The Florida Senate

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Committee on Communications and Public Utilities

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 166.236, F.S., AUDITS BY TAXING AUTHORITIES; CONFIDENTIAL INFORMATION

SUMMARY

The public records exemption set forth in s. 166.236, F.S., protecting proprietary confidential business information of a telecommunication service provider collected during a municipal audit assessing the public services tax, will be repealed on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

The purpose of s. 166.236, F.S., was to protect information received in an audit during the transition period between the public service tax levied by municipalities and the current Communications Service Tax (CST) levied by the Florida Department of Revenue (DOR). The transition period is over and the exemption should be allowed to repeal on the scheduled date of October 2, 2007.

BACKGROUND

Article I, s. 24, of the Florida Constitution provides every person 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 and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, commissioners, or entities created pursuant to law or the Florida Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of 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. *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for final inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and established the means by which these exemptions are to be established. Under Article I, s. 24(c), of the Florida 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. A law creating an exemption is permitted to contain only exemptions to public records or meeting requirements and must relate to one subject.

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 requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of five 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 of the fifth year, unless the Legislature acts to reenact the exemption.

In the year before the 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 the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

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

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

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

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?

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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. 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.

Under s. 119.15(3)(e), F.S., notwithstanding s. 768.28, F.S., 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 liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

METHODOLOGY

Information requests were sent inquiring whether telecommunication service providers or municipalities were involved with audits pursuant to s. 166.234, F.S. Responses were received and discussed with interested parties to determine the current need for the exemption. In addition, legislative history of the of the public service tax defined under s. 166.231(9), F.S., and its incorporation into the Communication Service Tax

(CST) in 2000 was reviewed, as well as relevant statutory provisions.

FINDINGS

The exemption

Section 166.236, F.S., provides that if an audit of a telecommunications service provider is conducted under s. 36 of Chapter 2001-140, Laws of Florida, and s. 166.234, F.S., any information received by the taxing authority in connection with the audit is confidential and exempt from public records requirements. This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and stands to be repealed on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 166.236, F.S., states that it is remedial in nature and applies to all audits conducted under s. 36 of chapter 2001-140, L.O.F., and s. 166.234, F.S., regardless of whether the audit was begun before or after the effective date of this act. On its face, the statute appears to be a typical exemption to be applied until revised or repealed by subsequent legislation. However, research into related statutes reveals that the legislative intent manifested in s. 166.236, F.S., was the product of a piecemeal accumulation of legislation over a four year period. In 1999, subsection 166.231(9), F.S., authorized municipalities to collect a public service tax from telecommunication service providers. Paragraph 166.231(9)(c), F.S., authorized a municipality to conduct audits of telecommunication service providers pursuant to standards outlined in s. 166.234, F.S. It also provided an exemption to public disclosure of confidential business material collected by the municipal audits.

In 2000, the Communications Service Tax (CST) subsumed the public service tax and audit authority established in s. 166.231(9), F.S. The CST provided that after October 1, 2001, s. 166.231(9), F.S., would be replaced.

In 2001, the legislature enacted s. 36, Ch. 2001-140, L.O.F., which resurrected the audit authority previously granted in s. 166.231(9), F.S., but did not enact a public record exemption. In 2002, the legislature recognized this omission as evidenced by the remedial nature of the legislation and enacted s. 166.236, F.S., to provide an exemption.

Information gathered

The 2001 reenactment of s. 166.231(9), F.S., could be interpreted as a broad authorization for the continuation of audits similar to those authorized prior to its appeal, or could be interpreted as being a temporary solution to allow municipalities the authority to conduct audits of taxes that were levied prior to 2001 to ensure those prior tax payments complied with the statute in effect at the time of the levy.

Research into the relevant related statutes reveals the following:

- When the Legislature extended the audit authority of s. 166.231(9), F.S., the extension was not codified into the Florida Statutes but was published only in the Laws of Florida, arguably indicative of the temporary nature of the exemption.
- Section 166.234 (4)(a), F.S., which sets forth the procedure for an audit of local service taxes, requires that a municipality conduct an audit within 3 years after the date the tax was due, with a grace period of 1 year. This limits the need of the exemption to 4 years after 2001.
- CST statutes now give the taxing and audit authority to the Florida Department of Revenue, with no audit authority to the municipal level.
- Telecommunication service providers have a public records exemption applicable to DOR's findings codified in s. 213.053, F.S.

When contacted, representatives of telecommunication service providers and municipalities agreed that the exemption was to exist only so long as audits were being conducted pursuant to the extended authority of s. 166.231(9), F.S.[1] Both representatives further agreed that the purpose of the extension was to protect confidential business information gathered during tailing audits and not to extend further.

Telecommunication service providers and municipal government responses both recognized that s. 166.236, F.S., was enacted to provide an exemption from public records collected during audits of tax years

[1] The First Amendment Foundation feels that the exemption should be limited to the duration of the audit. This section should be allowed to repeal which renders the First Amendment Foundation's concern moot.

before October 1, 2001. They also agreed that the three year audit limitation codified in s. 166.234(4)(a), F.S., had eclipsed and the exemption is no longer of use to either party.

Further, the telecommunication service providers response stated that, as discussed above, the CST statutes provide that audits are now conducted by the Department of Revenue rather than municipalities. Finally, s. 213.053, F.S., provides that filings at DOR are exempt from public records; therefore, the protection of s. 166.236, F.S., is no longer necessary.

RECOMMENDATIONS

Based on the analysis above of the legislative history and the comments of interested parties, the purpose of s. 166.236, F.S., was to protect information received in an audit during the transition between the public service tax levied by municipalities and the current CST levied by DOR. The transition is over and the exemption should be allowed to repeal on the scheduled date of October 2, 2007.