



The Florida Senate

Interim Project Report 2002-211

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Committee on Criminal Justice

Senator Victor D. Crist, Chairman

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 914.27, FLORIDA STATUTES

SUMMARY

Current law exempts from public disclosure information held by any state or local law enforcement agency, state attorney, the statewide prosecutor, or FDLE on the identity or location of a victim or witness who has been identified or certified for protection and relocation by the state attorney or statewide prosecutor. The Legislature created the exemption from the public records law in 1997 by finding that "...the untimely disclosure of identity and location information concerning victims and witnesses, and their immediate families or the disclosure of information revealing protection or relocation sites, techniques or procedures, or the permanent relocation residence of a victim or witness or family member, would constitute an unwarranted risk to, and jeopardize the safety of, such victims, witnesses and family members. This would significantly impair the administration of the victim and witness protection program established pursuant to s. 914.27, Florida Statutes, and impede the investigation and prosecution of crime." Chapter 97-71, Section 2, L.O.F. This section will expire October 2, 2002, unless the Legislature reviews and reenacts it.

It is recommended that s. 914.27, F.S., be reenacted.

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 State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under 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.

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 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.

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.

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.

Section 914.27, F.S., is subject to the Open Government Sunset Review Act of 1995 and shall stand repealed on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

Creation of Protection Reimbursement Program—During the 1997 Legislative Session, the Legislature enacted Chapter 97-52, L.O.F., which created s. 914.25, F.S., and established the victim and witness protection reimbursement program. Since the public records exemption being reviewed in this analysis applies only to those persons identified or certified for protection or relocation pursuant to s. 914.25, F.S., this “programmatically” section of law needs to also be reviewed. Essentially, the law establishes a multiple step process for a lead law enforcement agency to identify persons at risk, have the state attorney certify those individuals and, perhaps, seek reimbursement for relocation efforts.

The process enumerated in the law is as follows: (1) law enforcement identifies a person at risk; (2) the state attorney is notified; (3) the state attorney determines if he or she is critical to the investigation; (4) the state attorney certifies that the person needs to be protected or relocated; (5) if relocation is needed, the state attorney notifies FDLE; and, (6) FDLE and the local law enforcement officials coordinate the relocation and the law enforcement entity seeks reimbursement. If protection services only are needed and not relocation services, then FDLE is not involved, reimbursement is not sought, and local law enforcement handles it independently.

As of June 30, 2001, there have been 55 applications to FDLE for reimbursement of certified victim and witness relocation efforts. Thirty-two of those applications were from Dade County.¹ Ten other counties also applied but did so very infrequently.² While the Legislature allocates \$500,000 annually for reimbursement to local law enforcement for victim and witness protective services, only a small fraction of those funds are actually spent each year³.

Exemption from Public Records for Victim and Witness Information—During the same legislative session, the Legislature enacted Chapter 97-71, L.O.F., which created s. 914.27, F.S., and established an exemption from the public records law for records relating to victim and witness information. This section of law makes confidential information held by any state or local law enforcement agency, state attorney, the statewide prosecutor, or the Victim and Witness Protection Review Committee which discloses: (1) the identity or location of a victim or witness who has been identified or certified for protection or relocation by the state attorney or statewide prosecutor; (2) the identity or location of an immediate family member of a victim or witness who has been identified or certified; and, (3) relocation sites and techniques utilized. The law permits sharing of this information by law enforcement agencies and others to facilitate the protection efforts. However, the law specifies that when a victim or witness is identified but not certified to receive such services by the prosecutor, the information ceases to be exempt and becomes public information. When the certification expires, information made confidential becomes public information. There is, however, a provision in the law to permit the certifying prosecutor the ability to extend the certification. According to

¹ According to FDLE, Dade County has applied for and received the most funding because as the largest metropolitan jurisdiction, it experiences a large amount of drug, gang-related, and violent crimes and typically their requests derive from such crimes.

² Polk and Indian River counties applied and received funding once; Leon, Duval, Pinellas, Orange, and Broward counties applied and received funding twice; Hillsborough county applied and received funding three times; and Palm Beach county applied and received funding six times. FDLE asserts that some smaller agencies may fail to submit funding requests because they may not be aware of the services or they have difficulty completing the paperwork and application process.

