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Committee on Judiciary

## OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071(5)(A) AND (B), F.S., RELATING TO SOCIAL SECURITY NUMBERS AND FINANCIAL ACCOUNT NUMBERS HELD BY COURT CLERKS AND COUNTY RECORDERS

### SUMMARY

Section 119.071(5)(a), F.S., provides that social security numbers (SSNs) held by an agency are confidential and exempt from the open public records requirements. Section 119.071(5)(b), F.S., provides a general exemption for bank account numbers and debit, charge, and credit card numbers (financial account numbers) from the open public records requirements. Social security numbers may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities. Because, financial account numbers are only exempt, under s. 119.071(5)(b), F.S., not confidential and exempt, an agency has discretion to release this information where it is deemed to be in the interest of the agency.

These provisions are subject to s. 119.15, F.S., the Open Government Sunset Review Act, and will expire October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public records exemption provisions relating to SSNs and financial account numbers held by clerks of the circuit court and county recorders,<sup>1</sup> as well as the

<sup>1</sup> Article VIII, section 1(d) of the State Constitution provides: “[w]hen not otherwise provided by county charter or special law ..., the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.” Except for Orange and Broward counties, the clerk of the circuit court (clerk) is the custodian of all court and official records. In Orange County, the clerk is the custodian of court records, and the county comptroller is the custodian of official records. In Broward County, the clerk is the custodian of court records, and the Department of Finance and Administrative Services is the custodian of official records. The Florida Statutes generally uses the term *county recorder* to refer to the responsibilities of custodian of official records. To simplify the terminology, this report uses *clerk of the circuit court* as custodian of both court and official records.

conditions related to the filing and release of court records or official records containing these numbers.<sup>2</sup>

These exemptions are recommended for retention as each exemption is narrowly drawn to meet the stated public necessities for that exemption.

### BACKGROUND

#### Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>3</sup> In 1992, Floridians adopted an amendment, article I, section 24, to the State Constitution that raised the statutory right of access to public records to a constitutional level.

The Public Records Act<sup>4</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency<sup>5</sup> records are available for public inspection. Section 119.011(11), F.S., defines *public record* very broadly to include “all documents, ... tapes, photographs, films, sound recordings, ... made or

<sup>2</sup> See *Open Government Sunset Review of Section 119.071(5)(a) and (b), F.S., Relating to Social Security Numbers and Financial Account Numbers Held by Agencies*, Fla. Senate Comm. on Gov’t Oversight & Productivity, Interim Project Report 2007-209 (Oct. 2006), for a review of the application of the exemptions by agencies and for more background details on Florida public records law.

<sup>3</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> Section 119.011(2), F.S., defines *agency* as “any state, county, ... or municipal officer, department, ... or other separate unit of government created or established by law ... and any other public or private agency, person, ... acting on behalf of any public agency.”

received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Unless made exempt, all such materials are open for public inspection at the moment they become records.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>7</sup> 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.<sup>8</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>9</sup> provides for the systematic review of an exemption in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained 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 ... a formula, pattern, device, ... which 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.<sup>10</sup>

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.<sup>11</sup>

### Social Security and Financial Account Numbers in Official Records or Court Files

Section 119.071(5)(a) and (b), F.S., prohibits the public disclosure of SSNs and financial account numbers held by an agency. Section 119.071(5)(a)4., F.S., provides that social security numbers (SSNs) “may be disclosed to another governmental entity or its agents, employees, or contractors if disclosure is necessary for the receiving entity to perform its duties and responsibilities.” The receiving entity is required to maintain the confidential and exempt status of the numbers.

Additionally, the exemptions contain provisions and exceptions specific to SSNs and financial account numbers in official records or court files. A provision related to official records places the burden of complying with the requirement that SSNs or financial account numbers are only included if required by law on the person preparing or filing the document to be recorded.

An agency holding SSNs or financial account numbers is currently required to maintain the exempt or confidential status of such numbers. In contrast, until January 1, 2008, if such numbers are held in official records or court files, they may be inspected or copied by the public unless redaction was requested. As to court files, redaction of SSNs or financial account numbers is required only if requested for a specified record by the holder of such a number or the holder’s legal representative. As to official records, redaction of such numbers is required only if requested for a specific record by the owner of such number or the owner’s legal representative and only where such record is publicly available on an internet website. On January 1, 2008, the exempt or confidential status of SSNs and financial account numbers in official records or court files must be maintained without any person having to request redaction.

