The Florida Senate

Interim Project Report 2007-207 *October 2006*

Committee on Criminal Justice

OPEN GOVERNMENT SUNSET REVIEW OF CRIMINAL INTELLIGENCE AND CRIMINAL INVESTIGATIVE INFORMATION, SECTION 119.071(2)(C)2., F.S.

SUMMARY

Certain criminal intelligence and investigative information is exempt from public disclosure. Specifically, s. 119.071(2)(c)2., F.S., provides that [a] request of a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian's response to the request, and any information that would identify the public record that was requested by the law enforcement agency or provided by the custodian are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, during the period in which the information constitutes criminal intelligence information or criminal investigative information that is active. The exemption requires that the law enforcement agency give notice to the custodial agency when the criminal intelligence information or criminal investigative information is no longer active, so that the custodian's response to the request and information that would identify the public record requested are available to the public.

This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

Staff has performed the Sunset Review and determined that the exemption fits the criteria for retention. It is both narrowly-drawn to accomplish the stated public necessity and it is necessary for the efficient and effective administration of law enforcement. Therefore, staff recommends that the exemption be re-enacted.

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.[1] 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.[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. 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 Act,[3] which pre-dates the State Constitution, 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:

---

[1] Section 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

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

Only the Legislature is authorized to create exemptions to open government requirements.[8] 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.[9] A bill enacting an exemption[10] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[11]

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.[12] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[13]

The Open Government Sunset Review Act[14] provides for the systematic review, through a 5-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 if the exemption:

(a) 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) 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) 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

---

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.

[5] Section 119.011(11), F.S.

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

[9] *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).

[10] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

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

[12] Attorney General Opinion 85-62.

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

[14] Section 119.15, F.S.

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.[15]

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 amendments to the section made by ch. 2005-251, L.O.F., that became 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 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.[16] 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.

Under s. 119.10(1) (a), F.S., any public officer who violates any provision of the Public Records Act 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 violates 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.

Pertinent Terms Defined - There are certain terms, defined within s. 119.011, F.S., that appear in the exemption under review. An understanding of these definitions is helpful for purposes of determining whether the exemption meets the statutory criteria for retention.

"Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.[17]

"Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.[18]

Criminal intelligence information shall be considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.

Criminal investigative information shall be considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

In addition, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from

[15] Section 119.15(4)(b), F.S.
[16] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974).
[17] s. 119.011(3)(a), F.S.
[18] s. 119.011(3)(b), F.S.

prosecution under the provisions of s. 775.15, F.S., or other statute of limitation.[19]

A "law enforcement agency" falls under the general category of "criminal justice agency" in s. 119.011(4), F.S. Other criminal justice agencies include the court, prosecutor, and any other agency charged by law with criminal law enforcement duties.

The broader category of "criminal justice agency" also includes any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigation or prosecution, or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The Department of Corrections is also listed as a "criminal justice agency."[20]

Exemption Under Review - Section 119.071(2)(c)2., F.S.,[21] provides that:

> [a] request of a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian's response to the request, and any information that would identify the public record that was requested by the law enforcement agency or provided by the custodian are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, during the period in which the information constitutes criminal intelligence information or criminal investigative information that is active. This exemption is remedial in nature, and it is the intent of the Legislature that the exemption be applied to requests for information received before, on, or after the effective date of this subparagraph. The law enforcement agency shall give notice to the custodial agency when the criminal intelligence information or criminal investigative information is no longer active, so that the custodian's response to the request and information that would identify the public record requested are available to the public. This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

The public necessity statement declares that:

> …criminal investigations are jeopardized if law enforcement requests to inspect or copy a public record, the record custodian's response to such a request, or other information that would identify the records requested are available to the public.[22]

The public necessity for the exemption is further explained as follows:

> Persons who obtain such information may inadvertently or purposefully make the subjects of such investigations aware that an investigation is active. If it is discovered that criminal activity is being investigated, perpetrators of that activity may flee, destroy evidence, evade prosecution, or speed up the timetable for the performance of that illegal activity.[23]

Co-existing Exemption – Section 119.071(2)(c)1., F.S. provides that:

> [a]ctive criminal intelligence information and active criminal investigative information are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Briefly restated, "active criminal intelligence information" must meet the following criteria:

- information gathered by a criminal justice agency
- related to an identifiable person or group
- in an effort to detect, prevent or monitor on-going or reasonably anticipated criminal activity.[24]

"Active criminal investigative information" consists of:

- information gathered by a criminal justice agency
- related to an identifiable person or group
- so long as the investigation is on-going with a reasonable expectation of securing an arrest or prosecution in the foreseeable future.[25]

It is clear that this active criminal intelligence and investigative information, when shared between

[19] s. 119.011(3)(d), F.S.
[20] s. 119.011(4), F.S.
[21] Chapter 2001-364, Laws of Florida.
[22] Chapter 2001-364, Laws of Florida.
[23] Chapter 2001-364, Section 2, Laws of Florida.
[24] ss. 119.011(3)(a), 119.011(3)(d)1., F.S.
[25] ss. 119.011(3)(a), 119.011(3)(d)2., F.S.

criminal justice agencies, maintains the exemption from public disclosure via a request made under the Public Records Act.[26] But, what about situations where an agency that does *not* fall under the definition of a "criminal justice agency" shares *information requested from that agency by a criminal justice agency* for intelligence gathering or investigative purposes?

The exemption created in Chapter 2001-364, Laws of Florida, addressed that concern. The exemption protects *requests by law enforcement agencies* to non-criminal justice agencies, the non-criminal justice agency's *response to the request*, and any *information that would identify what records were requested or provided*.[27]

METHODOLOGY

Committee Staff conducted legal research and reviewed the responses to the surveys sent to state and local agencies by the Legislative Committee on Intergovernmental Relations, and the Florida House of Representatives Governmental Operations Committee staff.