³ Since the law's inception, law enforcement officials have been reimbursed a total of \$211,701 for protection services: \$17,204 in FY 97-98, \$77,873 in FY 98-99, \$65,667 in FY 99-00 and \$50,957 in FY 00-01.

FDLE there has been only one such extension request in the last four years and in that case additional protection services were sought.

METHODOLOGY

Staff reviewed relevant statutory provisions and statistical documents and surveyed sheriffs, police chiefs, state attorneys, the statewide prosecutor and officials at FDLE. In surveying the stakeholders, staff adhered to the methodology requirements set forth in the Open Government Sunset Review Act.

FINDINGS

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.

Using this analysis, the identifying information contained in the victim and witness protection program meets the criteria in paragraph (a) as noted by the Legislature in 1997, as well as paragraph (b).

Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions. Those questions are listed in italics below and staff conclusions follow.

First, what specific records or meetings are affected by the exemption? In practice, any record that includes the identity or location of a victim or witness or the immediate family of a victim or witness who has been identified or certified for protection or relocation is considered exempt. Also clearly exempted are relocation sites, techniques, or procedures used as a result of the victim or witness protection services afforded.

The exact records affected by the exemption are not specifically defined in the law, but FDLE believes that ample clarity exists and the law is capable of interpretation when and if a public records request were to be received.

Second, whom does the exemption uniquely affect, as opposed to the general public? The exemption affects a small number of victims and witnesses who the state attorney has identified or certified in need of protection and possible relocation.

Third, what is the identifiable public purpose or goal of the exemption? The purpose of the exemption is to ensure the physical safety of victims, witnesses, and family members of such victims or witnesses.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? No. However, for those cases the state attorney has certified and an application for reimbursement made to FDLE, the confidential records are kept at both FDLE and at the law enforcement agency that made the application. The duplicative exempt records housed at FDLE are not however “readily” available and are used by administrators processing the reimbursement requests.

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 narrow in scope and it is estimated to affect only about 12 cases each year.

Survey Results—As part of this review, 19 sheriffs and 19 police chiefs were surveyed, with 14 of the 19 sheriffs and 15 of the 19 police chiefs responding. Only 21 percent of the sheriffs and 33 percent of the police chiefs responding reported that their office did provide protective services to victims and witnesses at risk of harm.

In addition to surveying law enforcement officials, staff also surveyed prosecutors. Of the 14 state attorneys who responded, 5 or 37 percent reported that their office had identified or certified a victim or witness for protection pursuant to s. 914.25, F.S.

When those five responding state attorneys⁴ were asked how often their office made such determinations, most reported that it occurred rarely, with the exception of the 11th Circuit⁵.

⁴ From the 2nd, 9th, 11th, 18th, and 20th judicial circuits.

⁵ All of the five circuits except the 11th reported that this has occurred between one to four times. The 11th circuit, Dade County, reported that 33 cases have been identified and certified and relocation efforts reimbursed.

Of those three sheriffs⁶ and five police chiefs⁷ who do provide protection services and those five state attorneys who do certify, all indicated that the public records exemption: (1) was not broader than necessary; (2) did provide a compelling purpose to override the strong public policy of open government; (3) did permit the efficient administration of a governmental program; and, (4) would, if removed, impair the administration of the victim and witness protection program.

When commenting on the public purpose or goal served by maintaining the confidentiality of this information, one state attorney stated, "...the goal of securing a witnesses' availability at court proceedings would be nullified by making the information public." "By keeping the information confidential, witnesses are encouraged to come forward with the knowledge that they will be protected from retaliation" wrote one state attorney.

RECOMMENDATIONS

It is recommended that s. 914.27, F.S., be reenacted.

The exemption from the public records law meets the statutory criteria for reenactment in that the information provided to law enforcement and prosecutors, if released, would constitute an unwarranted risk to, and jeopardize the safety of, victims, witnesses and family members. The untimely release of this information would also significantly impair the administration of the victim and witness protection program established by s. 914.27, F.S., and impede the investigation and prosecution of crime.

⁶ Sheriffs from Broward, Hillsborough and Monroe counties.

⁷ Police Chiefs from Dade, Miami-Dade, Ocala, St. Petersburg, and Orlando.