This review principally addresses the exemptions for SSNs and financial account numbers as they relate to official records and court files. The Senate Committee on Governmental Oversight and Productivity reviewed these

<sup>6</sup> *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

<sup>7</sup> Art. I, § 24(c), Fla. Const.

<sup>8</sup> *Mem’l Hosp.-W. Volusia v. News-Journal Corp.*, 729 So. 2d 373, 380 & 380 n.14 (Fla. 1999); *Halifax Hosp. Med. Ctr v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>9</sup> Section 119.15, F.S.

<sup>10</sup> Section 119.15(6)(b), F.S.

<sup>11</sup> Section 119.15(6)(a), F.S. See the *Findings* section of this report for a review of the six questions.

exemptions, in Report No. 2007-209, as they relate to such numbers held by agencies.

## METHODOLOGY

Staff reviewed applicable state and federal statutes; case law; materials of the Florida Supreme Court, Committee on Privacy and Court Records; and other related secondary information. Staff surveyed clerks of the circuit court and other interested parties for their understanding of the requirements of the SSNs and financial account numbers exemptions and their progress in meeting the January 1, 2008, deadline. Staff also met with interest groups affected by these exemptions.

## FINDINGS

### Statutorily Prescribed Sunset Review Questions

The Open Government Sunset Review Act prescribes six questions to be considered by the Legislature in deciding whether to save a public records exemption from its scheduled repeal.<sup>12</sup>

#### *1. What Specific Records Does the Exemption Affect?*

The public records exemptions under review include the exemption for SSNs and the exemption for financial account numbers held by clerks of the circuit court (clerks). These numbers may be found in documents recorded in the official records, included in a court file, or collected for the clerks' administrative records.

A SSN or financial account number may be found in an instrument that the clerk of the circuit court is required to record in the official records either because the inclusion of such number is required by law or because it is voluntarily included. Consequently, these exempt numbers may be found in the following kinds of instruments presented for recording that, pursuant to s. 28.222(3), F.S., the clerk is required to record:

(a) Deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property ...; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments.

(b) Notices of lis pendens, including notices of an action pending in a United States court having jurisdiction in this state.

(c) Judgments, including certified copies of judgments, entered by any court of this state or by a United States court having jurisdiction in this state and assignments, releases, and satisfactions of the judgments.

(d) That portion of a certificate of discharge, separation, or service which indicates the character of discharge, separation, or service of any citizen of this state with respect to the military, air, or naval forces of the United States. . . .

(e) Notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens . . . .

(f) Certified copies of petitions ... commencing proceedings under the Bankruptcy Act of the United States, decrees of adjudication in the proceedings, and orders approving the bonds of trustees appointed in the proceedings.

(g) Certified copies of death certificates ... which exclude the information that is confidential under s. 382.008, and certified copies of death certificates issued by another state whether or not they exclude the information described as confidential in s. 382.008.

(h) Any other instruments required or authorized by law to be recorded.

A SSN or financial account number may also be found in court records, which include the following: the progress docket, transcripts filed with the clerk, documentary exhibits in the clerk's custody, and electronic records, videotapes, or stenographic tapes of depositions filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings.<sup>13</sup>

Survey responses indicate that, in the maintenance of human resources related records, clerks generally collect the SSNs of employees and some combination of spouses of employees, children of employees, and other dependents or family members. Clerks generally collect bank account numbers for the purpose of the direct deposit of employee payroll and child support payments. Clerks may also collect financial account numbers because most of the clerks accept some combination of debit card, charge card, or credit card for the payment of goods, services, or information.

<sup>12</sup> Section 119.15(6)(a), F.S.

<sup>13</sup> Fla. R. Jud. Admin. 2.420(b)(1)(A) (recently renumbered from 2.051).

## ***2. Whom Does the Exemption Uniquely Affect?***

These exemptions uniquely affect employees of the courts; employees of the clerk; spouses, children, and other dependents or family members of court or clerk employees; individuals who present the clerk with instruments to be recorded; and individuals whose SSN or financial account numbers are included in an official record or a court record.

