The Florida Senate

Interim Project Report 2001-041 *September 2000*

Committee on Governmental Oversight and Productivity Senator Jack Latvala, Chairman

CONFIDENTIALITY OF BANK ACCOUNT, CHARGE, DEBIT OR CREDIT CARD NUMBERS

SUMMARY

Under s.119.07(3)(z), F.S., bank account numbers or debit, charge, or credit card numbers given to an agency for the purpose of payment of any fee or debt owing are confidential and exempt from public records requirements. These numbers may be used by an agency, as needed, in any administrative or judicial proceeding, provided such numbers are kept confidential and exempt, unless otherwise ordered by the court.

The provision, which is subject to the Open Government Sunset Review Act of 1995, will be repealed October 2, 2001, unless reviewed and saved from repeal through reenactment by the Legislature during the 2001 legislative session.

Based upon the staff survey of state agencies, and the standards set forth in the Open Government Sunset Review Act of 1995, it is recommended that the confidential and exempt status of bank account numbers or debit, charge, or credit card numbers given to an agency for the purpose of payment of any fee or debt owing be retained and that s. 119.07(3)(z), F.S., be preserved.

BACKGROUND

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term *public records* has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . . 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995
Section 119.15, F.S., the *Open Government Sunset Review Act of 1995*, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment *expands* the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment *narrows* the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;

(b) The exemption is necessary for the effective and efficient administration of a governmental program; or

(c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

(a) What specific records or meetings are affected by the exemption?

(b) Whom does the exemption uniquely affect, as opposed to the general public?

(c) What is the identifiable public purpose or goal of the exemption?

(d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. 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;

2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals 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 information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(3)(e), F.S., notwithstanding s. 768.28, F.S., 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 an exemption under the section. The failure of the

Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act of 1995 so long as the requirements of Art. I, s. 24 of the State Constitution are not violated.

Section 119.07(3)(z), F. S. – Section 119.07(3)(z), F.S., was enacted in 1995. The section states:

> Bank account numbers or debit, charge, or credit card numbers given to an agency for the purpose of payment of any fee or debt owing are confidential and exempt from subsection (1) and s. 24(a), Art. I of the State Constitution. However, such numbers may be used by an agency, as needed, in any administrative or judicial proceeding, provided such numbers are kept confidential and exempt, unless otherwise ordered by the court. This paragraph 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, 2001, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.011, F.S., defines the term *agency* for purposes of chapter 119, 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.

During the 2000 interim, the Division of Statutory Revision included s. 119.07(3)(z), F.S., on a list of those statutues that is subject to repeal in 2001 unless reviewed and retained by the Legislature. As a result, the provision must be reviewed and retained by the Legislature in order for it to be preserved in law.

METHODOLOGY

Staff reviewed relevant statutory provisions, surveyed 49 agencies, contacted other interested entities, and reviewed relevant case law during the review process. Further, as the Open Government Sunset Review Act establishes specific standards regarding the review of exemptions subject to the act, s. 119.07(3)(z), F.S., was examined pursuant to the requirements of that act.

FINDINGS

Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions. *First, what specific records or meetings are affected by the exemption?* The specific records affected by the exemption are bank account numbers, debit and credit card numbers and charge card numbers.

Second, whom does the exemption uniquely affect, as opposed to the general public? The exemption affects persons, whether individuals or businesses, who pay a fee or debt to an agency by use of charge, credit, debit, or bank account.

Third, what is the identifiable public purpose or goal of the exemption? The purpose of the exemption is to protect financial information that a state agency obtains when persons make use of electronic and other payment options that require them to disclose bank account numbers, debit account numbers, credit card numbers or charge card numbers.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? The information can be obtained by other merchants who receive payment in the same fashion, but not generally by any other entity.

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. As noted above, an identifiable public purpose is served if the exemption:

1. 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;

2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals 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 information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. Finally, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open govenrment and cannot be accomplished without the exemption.

The exemption best fits under s. 119. 15(4)(b)1., F.S., which permits an exemption that allows the state to effectively and efficiently administer a governmental program. The use of electronic and other indirect payment options is necessary for the effective and efficient administration of modern governmental programs. Agencies that permit payment of fees or debts by debit or credit can reduce the time in which payment to the state is made, minimize paperwork through direct transfer of funds, as well as make payment more convenient for the person or entity who owes the fee or debt. Further, as e-commerce increases, and as the State of Florida continues to computerize and link various state systems, the use of alternative payment options is expected to grow. Failure to protect financial account information would disrupt these programs.

The agencies that were surveyed indicated the exemption permits the efficient administration of a governmental program. Of the agencies surveyed, 41% of respondents obtain bank account numbers, 18.2% obtain debit account numbers, 20.5% obtain charge account numbers, and 41% obtain credit card numbers. When agencies were queried whether the exemption permits the efficient administration of a governmental program, 63.6% indicated that the exemption did. Only 14% indicated that the provision currently did not permit the efficient administration of a governmental program. The remainder of the surveyed agencies were unresponsive or were not sure.

