The Florida Senate

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Committee on Health Care Senator Durell Peaden, Jr., Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 430.105, F.S., ELDER CARE/LONG-TERM CARE

SUMMARY

Section 430.105, F.S., specifies that "Personal identifying information relating to an individual's health or eligibility for or receipt of health-related, elder care, or long-term care services received as a result of services rendered under any program administered or funded by the department [Department of Elderly Affairs (DOEA)] is confidential and exempt from the provisions of s. 119.07(1) [F.S] and s. 24(a), Art. I of the State Constitution, except as otherwise provided by law. Such information may be contained in records created by or received by the department or its service providers or obtained through files, reports, inspections, or otherwise by employees of the department, persons who volunteer services through programs administered by the department or its contract providers, or by contract providers. Information made confidential and exempt from the public records law under this section may not be disclosed publicly unless the affected client or elder person or his or her legal representative provides written consent." This statute also specifies that the exemption is subject to the Open Government Sunset Review Act of 1995, in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S. (2004), provides that an exemption may be maintained only if the exemption: protects information of a sensitive, personal nature concerning individuals; allows the state or its political subdivisions to effectively and efficiently administer a governmental program; or protects confidential information concerning an entity. The Open Government Sunset Review Act of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law or Public Meetings Law.

Staff has reviewed the exemption in s. 430.105, F.S., pursuant to the Open Government Sunset Review Act of 1995 (2004), and finds that the exemption meets the requirements for reenactment with some changes. The exemption, viewed against the open government sunset review criteria, does protect information of a sensitive personal nature concerning individuals, the release of which information would jeopardize the safety of such individuals. The exemption also allows DOEA to effectively and efficiently manage its various programs by creating an environment in which its elderly clients are willing to share personal information necessary for the department's staff to identify appropriate services to meet the individual's needs.

Accordingly, staff recommends that the exemption in s. 430.105, F.S., be revived and readopted and amended to remove redundant language and to specify that confidential and exempt records maintained by DOEA may be provided to other government departments and agencies for the purpose of administering DOEA's programs for the elderly.

BACKGROUND

The 2001 Florida Legislature consolidated several of DOEA's statutory provisions exempting its consumers' health and financial information from public disclosure. These provisions were usually related to specific programs within the department. CS/SB 1726 (ch. 2001-194, Laws of Florida) established a single statutory public records exemption (s. 430.105, F.S.) for personal identifying information relating to receipt of services in programs administered or funded by DOEA.

Section 430.105, F.S., specifies that "Personal identifying information relating to an individual's health or eligibility for or receipt of health-related, elder care, or long-term care services received as a result of services rendered under any program administered or funded by the department is confidential and exempt from the provisions of s. 119.07(1) [F.S.] and s. 24(a), Art. I of the State Constitution, except as otherwise provided by law. Such information may be contained in records created by or received by the department or its service providers or obtained through files, reports, inspections, or otherwise by employees of the department, persons who volunteer services through programs administered by the department or its contract providers, or by contract providers. Information made confidential and exempt from the public records law under this section may not be disclosed publicly unless the affected client or elder person or his or her legal representative provides written consent." This statute also specifies that the exemption 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, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

At the time the bill was adopted, the Legislature found that the "exemption is needed to protect information that is of a sensitive personal nature that concerns individuals. Every person has an expectation of and a right to privacy in all matters concerning his or her personal health. For this reason matters of personal health are traditionally private and confidential concerns between an individual and an individual's health care provider. In addition, an individual's personal financial situation as it relates to eligibility for health or elder-related services is also of a sensitive personal nature and should be confidential and exempt. For elderly persons needing the services of the department [DOEA] this is even more important since elderly persons are often targets for those seeking to capitalize on their weaknesses. For these reasons, the individual's expectation and right to privacy in all matters relating to his or her personal health and eligibility for services provided by the department, or its agents, necessitates this exemption."[1]

Constitutional Access to Public Records and Meetings

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[2] Over the following decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., was first enacted in 1967.[3] These statutes have been amended numerous times since their 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 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 of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The term "public records" has been defined by the Legislature in s. 119.011(11), 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 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.[4] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[5]

[1] Chapter 2001-194, L.O.F.

[2] Section 1, ch. 5945, 1909; RGS 424; CGL 490.

[3] Chapters 67-125 and 67-356, L.O.F.

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

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

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

- Must state with specificity the public necessity justifying the exemption;
- Must be no broader than necessary to accomplish the stated purpose of the law;
- Must relate to one subject;
- Must contain only exemptions to public records or meetings requirements; and
- May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida's citizens to discover the actions of their government.[6] 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.[7]

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.[8] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances.[9]

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person 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. Section 119.10, F.S., also provides a first-degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[10] For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.[11] The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records.[12]

The Open Government Sunset Review Act of 1995

Section 119.15, F.S. (2004), 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. (2004), 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, unless the Legislature acts to reenact the exemption.

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

[7] *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).

[8] Attorney General Opinion 85-62.

[9] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[10] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

[11] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).

[12] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.,* 570 So.2d 1322 (Fla. 2d DCA 1990).

In the year before the scheduled 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 s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act of 1995 (2004), an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S. (2004), requires the consideration of the following specific questions:

- 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?

Further, under the Open Government Sunset Review Act of 1995 (2004), an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- 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;
- 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
- 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.[13] 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.

