The Florida Senate

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Committee on Governmental Oversight and Productivity | Senator James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 110.1091, F.S.

SUMMARY

The Open Government Sunset Review Act provides for the repeal of a public records exemption five years after its initial enactment, unless it is reviewed as provided in s. 119.07(3)(cc), F.S., and reenacted by the Legislature. Section 110.1091, F.S., falls within the purview of this review process.

Florida law affords the expectation of confidentiality to information gathered on a state employee's participation in a workplace-sponsored program for the treatment of a behavioral or medical disorder or substance abuse. The confidentiality covers both records and communications and is set for expiration on October 2, 2003, as part of the five-year open government review cycle provided in s. 119.15, F.S.

The report recommends retention of the confidentiality provision with amendment to clarify that records confidentiality should extend only to personally identifying information. It recommends repeal of a provision authorizing monitoring of telephone calls and of surplus language providing for future repeal that is redundant with s. 119.15, F.S. In keeping with the requirements of the Open Government Sunset Review Act, the failure to reenact the exemption would significantly impair the operation of the employee assistance program.

BACKGROUND

Florida has a long history of providing public access to the records of governmental and other public entities. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[1] Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.[2] The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

(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.

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment "grandfathered" exemptions that were in effect on July 1, 1993, until they are repealed.[3]

The State Constitution, the Public Records Law,[4] and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution. Section 119.07(1)(a), F.S., requires:

[1] Section 1, ch. 5942, 1909; RGS 424; CGL 490.

[2] Chapter 67-125 (1967 L.O.F.)

[3] Article 1, s. 24(d) of the State Constitution.

[4] Chapter 119, F.S.

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

The Public Records Law states that, unless specifically exempted, all agency[5] records are to be 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.[6]

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[9]

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."[10] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[11] Exemptions to open government requirements are subjected to a review and repeal process five years after their initial enactment.[12] An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended under the act if it ". . . expands the scope of the exemption to include more records or information or to include meetings as well as records."[13]

The Open Government Sunset Review Act of 1995[14] establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must certify to the President of the Senate and the Speaker of the House, the language and statutory citation of each exemption scheduled for repeal the following year.[15] If the division does not include an exemption on the certified list that should have been included, that exemption ". . . is not subject to legislative review and repeal under this section."[16] If the division later determines that an exemption should have been certified, it ". . . shall include the

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[5] 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."

[6] Section 119.011(1), F.S.

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

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

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

[10] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

[11] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied *sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

[12] An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

[13] Section 119.15(3)(b), F.S.

[14] Section 119.15, F.S.

[15] Section 119.15(3)(d), F.S.

[16] *Ibid*.

exemption in the following year's certification after that determination."[17]

As part of the review process, the Legislature is to consider:

(1) What specific records or meetings are affected by the exemption?
(2) Whom does the exemption uniquely affect, as opposed to the general public?
(3) What is the identifiable public purpose or goal of the exemption?
(4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?[18]

Under s. 119.15(4)(b), F.S., 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 specified criteria, one of which must be met by the exemption, are if the exemption:

(1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
(2) 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
(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 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.[19]

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.[20] The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), 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 an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

METHODOLOGY

Legislative program directors of state executive branch agencies were sent questionnaires in August 2002, eliciting their agency's experience with the confidentiality provisions of s. 110.1091, F.S. All state agencies responded. Three legislative branch agencies which exercise constitutional or separate statutory authority also responded.[21] Two educational entities submitted responses for their headquarters operations, although a concurrent reorganization of their respective academic institutions either maintained or changed their status to non-state agencies.[22] Several state agencies cross-referred their completed questionnaires sent to the House of Representatives in its independent review of this statute. The analysis which follows represents the cumulative results of the responses completed by the responding state agencies.

FINDINGS

Florida law makes the existence of an employee assistance program discretionary with the agency head; in practice, all responding executive branch agencies indicated they had one in effect. The Department Health also maintains an impaired practitioner program for its regulated professionals.[23] There was wide agreement among the agencies of the importance of such a program. A frequently cited attribute was the enhancement of employee productivity without the associated fear of a

[17] *Ibid.*
[18] Section 119.15(4)(a), F.S.
[19] Section 119.15(4)(b), F.S.
[20] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla., 1974)
[21] The Office of the Auditor General, the Commission on Ethics, and the Florida Public Service Commission, respectively.
[22] Ch. 2002-387, Laws of Florida.
[23] Section 456.076, F.S.

disclosable employee public record and the embarrassment which may ensue.