FINDINGS

The statute under review satisfies the criteria for retention set forth in the Open Government Sunset Review Act.

As previously noted, the exemption protects *requests by law enforcement agencies* to non-criminal justice agencies, the non-criminal justice agency's *response to the request*, and any *information that would identify what records were requested or provided*.[28]

The exemption serves an identifiable public purpose. Enhancing public safety, through criminal justice agencies' detection and investigation of criminal activity, and making arrests where warranted, is the overall public purpose. How the exemption accomplishes the overall public purpose is expanded upon, in detail, in Section 2 of Chapter 2001-364, Laws of Florida, which states:

> …criminal investigations are jeopardized if law enforcement requests to inspect or copy a public record, the record custodian's response to such a request, or other information that would identify the records requested are available to the public. Persons who obtain such information may inadvertently or purposefully make the subjects of such investigations aware that an investigation is active. If it is discovered that criminal activity is being investigated, perpetrators of that activity may flee, destroy evidence, evade prosecution, or speed up the timetable for the performance of that illegal activity.[29]

Further, the exemption is no more broad than necessary. It is as narrowly drawn as possible without *compromising* its purpose, and it applies only so long as the exempt information constitutes *active* criminal-intelligence information or *active* criminal – investigative information.[30] In addition, the exemption requires the law enforcement agency seeking the agency records to *notify the agency records custodian* when the information is no longer considered to be *active*.[31] This notification facilitates the records custodian's ability to respond appropriately to the citizen who may be seeking the public record. Unless the public record is exempt from disclosure under some other exemption, the citizen may access it upon the termination of the information's "active" status.

Although there are general exemptions for *other types* of active criminal investigative and active criminal investigative information – the *specific information itself* -- the *law enforcement requests, agency responses, and identifying information* -- made exempt from disclosure under this particular statute, is not exempt under any other provision of law, therefore there is no potential for a merger of exemptions.

The exemption under review *"allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption."*[32] The exemption was created, and should be retained, because the efficient and uncompromised exchange of intelligence and information between criminal justice agencies and non-criminal justice agencies is critical to the successful detection, investigation, and prosecution of criminal activity. Without the exemption it is possible for the information or intelligence to be obtained prematurely,

[26] see *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla. 4th DCA 1994), wherein the court "conclude[d] that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status."
[27] s. 119.071(2)(c)2., F.S.
[28] *id.*
[29] s. 2, Ch. 2001-364, L.O.F.
[30] s. 1, Ch. 2001-364, L.O.F.
[31] s. 1, Ch. 2001-364, L.O.F.
[32] s. 119.15(6)(b)2., F.S.

potentially thwarting investigations. Although the information itself would be exempt from disclosure when in the hands of a law enforcement agency, an "end-around" request for disclosure, made to the non-law enforcement agency, for "the request from the law enforcement agency and copies of the documents provided" could compromise public safety.

The results of the agency and law enforcement surveys indicate that the exemption is either generally under-utilized, or law enforcement agencies determine on a case-by-case basis whether the exemption *should* be utilized. For example, fairly routine criminal traffic cases result in requests for the defendant's driving record from the Department of Highway Safety and Motor Vehicles. The department states that it receives in excess of 20,000 public records requests from law enforcement agencies annually, but *minimal requests under this particular exemption*. This is quite likely because the routine criminal traffic case does not rise to the level of "sensitivity," in terms of the type or on-going nature of the investigation, for which this exemption was created. Presumably the minimal number of requests made to the department under this exemption are seeking information related to more "sensitive" investigations.

Although it does not appear that law enforcement agencies often utilize the exemption, all law enforcement agency survey respondents who had an opinion on whether the exemption should be repealed or re-enacted recommended *re-enactment* of the exemption. A sample of the reasons given include:

- Jacksonville Sheriff's Office (utilizes the exemption "several" times a year): While the exemption is not used often, it can be very important when it is used. During investigations it is often essential that the subjects of the investigations are not aware that documents are being requested and examined by law enforcement.
- Polk County Sheriff's Office (has never utilized the exemption): These exemptions are critical to maintain the integrity of our ongoing active investigations.
- West Palm Beach Police Department (reports utilizing the exemption 5,200 times annually): It is critical to ensure investigations are not compromised and the safety of those involved is not divulged (sic) during the course of active investigations.
- St. Petersburg Police Department (uses the exemption 15-20 times per year): This is an important exemption in that the compelled disclosure of the actual request by another law enforcement agency, whether the documents requested/provided were protected, could alert someone that an investigation of some type is underway. It could hamper the investigation as well as pose a risk to potential witnesses. Repeal of the exemption could have an adverse effect on state and national security.

It is interesting to note that the methods used to notify non-criminal justice agencies when the exemption no longer applies (i.e., the investigation is completed) are somewhat haphazard. For instance, some law enforcement agencies notify the non-criminal agency telephonically, some verbally (in person), some by e-mail and some by written correspondence. Any method other than written correspondence cannot be easily verified, which may become necessary under challenge. The non-law enforcement agencies that responded to surveys indicate that sometimes they are not notified at all when the exemption no longer applies. These notification procedures (or lack thereof) are somewhat troublesome. Non-criminal justice agencies may want to address these issues with their Records Custodians and criminal justice agency personnel who may request records from those agencies.

RECOMMENDATIONS

Staff recommends that the public records exemption that applies to requests of law enforcement agencies to inspect or copy public records that are in the custody of another agency, the agency response to the request, and any information that would identify the public record that was requested or provided be retained.

The exemption is narrowly-drawn to accomplish its purpose, and the public purpose is a valid one. Additionally, the exemption is necessary for the efficient and effective administration of law enforcement duties.