Fifty percent of responding agencies stated that the administration of a program would be significantly impaired without the exemption. Seventy-five percent of responding agencies recommended that the exemption be retained.

For example, the survey response of the Department of Banking and Finance stated:

> An increasing number of the accounts that are being settled by the Comptroller pursuant to Chapter 17, Florida Statutes, involve the electronic transfer of funds or receipt of account information to facilitate the resolution of outstanding claims and refunds. It is anticipated that debit accounts, charge accounts, and credit card numbers will be used in addition to bank account numbers. The exemption is necessary to encourage this more efficient method of settling accounts.

The survey responses of the Department of Health and the Department of Insurance both state that the exemption is appropriate especially given the use of e-commerce. The Department of Transportation states:

> The FDOT has thousands of SunPass accounts which are automatically replenished using credit card, debit card, or bank account numbers. Customers are more comfortable using these methods when they know their numbers are confidential. In addition, the state is moving towards more e-commerce in which credit cards are used. These number should probably be kept confidential.

While not all universities utilize current authorized payment options, the University of Florida states that it:

> . . . strongly supports any action that allows state agencies to continue to obtain debit, credit, charge, and bank account numbers from persons attempting to pay fees or obtain services. . . . It is crucial for the University of Florida to retain the ability to obtain banking and charge card information from students. Many students now pay their debts or receive their financial aid directly by some electronic transaction for which this information is necessary. The University of Florida currently has over 47 different departments that accept credit and debit card payments. In fiscal year 1999-2000 over $26 million in receipts were processed in credit and debit card sales. Additionally, the majority of students receiving financial aid prefer to have those funds transferred electronically into their bank accounts. Most recently, the University of Florida has initiated a procedure which will allow students to pay debts by electronic transfer directly from their bank accounts.

While not all agencies currently use electronic media for payment of certain fees, some, such as the Agency for Health Care Administration, the South Florida Water Management District, and the University of South Florida are contemplating the use of electronic media for payment in the future.

The Department of Revenue also stated concerns that the repeal of the section would jeopardize the confidentiality of information that they currently receive from other agencies:

> The Department is responsible for administering many of the taxes imposed in Florida. The Department also contracts with other state agencies to provide processing of payments and returns. Information obtained from taxpayers, including personal banking information, is exempt from the public records law under the provisions of s. 213.053, F.S. This provision is not applicable to the information received on behalf of other state agencies. The repeal of s. 119.073(z), F.S., may result in the disclosure of information similar to that held confidential with respect to taxes administered by the Department of Revenue. . . .

In a similar vein, the Florida Department of Law Enforcement notes that:

> . . . . the loss of the exemption for credit card (or other financial account numbers) would adversely affect public confidence in the security of this information once it is transmitted to the Department, electronically or otherwise. Therefore, the Department of Law Enforcement strongly recommends that this exemption be retained.

While the exemption fits under s. 119.15(4)(b)1., F.S., it also might fit under subparagraph 2. Section 119.15(2), F.S., provides that an exemption is to be maintained only if the exempted record is of a sensitive, personal nature concerning individuals. Under s. 119.15(4)(b), F.S., information that is of a sensitive personal nature is limited to information, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. The financial information that is protected under the exemption clearly would not be defamatory to an individual or cause unwarranted damage to the good name or reputation of an individual. Release of this financial information, however, clearly could be argued to jeopardize the *financial safety* of an individual.

The exemption does not appear to fall under s. 119.15(2)(c), F.S. This paragraph is intended to protect confidential information concerning entities, including, *but not limited to*, a formula, pattern, device, or other information which is used to further a business advantage. Information of the sort that *furthers a business advantage* typically relates to patented products or copyrighted information, not payment options. As a result, the exemption does not appear to fall within this provision.

As the exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program and the release of the information could jeopardize the financial safety of an individual, the next consideration under the act is the breadth of the exemption. Section 119.15(4)(b), F.S., requires an exemption to be no broader than is necessary to meet the public purpose it serves. The exemption under review is very limited in scope. Only bank account numbers or debit, charge, or credit card number given to an agency for the purpose of payment of a fee or debt are made confidential and exempt. Other information about the payer and the debt or fee being paid, remains open to the public.

Finally, under the Open Government Sunset Review Act, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. While state government has, in the past, operated without use of the payment options protected under the exemption, the state is increasingly utilizing modern means of payment transactions. As noted in the survey responses, increasing numbers of state agencies are relying upon alternative payment options for their operations and an exemption that protects financial account numbers must be in place for these programs to be viable. Alternative payment methods would be severely restricted if the financial information required to be collected were to be released to the public because, in the absence of a statutory exemption, financial information that is prepared or received by an agency typically is subject to open records requirements. *See, Wallace v. Guzman*, 687 So.2d 1351 (Fla. 3d DCA 1997). As a result, it can be concluded that these payment options would be jeopardized without the continuation of the exemption.

RECOMMENDATIONS

Staff recommends that the exemption in s. 119.07(3)(z), F.S., be maintained and that legislation be drafted to preserve the exemption.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
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MEMBER OVERSIGHT
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