METHODOLOGY

Staff reviewed the provisions and applicable law pursuant to the criteria specified in the Open Government Sunset Review Act of 1995 (2004), to determine if the provisions of s. 430.105, F.S., making personal identifying information relating to an individual's health or eligibility for DOEA's programs and services exempt from the Public Records Law, should be continued or modified. Staff consulted with and surveyed DOEA staff and other interested parties[14] in conducting the Open Government Sunset Review of s. 430.105, F.S. Staff also reviewed the Senate analysis of the bill (CS/SB 1726) creating this public records exemption.

FINDINGS

There is data, although it is limited, to support the concern that disclosing personal identifying information for DOEA clients and applicants puts the elderly at risk. The National Center on Elder Abuse states that it is difficult to determine exactly how many older Americans are abused, neglected, or exploited, in large part because surveillance is limited and the problem remains greatly hidden. However, various studies indicate that between 2 percent and 10 percent of persons over the age of 65 is the victim of abuse, neglect, or exploitation at any given time, and that as

[13] *Memorial Hospital–West Volusia, Inc. v. News-Journal Corporation,* 2002WL 390687 (Fla. Cir. Ct.).

[14] The Florida Chapter of the American Association of Retired Persons (AARP) and the First Amendment Foundation (FAF).

many as 5 million cases of financial exploitation of the elderly occur annually. The Center stresses that these numbers may actually be low and estimate that for every one case of elder abuse, neglect, or exploitation that is reported to authorities, about five more may go unreported.[15]

The public interest originally identified for justifying the public records exemption was that "For elderly persons needing the services of the department [DOEA] this [exemption] is even more important since elderly persons are often targets for those seeking to capitalize on their weaknesses…[and] the individual's expectation and right to privacy in all matters relating to his or her personal health and eligibility for services provided by the department, or its agents, necessitates this exemption."[16] The department's response to the Committee's Open Government Sunset Review questionnaire emphasizes this same public interest still exists and that maintaining the exemption is of "paramount importance to elders and their families in Florida." The department's response goes on to state that "Persons seeking services from the Department of Elder Affairs are often aged, frail, lacking full cognitive ability, and [are] generally in poor health…[and] If the confidential information used to determine eligibility for the department's various assistance programs and to track the ongoing health of the department's clients were readily available to anyone who requested it, these most vulnerable citizens could fall prey to those seeking to capitalize on their weaknesses."[17]

The exemption provided under s. 430.105, F.S., affects a broad range of personal identifying information obtained from the department's clients and applicants for its programs including: name, address, telephone number, Social Security number, Medicaid identification number (if applicable), and health information, including actual medical records obtained as a result of a person applying for or receiving services provided through DOEA.

For example, the Comprehensive Assessment Review and Evaluation Services (CARES) section of the department, which is the federally mandated nursing home pre-admission assessment program, obtains such information. Persons who are applying for Medicaid nursing home care are assessed by either a CARES nurse or social worker, with medical review by a physician prior to approval. The records and information collected to conduct these reviews include most of the types of personal identifying information described above. This information is maintained in records housed in the 17 CARES offices located throughout the state. The information is used for evaluations of service needs and the development of care plans. Public disclosure of this information could place clients and applicants in jeopardy of those who may seek to capitalize on the aged or frail status of the individual being assessed by CARES.

Another example of how this exemption for personal identifying information is used to protect the elderly is in the Long-Term Care Ombudsman Program. This program investigates resident complaints in nursing homes and assisted living facilities. Both personal and medical information is collected as part of these investigations which could put the client at greater risk if easily accessible by the public, particularly the facility, or provider in the facility, that is the subject of investigation.

DOEA reports that this exemption affects only their elderly clients, as opposed to the general public, by providing them the security of knowing they can access the department's services without sacrificing their privacy. The department also states that most of the information collected and made exempt by s. 430.105, F.S., can be obtained by alternative means, although other federal or state laws may limit access. For example, medical information may only be obtainable through consent of the client or methods specified in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Both legislative staff and DOEA have identified issues with the current exemption that may warrant amending the statute if reenacted. DOEA suggests clarifying that the exemption applies equally to persons applying for services as those actively receiving services.[18] They believe that the current language leaves some ability for an interpretation that could require the department to release an applicant's personal identifying information. Legislative staff identified some redundancy in the current statute and, more seriously, a question of whether the confidential and exempt nature of the

[15] National Center for Elder Abuse. *Fact Sheet: Elder Abuse Prevalence and Incidence*. April 5, 2005.
[16] Chapter 2001-194, L.O.F.
[17] DOEA response to Open Government Sunset Review Questionnaire, July 2005.
[18] DOEA provided proposed language for amending the exemption as part of their response to the Open Government Sunset Review Questionnaire submitted by the Committee.

statute's language may actually prohibit the disclosure of personal identifying information to other state agencies and departments that coordinate with DOEA to provide services (e.g., the Agency for Health Care Administration, the Department of Children and Families, etc.).

RECOMMENDATIONS

Staff has reviewed the exemption in s. 430.105, F.S., pursuant to the Open Government Sunset Review Act of 1995 (2004), and finds that the exemption meets the requirements for reenactment with some changes. The exemption, viewed against the open government sunset review criteria, does protect information of a sensitive personal nature concerning individuals, the release of which information would jeopardize the safety of such individuals. The exemption also allows DOEA to effectively and efficiently manage its various programs by creating an environment in which its elderly clients are willing to share personal information necessary for the department's staff to identify appropriate services to meet the individual's needs.

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