The Florida Senate

Interim Project Report 2006-204 *September 2005*

Committee on Children and Families Senator Walter "Skip" Campbell, Jr., Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 61.1827, F.S., CHILD SUPPORT SERVICES

SUMMARY

Section 61.1927, Florida Statutes, makes confidential and exempt from public disclosure any information that reveals the identify of applicants for or recipients of child support services, including the name, address, and telephone number of such persons, in the possession of a non-Title IV-D county child support agency.

The section defines "non-Title IV-D county child support agency," excluding local depositories operated by the clerks of the court.

The section authorizes disclosure of the information in specified circumstances, primarily relating to law enforcement activities.

This exemption was made subject to s. 119.15, F.S., the Open Government Sunset Review Act of 1995, and will expire October 2, 2006, unless it is reviewed by the Legislature and saved from repeal. The exemption was reviewed pursuant to the standards of the Open Government Sunset Review Act and retention of the exemption is recommended.

BACKGROUND

Public Records – 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. 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.[1] 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 Law,[2] which pre-dates the State Constitution, specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental 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 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.

Unless specifically exempted, all agency[3] 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.[4]

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.[5] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[6]

Only the Legislature is authorized to create exemptions to open government requirements.[7] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[8] A bill enacting an exemption[9] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[11] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

The Open Government Sunset Review Act of 1995[13] provides for the systematic review, through a five year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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 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 statutory criteria are:

(a) if 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;

(b) if 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

(c) if the exemption 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.[14]

The act also requires consideration of the following:

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?

In addition to these considerations, pursuant to the Committee Substitute for Senate Bill 1144 by the Committee on Governmental Oversight and Productivity and Senator Argenziano,[15] which is effective October 1, 2005, consideration must also be given to the following:

1. Is the record or meeting protected by another exemption?
2. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.[16] 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 (sic) 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.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act chapter is guilty of a noncriminal infraction, punishable by a fine not to exceed $500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000.

Public Disclosure Exemption for Non-Title IV-D County Child Support Agencies

Child support enforcement (CSE) services are provided state-wide by the Department of Revenue (DOR or the Department). In a few counties, DOR has contracted with local governmental entities to provide the services.[17] As the designated statewide CSE agency, DOR is required by federal law to provide its services to anyone who requests the services, regardless of whether the child support obligation arises through public assistance or through private action.[18] The CSE services provided by DOR statewide include establishment of paternity and the establishment, modification, or enforcement of child support obligations. All CSE services provided by DOR are considered "Title IV-D" services.[19] Effective October 1, 2005, these services are provided free of charge. (Prior to this date, persons who were not public assistance recipients were charged $25.00 for the services.)

The DOR CSE program is funded by a combination of state and federal dollars, with the federal government paying 66 per cent of all administrative costs.[20] In FY 2004-2005, the Legislature appropriated $255.5 million and 2,334 staff positions to administer the program. Of this, approximately $46.9 million was General Revenue.

Federal law requires that information concerning applicants for or recipients of Title IV-D child support services be protected from disclosure when a domestic violence protective order has been entered or when the Title IV-D agency has other reason to believe that releasing the information may result in physical or emotional harm to the applicant, recipient, or child.[21] Florida has codified this requirement of federal law in s. 409.2579, Florida Statutes. This section of Florida law also contains a provision prohibiting disclosure of identifying information to any state, local, or federal legislative body or committee thereof. It also makes a violation of the confidentiality provision a first degree misdemeanor.

Despite the requirement that DOR provide CSE services free of charge statewide to anyone who requests them, some counties have chosen to provide support enforcement services. Only Broward County provides more than a limited array of services, however, and Broward provides enforcement services only. According to Broward County Support Unit officials, in order to receive services from the Broward Support Unit, a support order must already have been entered, both parties must live in Florida, and one of the parties must live in Broward County. Broward provides enforcement services not only for child support cases meeting these criteria but for alimony cases as well. The Broward County program is completely county-funded.

According to the Broward County Support Unit, that agency represents more than 22,000 custodial parents and receives approximately 20 requests monthly for information from the support files.

In the 2001 legislative session, Broward County officials were successful in advocating that applicants and recipients using their Support Enforcement program (and any others which counties might develop without Title IV-D funding) should receive privacy protections similar to those afforded persons using the DOR program.[22] It is this provision of law, s. 61.1827, F.S., which is the subject of this review.

Both s. 409.2579(1), F.S., and s. 61.1827(1), F.S., while making information concerning applicants or recipients of support enforcement services confidential and exempt, at the same time allow release of the protected information to identified agencies (such as, among others, those who investigate or prosecute criminal cases connected with the administration of child support enforcement programs). Each statutory

provision contains one or more additional paragraphs (s.409.2579(3) and (4), F.S.; s. 61.1827(2), F.S.) specifically prohibiting the disclosure of information identifying the whereabouts of parties or children when a protective order has been entered on their behalf or when the agency has reason to believe that disclosure of the information could result in physical or emotional harm to the party or child. The prohibition is limited to the release of information to the person who is the subject of the protective order or who is identified as likely to cause the harm. According to DOR, this additional layer of protection is necessary so that the location of a party who may be endangered cannot be revealed to a person who may harm them, even when release of the general information about the case is authorized by the provisions of s. 409.2579(1) F.S., or s. 61.1827(1), F.S.

