure could create a chilling effect on participation. There is a strong likelihood that participants might choose not to avail themselves of the plan because the information submitted would identify them as qualified recipients of low-income program benefits. Finally, without the exemption, the effective and efficient administration of a government program would be hindered.²⁶

This public-records exemption will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.²⁷

[https://secure.floridapsc.com/\(S\(rj4i4z45i2ihmm45v3viku45\)\)/public/lifeline/lifelineapplication.aspx](https://secure.floridapsc.com/(S(rj4i4z45i2ihmm45v3viku45))/public/lifeline/lifelineapplication.aspx) (last viewed August 12, 2011).

²³ Section 364.10(3)(h)(2), F.S.

²⁴ Federal Communications Commission rules require at least twice-yearly verification that a participant still qualifies for the plan.

²⁵ Art. I, s. 24(c) of the State Constitution.

²⁶ Chapter 2007-247, s. 2, L.O.F.

²⁷ Chapter 2007-247, s. 1, L.O.F.

Findings and/or Conclusions

The public-records exemption that is at issue under this Open Government Sunset Review makes confidential and exempt from public disclosure personal identifying information of Lifeline Assistance Plan participants held by the Public Service Commission (PSC).

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:

- **What specific records or meetings are affected by the exemption?** The exemption protects personal identifying information of Lifeline Assistance Plan participants held by the PSC.
- **Whom does the exemption uniquely affect, as opposed to the general public?** The exemption uniquely affects participants in the Lifeline Assistance Plan.
- **What is the identifiable public purpose or goal of the exemption?** The identifiable public purpose or goal of the exemption as stated in the statement of public necessity is to protect the personal identifying information of Lifeline Assistance Plan participants and to promote the effective and efficient administration of the Lifeline Assistance Plan program.
- **Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?** It is unlikely because the protected information is also confidential and exempt when held by the Department of Children and Family Services, the only agency currently forwarding the information to the PSC for use in Lifeline Assistance Plan enrollment.²⁸
- **Is the record or meeting protected by another exemption?** The records are not covered by another exemption when held by the PSC.
- **Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?** No.

Options and/or Recommendations

Senate professional staff recommends that the Legislature reenact the public-records exemption established in s. 364.107, F.S., which makes personal identifying information of a Lifeline Assistance Plan participant held by the Public Service Commission confidential and exempt from disclosure. This recommendation is made in light of the information gathered for this Open Government Sunset Review which indicates that there is a public necessity to continue to protect information of a sensitive personal nature concerning the participants and that without the exemption, the effective and efficient administration of a governmental program would be impaired.

The Legislature may also wish to consider amending subsection (3)(c) of the exemption under review to provide that an officer or employee of the Public Service Commission who intentionally discloses the protected information in violation of the exemption's provisions is subject to the provided penalty, in addition to the officers and employees of a telecommunications carrier who are already subject to the penalty.

²⁸ Section 364.10(3)(h)2, F.S., requires any state agency that determines a person is eligible for Lifeline services to immediately forward that person's information to the PCS to ensure that the person is automatically enrolled in the program with the appropriate eligible telecommunications carrier. PSC staff stated that the only agency forwarding such information to the PSC is the Department of Children and Family Services (DCF) (telephone conference, July 7, 2011). DCF staff stated that the personal identifying information made confidential and exempt by the exemption under review when held by the PSC is also protected when held by the DCF (telephone call, August 25, 2011). *Also see* 45 C.F.R. 205.50(a)(1) (providing that disclosure of identifying information of an applicant for or recipient of state financial assistance under title IV-A of the Social Security Act is prohibited except under specified circumstances) and s. 414.295, F.S. (providing that personal identifying information of a temporary cash assistance program participant, a participant's family, or a participant's family or house hold member, except for information identifying a parent who does not live in the same home as the child, held by the DCF and other specified entities is confidential and exempt).