The Florida Senate

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Committee on Children, Families, and Elder Affairs

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 383.51, F.S., RELATING TO PARENTAL IDENTITY

SUMMARY

Section 383.51, F.S., makes confidential and exempt from public disclosure the identity of a parent who leaves a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50, F.S. However, this section directs that the identity of a parent leaving a child shall be disclosed to a person claiming to be a parent of the newborn infant.

This exemption was made subject to s. 119.15, F.S., the Open Government Sunset Review Act of 1995, and will expire on October 2, 2007, 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, with modification, is recommended.

BACKGROUND

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[2] 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. . . .

The Public Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other 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[4] records are 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.[5]

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

[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.
[3] Chapter 119, F.S.
[4] 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."
[5] Section 119.011(11), F.S.

formalize knowledge.[6] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[7]

General policy standards related to computer records are contained in s. 119.01, F.S. Agency use of computers should not restrict access to public records.[8] Agencies are required to consider whether a computer system is capable of providing data in a common format when designing or acquiring an electronic recordkeeping system.[9] Further, agencies are prohibited from entering into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency. Agency use of proprietary software must not diminish the right of the public to inspect and copy a public record, subject to copyright and trade secret laws.[10]

Only the Legislature is authorized to create exemptions to open government requirements.[11] 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.[12] A bill enacting an exemption[13] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[14]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[15] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[16]

The Open Government Sunset Review Act[17] provides for the systematic review of an exemption five years after its enactment. 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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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

[6] Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980).
[7] Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979).
[8] Section 119.01(2)(a), F.S., provides that ". . . [a]utomation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law."
[9] Section 119.01(2)(b), F.S.
[10] Section 119.071(1)(f), F.S., makes exempt data processing software obtained by an agency under a licensing agreement which prohibits its disclosure if that software is a trade secret as defined in s. 812.081, F.S.
[11] Article I, s. 24(c) of the State Constitution.
[12] 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).
[13] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[14] Art. I, s. 24(c) of the State Constitution.
[15] Attorney General Opinion 85-62.
[16] Williams v. City of Minneola, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[17] Section 119.15, F.S.

> would injure the affected entity in the marketplace.[18]

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 by readily obtained by alternative means? If yes, how?
(5) Is the record or meeting protected by another exemption?
(6) 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 may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[19] The Legislature is only limited in its review process by constitutional requirements.

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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Public Disclosure Exemption for Parents Who Leave Newborn Infants at Certain Locations –
In 2000, in response to a growing concern about the number of newborns who were discovered abandoned in dumpsters and other unsafe locations, the Florida Legislature joined a substantial number of other states in passing legislation designed to provide a safe alternative.[20] Florida law provides the framework for a parent to leave a newborn infant, approximately three days old or younger, at a hospital, emergency medical services (EMS) station, or fire station under certain circumstances without fear of civil or criminal investigation and prosecution.[21] Additionally, under s. 383.50, F.S., unless there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant with a firefighter, emergency medical technician, or paramedic at a fire station or who brings a newborn infant to an emergency room of a hospital "has the absolute right to remain anonymous and to leave at any time and may not be pursued or followed...."[22]

Section 383.50, F.S., further provides for the acceptance of the newborn infant, emergency treatment, transfer of custody, termination of parental rights, and adoption in cases of newborn infants left by a parent at one of the specified locations. A parent is given the opportunity to claim or reclaim his or her newborn infant up until the court enters a judgment terminating his or her parental rights.

Several apparent inconsistencies are noted across these statutes relating to leaving newborn infants in a designated location, although most are outside the scope of this Open Government Sunset Review. Among the inconsistencies are these:

- Section 383.50(5), F.S., provides the parent leaving a newborn infant "the absolute right to remain anonymous," and yet s. 383.51, F.S., states that "(t)he identity of a parent leaving a child shall be disclosed to a person claiming to be a parent of the newborn infant."
- Section 383.50, F.S., says that "(a) claim to the newborn infant must be made to the entity having *physical or legal* custody of the newborn infant or to the circuit court before whom proceedings involving the newborn infant are pending." However, s. 63.0423(6), F.S., says that "(a) claim of parental rights of the abandoned infant must be made to the entity having *legal* custody of the abandoned infant or to the circuit court before whom proceedings involving the abandoned infant are pending." (emphasis added)
- In s. 39.201(2)(f)1., F.S., the Child Abuse Hotline is directed to give the hospital in possession of an abandoned newborn infant the name of a child-placing agency from a list of agencies *eligible and required* to accept physical custody of newborn infants; but the list that is maintained according to

[18] Section 119.15(4)(b), F.S.
[19] Straughn v. Camp, 293 So.2d 689, 694 (Fla. 1974).
[20] Chapter 2000-188, L.O.F.
[21] See ss. 383.50, 39.201(2)(g), 63.0423, and 827.035, F.S.
[22] Section 383.50(5), F.S.

> s. 63.167, F.S., is of *eligible and willing* child-placing agencies. (emphasis added)

In addition to establishing the conditions under which a parent may leave a newborn infant in a designated location, chapter 2000-188, L.O.F., directed the Department of Health, in conjunction with the Department of Children and Families, to produce a media campaign to promote safe placement alternatives for newborn infants, to inform the public concerning the confidentiality and limited immunity from criminal prosecution afforded a parent who leaves a newborn infant at one of the designated locations and of the rights of parents to reclaim or claim their newborn infant within specified time periods, and to publicize adoption procedures. The Department of Health has carried out this function in partnership with the Gloria M. Silverio Foundation, a not-for-profit corporation which, in 2001, established a program called "A Safe Haven for Newborns." Among its activities, the Silverio Foundation partners with the Department of Health and many hospitals, fire stations and EMS stations to provide training and public awareness of this law; operates a 24/7 multilingual crisis referral help line for expectant and new parents; and maintains some data relating to abandoned newborns. According to the foundation's statistics, 47 newborn infants have been left safely at a designated location under the provisions of s. 383.50, F.S., since the law's passage, and 29 have been left in unsafe locations.[23]