## ***3. What Is the Exemption's Public Purpose or Goal?***

In the statement of public necessity for the SSN exemption, the Legislature found that the exemption is justified because of the large amount of sensitive personal information that can be acquired with the use of a SSN which could be used to perpetuate fraud upon that person or otherwise cause great harm to that person and his or her family. Additionally, public disclosure of the SSN constitutes an unwarranted invasion into the life and personal privacy of a person.<sup>14</sup> The Legislature found that the financial account numbers exemption is justified because such numbers are of a sensitive, personal nature and disclosure of such numbers would create the opportunity for theft or fraud, thereby jeopardizing the financial security of an individual. Revealing such numbers could interfere with an individual's willingness to pay a financial debt owed to an agency or to otherwise provide such numbers to an agency for the furtherance of that agency's duties and responsibilities. When people are discouraged from providing or refuse to provide such numbers to an agency, the effective and efficient administration of that agency's programs is significantly impaired.<sup>15</sup>

The recent incident of Hewlett-Packard hiring investigators who used SSNs and other personal information to gain access to detailed logs of cell and home phones of board members is one high profile example of the harm that can occur from public access to personal information, such as SSNs or financial account numbers.<sup>16</sup> The theft or misuse of personal information, for example, SSNs or financial account numbers, is generally called identity fraud or identity theft.

<sup>14</sup> Section 2, ch. 2002-256, L.O.F.

<sup>15</sup> Section 2, ch. 2002-257, L.O.F.

<sup>16</sup> See Michael Liedtke, *HP Probe Targeted ex-CEO*, Seattle Times, Sept. 20, 2006, at E2, <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=hpforina20&date=20060920&query=hp+probe+targeted>. News reports are not clear whether investigators obtained SSNs from public records; nevertheless, the incident is illustrative of the harm that can be done with access to a person's SSN.

Government reports indicate that millions of people in the United States are victims of identity theft every year.<sup>17</sup> The loss as a result of identity theft is estimated in the billions of dollars per year.<sup>18</sup>

## ***4. Is the Information Otherwise Readily Available?***

The statutes under review provide that all SSNs held by an agency are confidential and exempt and that all financial account numbers held by an agency are exempt. Consequently, this information should not be otherwise readily available. However, data aggregators<sup>19</sup> have been gathering public record information for years that often includes SSNs and financial account numbers. Data aggregators will continue to gather such information until clerks of the circuit court meet the requirement to keep that information exempt without request for redaction, which clerks must accomplish by January 1, 2008.<sup>20</sup> Thus public records may be available with SSNs or financial account numbers to customers of data aggregators, which include employers, debt collectors, loan officers, and law enforcement among others.

## ***5. Is the Record Protected by Another Exemption?***

There are other exemptions in the Florida Statutes that protect SSNs and some part of what is covered by the exemption for financial account numbers in s. 119.071(5)(b), F.S. These other somewhat redundant exemptions are generally a part of an exemption that includes other public information and that is more narrowly tailored to a specific situation. For example, s. 97.0585, F.S., provides that the SSN, driver's license number, and Florida identification number of a voter registration applicant or voter are confidential and exempt. Because the exemptions for SSNs and financial account numbers in s. 119.071(5)(a) and (b), F.S., apply to all such numbers held by an agency, they appear to subsume such similar but more narrowly tailored exemptions. In another example, the exemption for credit

<sup>17</sup> Federal government sources estimate that close to 10 million Americans were victims of identity theft in 2003.

<sup>18</sup> One source estimated the loss as a result of identity theft at \$3.2 billion in 2003, which may or may not include the cost to businesses. Another federal government source reported the total annual cost of this crime, including business losses, at close to \$50 billion per year.

<sup>19</sup> Data aggregators (or data brokers) collect information from public records and other sources, and package it into reports that they sell to businesses and government entities.

<sup>20</sup> Until January 1, 2008, the statute permits the clerk of the circuit court to include SSNs or financial account numbers as part of the court record or official record available for public inspection and copying unless the holder or owner of such number requested redaction.

card account numbers in s. 215.322(6), F.S., is redundant with the broader exemption for financial account numbers in s. 119.071(5)(b), F.S.