Supportive workplace benefits such as employee assistance programs are widespread in the United States. An Internet search using the terms "employee assistance programs" and "work/life benefits" produced some one million references. A Work/Life Program for federal employees recently expanded its coverage to include traumatic effects associated with the tragedies of September 11, 2001. Such programs meet employer needs as well, with a reduction in the cost of absenteeism and a better, utilization of health care benefits when incorporated within a personnel management system.[24] EAP programs emerged in the 1940s in industrial settings for the treatment of alcoholism. Over the years they have evolved to include multi-faceted interventions for employees, co-workers, and their families for a variety of work-related behaviors.

Several agencies also cited concurrent federal statute for the shielding of employee records. Among the most frequently cited federal authorities was the Americans with Disabilities Act, the Family Medical Leave Act, and the Health Insurance Portability and Accountability Act. Six state agencies indicated they did not receive any of the information exempted by s. 110.1091, F.S. since their records were maintained by a contractor.[25]

The current law provides that an agency may monitor phone calls without violating the confidentiality provision. In practice, only three agencies indicated that such monitoring took place.[26] The monitoring was reported to be incidental to other statutory, security or customer service responsibilities. A recent opinion[27] by the Attorney General upheld the monitoring of telephone calls for law enforcement purposes, but conditioned approval on adherence to the provisions of s. 934.03, F.S. Removing this authorization from s. 110.1091, F.S., would prevent the untoward circumstance of an agency monitoring a conversation between patient and therapist to determine its "appropriateness."

There seemed to be some divergence of opinion on the topic of compelled access to employee participation records. For some agencies the access restriction seemed absolute, while for others its was relative: they would comply with a court order or an employee request to produce such records. There was a similar divergence on the scope of the exemption in its use of the phrase " . . .(A)ll records relative to that participation . . . ." Since some workplace records capture any leave used by an employee and are properly in the public domain, it would only be the records specifically identifying the use of particular leave for a relevant employee assistance purpose that would be protected. One agency reported that 293 employees, almost six percent of the workforce, participated in its EAP program. That agency indicated in a subsequent communication that emotional/psychological and family problems dominated its utilization. Subsequent contacts with two other large state agencies indicated a recent and relatively high utilization rate in their EAP programs.

RECOMMENDATIONS

The employee assistance programs authorized by s. 110.1091, F.S., are well-recognized as valuable complements to the workplace and deserve retention. Three changes do appear warranted. First, to avoid the inappropriate shielding of information that is within the public domain, the statute should be amended to shield only those records containing personally identifying information. Such a change would ensure that an employee's participation would not be disclosed inadvertently.

Secondly, the provision authorizing the monitoring of telephone calls should be removed. Florida law already provides conditions under which calls may be intercepted. Generally, these indicate situations in which public safety is an overriding consideration. Since the three named agencies already qualify in whole or in part as public safety organizations, or have specific statutory authority to engage in monitoring, there appears little reason to spread this blanket authority around unless a particular need can be demonstrated to the satisfaction of s. 934.03, F.S.

Thirdly, the reasoning above on removal of the authorization for telephone call monitoring should apply also to "confidential communication." The

[24] A recent report found EAPs to be the most widely adopted work place benefit. The reported noted an increase in employee leave due to family issues and stress during its annual survey period. *2002 CCH Unscheduled Absence Survey*, Commerce Clearing House at www.cch.com/absenteeism.

[25] By 2004 all state agencies will deal through a single contract vendor for EAP programs as part of an outsourcing of administrative support functions.

[26] The Departments of Children and Families, Corrections, and Insurance.

[27] Op. Att'y. Gen. 2002-5 (2002).

current law could be assumed to extend a patient-therapist privilege to this authorization, thus inadvertently giving it an evidentiary status which should be conferred only by specific amendment of the Evidence Code in ch. 90, F.S. An employer's representative acts only as an intermediary between the participant and an EAP provider, and has an interest only in the outcome, not the process or its content.