Under s. 383.51, F.S., the identity of a parent who leaves a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50, F.S., is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

METHODOLOGY

The methodology for this project included research to identify relevant case law and law review articles. Staff also conducted interviews with staff from several organizations, including the Department of Health, the Gloria M. Silverio Foundation, and the Children's Home Society. In addition to individual interviews, a meeting was held to discuss the legislative review and any issues with the current law and exemption. Representatives from the Florida Hospital Association, the Florida Fire Chiefs Association, the Department of Health, the Department of Children and Families, the Silverio Foundation, the Children's Home Society, the Florida Catholic Conference, the Florida Adoption Council, and the Florida Coalition for Children participated in the meeting. Further, a survey was prepared and distributed to all facilities that were identified as having received a newborn infant under the provisions of s. 383.50, F.S. The First Amendment Foundation also provided information for the report.

FINDINGS

Section 383.51, F.S., specifies that the identity of a parent who leaves a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a) of the State Constitution. The unanimous recommendation of those stakeholders interviewed and those surveyed for this review is that the exemption be retained. According to one respondent to the questionnaire, "(t)he exemption protects the health, safety and welfare of newborn infants by encouraging parents to leave a newborn infant in a safe place which ensures timely access to critical health care services and access to a long term protective home. The exemption balances the important interest of public access to records against the compelling public need to protect the health and life of a newborn infant." Another said that unless the exemption is re-enacted, "(a) mother wishing to give her infant up may not do so in a manner assuring the safety of the infant if they lose the confidentiality provided by the statute."

The First Amendment Foundation also supports the continuation of the exemption as does much, but not all, of the professional literature. While a minority position reflected in the literature argues that safe haven laws and the confidentiality provisions that are part of them encourage abandonment, do little to prevent abandonment in unsafe places, and undermine the rights and needs of both parents,[24] the predominant position reflected in the literature is that such laws, including the confidentiality provisions, are critically important. A typical observation is this: "Perhaps the most important benefit this statute can provide, beyond immunity from prosecution, is the anonymity provided

[23] http://www.asafehavenfornewborns.com/materials.htm, July 28, 2007.

[24] see, for example, Racine, Jennifer R. "A Dangerous Place for Society and its Troubled Young Women: A Call for an End to Newborn Safe Haven Laws in Wisconsin and Beyond." Wisconsin Women's Law Journal, Fall 2005.

to the person surrendering the newborn. Its importance is paramount because anonymity encourages this method of abandonment rather than walking away from a child."[25]

Among the stakeholders, however, there is a broadly held interest in modifying the exemption. Section 383.51, F.S., includes a provision that appears to contradict the assurance of anonymity for the parent leaving a newborn infant that is specified in s. 383.50 (5), F.S. Section 383.51, F.S., provides, in part, that "(t)he identity of a parent leaving a child shall be disclosed to a person claiming to be a parent of the newborn infant." Although appreciating the need to protect the rights of a parent who does not participate in and may not support leaving a newborn infant in a designated facility under this law, many stakeholders expressed concern that this provision not only undermines the purpose of the broader law and could discourage a parent from safely leaving a child, it may also, in certain instances, violate the federal Health Insurance Portability and Accountability Act (HIPAA) which prohibits a hospital from disclosing the parent's identifying information in those instances when the parent is considered a patient.[26] Further, the provision as worded would not prevent someone from falsely claiming to be a parent in order to obtain the name of the parent leaving a newborn infant.

Deleting or modifying this provision in s. 383.51, F.S., would not result in the loss of the other parent's rights. In fact, several statutory provisions more directly protect the rights of a parent who is not involved in abandoning a newborn infant under s. 383.50, F.S. Newborn infants left at a designated facility are placed by the hospital with a licensed child-placing agency[27] for the purpose of adoption under s. 63.0423, F.S., a section which addresses the rights of both parents prior to the court terminating parental rights. Within 24 hours of taking physical custody of the abandoned infant, the child-placing agency must "request assistance from law enforcement officials to investigate and determine, through the Missing Children Information Clearinghouse, the National Center for Missing and Exploited Children, and any other national and state resources, whether or not the abandoned infant is a missing child."[28] The law further directs the agency to initiate a diligent search to notify and to obtain consent from a parent whose identity is known but whose location is unknown and provides the minimum inquiries that must be included in the diligent search; provides for constructive notice to be given in the county where the infant was abandoned; and prohibits the court from granting a petition for termination of parental rights until consent to the adoption or an affidavit of nonpaternity has been executed, a parent has failed to reclaim or claim the abandoned infant within the time period specified in s. 383.50, F.S., or the consent of a parent is otherwise waived by the court.[29]

RECOMMENDATIONS

The exemption was reviewed according to the standards of the Open Government Sunset Review Act, and retention of the exemption is recommended. It is further recommended that the Senate consider modifying that part of s. 383.51, F.S., that provides for disclosure of the parent's name. The provision could be removed entirely which would further broaden the exemption and subject it to subsequent review, or the provision could be modified to specify the conditions under which the name of the parent is divulged.

[25] Partida, Ana L. "The Case for 'Safe Haven' Laws: Choosing the Lesser of Two Evils in a Disposable Society." New England Journal on Criminal and Civil Confinement, Winter 2002.
[26] 45 CFR ss. 160.102, 160.103, and 164.502.
[27] See s. 383.50(7), F.S.
[28] s. 63.0423(5), F. S.
[29] ss.63.0423(3),(4), and (5), F.S.