#### ***6. Would It Be Appropriate to Merge the Exemption with Another Exemption?***

Section 119.071(5)(a) and (b), F.S., provide broad exemptions for SSNs and financial account numbers. A merger of either of these exemptions with another exemption would narrow their scope. Thus it would not be appropriate to merge them with any other exemptions.

However, the Legislature may wish to merge the SSN exemption of s. 97.0585, F.S., providing that the SSN, driver's license number, and Florida identification number of a voter registration applicant or voter are confidential and exempt, with the exemption in s. 119.071(5)(a), F.S. Furthermore, the Legislature may wish to consider merging the exemption for credit card account numbers in s. 215.322(6), F.S., with the similar exemption in s. 119.071(5)(b), F.S. Section 215.322(6), F.S., provides that "credit card account numbers in the possession of a state agency, a unit of local government, or the judicial branch are confidential and exempt from the provisions of s. 119.07(1)." Section 119.071(5)(b), F.S., provides that credit card numbers held by an agency are exempt. There are two notable differences. First, s. 215.322(6), F.S., provides that credit card numbers are confidential and exempt; whereas, s. 119.071(5)(b), F.S., provides only that they are exempt. This conflict was created when the Legislature amended the ch. 119, F.S., provision in 2002, changing the public records exemption for financial account numbers from confidential and exempt to exempt. Unless the will of the Legislature has changed, merging the exemption of s. 215.322(6), F.S., with the exemption of s. 119.071(5)(b), F.S., seems to be appropriate as it is consistent with the later expression of the Legislature. The second difference is that the s. 215.322(6), F.S., exemption applies to a state agency, a unit of local government, or the judicial branch; whereas, s. 119.071(5)(b), F.S., applies to agencies. The definition of agency in ch. 119, F.S., encompasses state agencies and units of local government as they are individually used in s. 215.322(6), F.S., but arguably does not include the judicial branch. Nevertheless, the provisions regarding the phased-in implementation of the ch. 119 exemption demonstrate that it clearly applies to records of the judicial branch, that is, court files.<sup>21</sup> If the Legislature chooses to merge the exemption for credit card account numbers in s. 215.322(6), F.S., with the

similar exemption in s. 119.071(5)(b), F.S., it may wish to amend ch. 119, F.S., to clearly protect financial account numbers held by the judicial branch.<sup>22</sup> This merger question highlights the broader issue related to the use of the term agency in ch. 119, F.S., provisions dealing with records of the judicial branch, which is discussed below.

#### **Additional Considerations**

##### ***Ambiguity Regarding Chapter 119, F.S., & Judicial Branch Records***

Prior to the adoption of the public records amendment to the Florida Constitution (the Sunshine Amendment),<sup>23</sup> the separation of powers doctrine<sup>24</sup> arguably precluded the Legislature from creating laws regulating the records of the judiciary. However, the Sunshine Amendment provides that the Legislature may enact exemptions from the right to inspect or copy any public record, including those of the judiciary. Furthermore, the Sunshine Amendment states that the Legislature *shall* enact laws governing the enforcement of the amendment, "including the maintenance, control, destruction, disposal, and disposition of records made public by" the Sunshine Amendment. Use of the word *shall* in this provision regarding enforcement imposes a requirement upon the Legislature to enact such laws. The provision spells out that enforcement includes *maintenance*, i.e., the act of keeping in an appropriate condition, operation, or force; *control*, i.e., to exercise restraining or directing influence over; *destruction*, i.e., a cause or means of destroying; *disposal*, i.e., the act or process of getting rid of something; and *disposition*.<sup>25</sup> The amendment also provides that each house of the Legislature may adopt rules governing enforcement related to records of the legislative branch. As to the judiciary, the amendment only provides that rules of court that are in effect on the date of adoption of this amendment *limiting access* to records shall remain in effect until they are repealed.

Coinciding with the adoption of the Sunshine Amendment, the Florida Supreme Court adopted Fla. R. Jud. Admin. 2.420, that addresses public access to judicial records and specifies public records exemptions. Despite the language of the Sunshine Amendment

<sup>21</sup> See s. 119.071(5)(a)7.d. & g., F.S.