Despite addressing the same privacy concerns as s. 409.2579, F.S., which protects information concerning applicants and recipients of child support enforcement services provided by DOR, the provisions of s. 61.1827, F.S., differ from the provisions of s. 409.2579, F.S., in several ways:

- Section 61.1827, F.S., is more narrowly drawn than s. 409.2579, F.S., in its description of the information that is protected. Section 409.2579, F.S., exempts "information concerning applicants or recipients of…" services while s. 61.1827, F.S., limits the exemption to "any information that reveals the identity of applicants for or recipients of…." services;
- The list of acceptable uses of the information is different, recognizing that the counties are not approved programs under the federal law;
- The county exemption does not contain the prohibition against revealing information to legislative bodies;
- The county exemption does not contain provisions relating to criminal penalties for violating the provisions of the section.[23]

METHODOLOGY

The research for this project included a review of the exemption provision and similar provisions in Florida law, including related case law. In addition, stakeholders were provided with a survey instrument and the opportunity to provide information regarding the provision. Follow-up interviews were conducted with DOR and the Broward County Support Unit. The First Amendment Foundation, the Florida Association of Counties, and the Florida Coalition Against Domestic Violence were also contacted and provided information for the report.

FINDINGS

Both the Broward County Support Unit and the Florida Coalition Against Domestic Violence support retaining the exemption. In both cases, the primary reason given for this position is prevention of domestic violence. The Broward County Support Unit director pointed out that the information would be protected if provided to DOR and thus should be protected if provided to their agency, which performs the same or similar function as DOR. In addition, Broward County cited the need for clients to freely communicate with their office, reporting that prior to enactment of the statute, clients often used the address of relatives or post office box address in an effort to protect their locations.

Finally, one of the reporting counties[24] raised the concern that allowing ready access to the personal identifying information protected by the exemption would make applicants and recipients of the services of the support units vulnerable to identity theft.

The First Amendment Foundation has no objection to the exemption.

Neither the DOR nor the Association of Clerks has a position regarding the exemption, reporting that it does not affect them. The Florida Association of Counties forwarded the survey instrument to counties which it identified as possibly affected by the exemption but expressed no collective position on the exemption. No counties other than Broward were identified and confirmed to be affected by the exemption.

After reviewing the exemption provided in s. 61.1827, F.S., the questions that must be considered pursuant to s. 119.15(4)(a), F.S., can be answered as follows:

What specific records or meetings are affected by the exemption?

The specific records protected by the exemptions are case records of persons applying for or receiving child support enforcement services from Broward County or from other counties which may provide non-Title IV-D child support enforcement services.

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

The only persons uniquely affected by the exemption are persons in Broward County who qualify for and seek the child support enforcement services of the Broward County Support Enforcement Division. It may also be applicable to residents of other counties if other counties choose to provide non-Title IV-D child support services.

What is the identifiable public purpose or goal of the exemption?

The public purpose of the exemption is to protect applicants and recipients of child support enforcement services offered by the non-Title IV-D county child support enforcement agencies from domestic violence and from identity theft.

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

The information is not readily obtainable through other means. While some of the information protected may be contained in the family law files relating to the granting of the enforcement order, critical items such as the current address of the applicant are unlikely to be in those files.

Is the record or meeting protected by another exemption?

No other exemption protects the records affected by this exemption.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

No. While a somewhat similar exemption protects the records of applicants for Title IV-D CSE services through DOR, the differences in the focus and operation of the DOR program and the Broward County program are such that merging the exemptions would not appear to be practical. The DOR exemption has as part of its rationale for existence a requirement of federal law that the Title IV-D agency administering the child support enforcement program provide protections for the information it gathers. This rationale does not apply to this exemption. The services offered by DOR are much broader in scope than those offered by the local program. The local program, however, collects court-ordered alimony, which DOR does not. These differences would make the merger of the two statutory provisions problematic.

Continued necessity for the exemption.

The continuation of this exemption is necessary for the protection of the persons seeking county-based non-Title IV-D support services.

Can the exemption be narrowed?

The exemption is already narrowly drawn to affect only information revealing the identity of applicants for or recipients of child support services when that information is gathered by counties providing non-Title IV-D child support services. In application, this means that the exemption only applies to persons who meet the criteria for services from the Broward County Support Enforcement Division or from those few other counties which provide limited support enforcement services..

RECOMMENDATIONS

The exemption was reviewed pursuant to the standards of the Open Government Sunset Review Act and retention of the exemption is recommended.

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[1] Article I, s. 24 of the State Constitution.
[2] Chapter 119, F.S.
[3] 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.
[4] Section 119.011(11), F.S.
[5] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[6] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).

[9] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[10] Art. I, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62.
[12] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[13] Section 119.15, F.S.
[14] Section 119.15(4)(b), F.S.
[15] Ch. 2005-251 L.O.F.
[16] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974).
[17] In Manatee and Leon Counties, the clerk's office; in Dade County, the State Attorney's office.
[18] 42 CFR 654
[19] This refers to the fact that the services are funded in large part through Title IV-D of the federal Social Security Act.
[20] *Child Support,* Florida Government Accountability Report, Florida Office of Program Policy Analysis and Government Accountability (OPPAGA), August 26, 2004, p. 3.
[21] 42 USC 654(26).
[22] Ch. 2001-131, L.O.F.
[23] This paragraph is unnecessary, since criminal penalties are already provided for in s. 119.07, F.S.
[24] Pasco.