<sup>22</sup> See *Additional Considerations* for the recommendation that the Legislature add the exemptions of this review to the s. 119.07(6), F.S., list of ch. 119 exemptions that are applicable to public records made part of a court file.

<sup>23</sup> Art. I, § 24, Fla. Const. (effective July 1, 1993).

<sup>24</sup> Art. II, § 3, Fla. Const.

<sup>25</sup> See Dictionary.com Unabridged (v 1.0.1), at <http://www.dictionary.com>.

arguably to the contrary, courts continue to assert that “‘access to judicial records ... is governed exclusively by rule [2.420]’”<sup>26</sup> and that “‘clerks of circuit court are not subject to ... chapter 119, the Public Records Act.’”<sup>27</sup> Adding to the confusion, on the one hand, Florida case law notes that rule 2.420(c)(8) incorporates statutory public records exemptions,<sup>28</sup> while on the other hand, a recent Florida Supreme Court administrative order notes that the court has not decided whether rule 2.420 incorporates or absorbs statutory exemptions.<sup>29</sup>

Public records case law in Florida does not clarify these ambiguities. In 1981, the Florida Supreme Court stated that the ch. 119, F.S., definitions of *public records* and *agency* are broad enough to include the records of the judicial branch.<sup>30</sup> As would be expected in a pre-Sunshine Amendment decision, the court made a separation of powers argument for why the Legislature could not regulate judicial branch records, which it stated was purely a judicial function.<sup>31</sup> In 1992, the Florida Supreme Court held that the ch. 119, F.S., “definition of ‘agency’ does not, by its terms, include the legislature or its members.”<sup>32</sup> In 1995, the Florida Supreme Court, apparently taking a position contrary to its 1981 decision, held that the Second District Court correctly interpreted ch. 119, F.S., in reaching its decision that the judiciary is not an agency.<sup>33</sup> Finally, in a post-Sunshine Amendment decision, the Florida Supreme Court cited to the above-mentioned 1981 decision for the same separation of powers argument, despite the enactment of the Sunshine Amendment in 1992.<sup>34</sup> However, the court’s separation of powers argument, with citation to a pre-Sunshine Amendment decision, appears to be dicta because regardless of whether the Legislature can regulate

records of the judiciary, i.e., the public records of the Florida Bar, a rule of court makes the Florida Bar records of the disciplinary matter at issue confidential.<sup>35</sup>

With the adoption of the Sunshine Amendment,<sup>36</sup> the authority of the case law holding that the constitutional separation of powers doctrine prevents the application of ch. 119, F.S., to the judiciary or judicial branch records<sup>37</sup> seems to be called into question. However, the case law finding that the judiciary is not an agency based on statutory interpretation of ch. 119 and the finding that “chapter 119 does not apply to the judiciary or judicial records”<sup>38</sup> appears to still have authority.<sup>39</sup> First, the definition of agency in ch. 119, F.S., encompassing both state agencies and units of local government, arguably does not include the judicial branch. Second, ch. 119, F.S., defines public records to include only records of agencies; therefore, by inference, public records do not include records of the judicial branch. Despite the plain language of these definitions and the judiciary’s finding that ch. 119 does not apply to the judiciary or judicial records, the subject of this review illustrates the Legislature’s intent for certain ch. 119, F.S., public record exemptions to apply to judicial records.

For several years, the judiciary has been studying the issue of access to court records with a focus on electronic access. To assist in developing the necessary policies for electronic access, on August 21, 2006, the Florida Supreme Court established the Committee on Access to Court Records with the primary purpose of reviewing Fla. R. of Jud. Admin. 2.420, with a final report due by June 1, 2008.<sup>40</sup> As previously discussed, article I, section 24(c) of the Florida Constitution provides the Legislature with the authority to create public records exemptions and to enact laws regarding enforcement that apply to the judicial branch. Consistent with this authority, ch. 119, F.S., contains public records exemptions for certain *judicial records*; yet, by statutory definition, the records

<sup>26</sup> *Times Publ’g Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995) (quoting *Times Publ’g Co. v. Ake*, 645 So. 2d 1003, 1005 (Fla. 2d DCA 1994)). Note: Fla. R. Jud. Admin. 2.420 was formerly Fla. R. Jud. Admin. 2.051.

<sup>27</sup> *Sarasota Herald-Tribune v. State*, 924 So. 2d 8, 15 n.2 (Fla. 2d DCA 2005).

<sup>28</sup> *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998) (citing *Florida Publ’g Co. v. State*, 706 So. 2d 54, 55 (Fla. 1st DCA 1998)).

<sup>29</sup> *In re: Comm. on Access to Court Records*, Fla. Admin. Order No. AOSC06-27 (Aug. 21, 2006), <http://www.florida-supremecourt.org/clerk/adminorders/2006/sc06-27.pdf>.

<sup>30</sup> *Florida Bar*, 398 So. 2d 446, 447 (Fla. 1981) (citing Florida Statutes (1979), which defined *public records* and *agency* essentially the same as they are defined in Florida Statutes (2006)).

<sup>31</sup> *Id.*

<sup>32</sup> *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992).

<sup>33</sup> *Times Publ’g Co.*, 660 So. 2d at 257.

<sup>34</sup> *Florida Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005) (citing *Florida Bar*, 398 So. 2d at 447).

<sup>35</sup> R. Regulating Fla. Bar 3-7.1(a)(1).

<sup>36</sup> Art. I, § 24, Fla. Const. (effective July 1, 1993).

<sup>37</sup> See *Times Publ’g Co.*, 660 So. 2d at 257 (holding that “the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records ..., are an arm of the judicial branch” and are not subject to the oversight and control of the legislative branch).

<sup>38</sup> *Times Publ’g Co.*, 645 So. 2d at 1004 (arising from a public records request pre Art. I, § 24, Fla. Const.).

<sup>39</sup> *Times Publ’g Co.*, 660 So. 2d at 257 (holding that the Second District Court correctly applied to the *judiciary* the Florida Supreme Court’s finding in *Locke*, 595 So. 2d at 36, that the definition of agency in ch. 119, F.S., “does not, by its terms, include the legislature or its members”).

<sup>40</sup> Fla. Admin. Order No. AOSC06-27.

of the judiciary arguably may not be public records. The Legislature may wish to amend ch. 119, F.S., to address the applicability and enforcement of ch. 119, F.S., to the judiciary or judicial records to clarify the Legislature's intent as a precursor to the judiciary's review of Fla. R. of Jud. Admin. 2.420.

Section 119.07(6), F.S., provides that, other than an enumerated list of exemptions, nothing in ch. 119, F.S., shall be construed to exempt from the public records law a public record made part of a court file.<sup>41</sup> The s. 119.071(5)(a) and (b), F.S., exemptions, which are the subject of this review, are not included in the s. 119.07(6), F.S., list of exemptions. Consequently, if the Legislature chooses not to address the broader ch. 119, F.S., issues discussed above, it may wish to consider adding the exemption provisions of this review to the list of exemptions in s. 119.07(6), F.S., that apply to public records made part of a court file.

#### ***Definitions Needed for Confidential & Exempt Versus Exempt Only***

Thirty-seven percent of the county clerk of circuit court survey respondents indicated the need for clarification of the meaning and application of confidential and exempt versus only exempt public record exemptions. Although s. 119.011, F.S., provides a definition of exempt, it is a general definition that does not elucidate the distinction between confidential and exempt, and only exempt.

The Legislature may wish to codify the meaning of these terms as they have been determined by case law. If a public record is confidential and exempt, the record is not subject to inspection by the public and may be released only as designated by statute.<sup>42</sup> If a public record is only exempt, the exemption does not prohibit the showing of such a record.<sup>43</sup> The decision to release a public record that is only exempt should focus on the policy behind the exemption and whether there is a statutory need for disclosure.

#### ***Responsibility of Clerk in "Collecting" & "Segregating" Social Security Numbers***

Survey results indicate that clerks of the circuit court disagree as to the meaning of the requirements of s. 119.071(5)(a)2., F.S., that:

- [a]n agency may not collect an individual's SSN unless authorized by law to do so, and
- an agency that collects SSNs shall also segregate that number on a separate page from the rest of the record, or as otherwise appropriate, in order that the SSN be more easily redacted.

Some clerks contend that they do not *collect* SSNs in the traditional sense of a regulatory agency; on the contrary, they *receive* SSNs in their ministerial role of accepting documents for filing. The significance of this distinction goes to whether the clerk of the circuit court has responsibility to review all filed documents and whether the clerk is responsible for segregating SSNs from the rest of the record.<sup>44</sup> If the clerk *collects* SSNs, it follows, arguably, that he or she is responsible for reviewing all filed documents. In this case, there is also confusion regarding the meaning of the requirement to segregate SSNs on a separate page or "as otherwise appropriate." Some clerks maintain that "as otherwise appropriate" means that segregation of SSNs on a separate page is not required; therefore, alternative means, such as the use of automatic redaction software, are permitted to facilitate the redaction of SSNs.

Answering the question of whether the clerk of the circuit court *collects* or *receives* an individual's SSN is complicated by the dual roles that the clerk fulfills as custodian of court records as well as custodian of official records. Furthermore, survey responses indicate that currently most clerks of the circuit court do not review documents as they are filed. In a recent administrative order, the Florida Supreme Court noted that "[t]he responsibility for identifying unauthorized filings cannot be placed on the clerks of court."<sup>45</sup> If the Legislature's intent is to require clerks to review all documents, then there is a significant human resources issue to be addressed before the clerks can implement such a requirement.

The Legislature may wish to consider providing clarification of its intent related to these issues.

<sup>41</sup> Section 119.07(6), F.S., also provides that a public record made part of a court file and closed by order of court is exempt from inspection and copying.

<sup>42</sup> *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

<sup>43</sup> *Id.* at 54.

<sup>44</sup> The Florida Supreme Court has stated that "the clerks, as ministerial officers charged with maintaining custody of court records, cannot and should not be responsible for making substantive decisions regarding whether documents accepted for filing are confidential." *In re: Implementation of Report & Recommendations of the Comm. on Privacy & Court Records*, Fla. Admin. Order No. AOSC06-20 (Jun. 30, 2006), <http://www.floridasupremecourt.org/clerk/adminorders/2006/sc06-20.pdf>.

<sup>45</sup> Fla. Admin. Order No. AOSC06-27.

### Conflicting Provisions

Section 119.07(2)(a), F.S., appears to be in conflict with s. 119.071(5)(a)7.a. and e., F.S. The former states that a custodian of public records may only make public records accessible to the public by remote electronic means if exempt or confidential information is not disclosed. On the other hand, s. 119.071(5)(a)7.a. and e., F.S., provides that SSNs or financial account numbers that have been included in the official records may be made available as part of the official record available for public inspection and copying including on a publicly available Internet website. Offsetting this apparent conflict is the provision in s. 119.071(5)(a)7.e., F.S., providing if official records are stored electronically, there must be best efforts made to redact all SSNs and financial account numbers. However, survey responses indicate that in many counties where the official records are available by remote electronic means, best efforts have not yet been made to redact all SSNs and financial account numbers. As would be expected, random on-line queries of the official records of several counties revealed numerous instances of unredacted SSNs.

The Legislature may wish clarify its intent regarding the electronic access of public records pending the January 1, 2008, deadline for redaction of SSNs and financial account numbers.

### Continuing Necessity for the Exemptions

The Open Government Review Act specifies that a public records exemption may be maintained only if it serves an identifiable public purpose and that the exemption may not be broader than necessary to meet that purpose.<sup>46</sup> In addition, to maintain an exemption, the Legislature must find that the exemption's public purpose is "sufficiently compelling to override the [state's] strong public policy of open government."<sup>47</sup>

The exemptions under review in this report protect information of a sensitive personal nature concerning individuals, the release of which information could be used to cause great harm to the individual.

As the Legislature has noted and studies have demonstrated, there is a large amount of sensitive personal information that can be acquired with the use of a SSN that could be used to perpetuate fraud upon a person or otherwise cause great harm to a person and his or her family. Thus the public records exemption for SSNs satisfies a compelling public purpose as it protects

information of a sensitive personal nature the release of which could cause great harm.<sup>48</sup>

As the Legislature has stated, permitting access to financial account numbers could interfere with an individual's willingness to pay a financial debt owed to an agency for the furtherance of that agency's duties and responsibilities. Thus the public records exemption for financial account numbers satisfies a compelling public purpose as it allows for the effective and efficient administration of a governmental program that would otherwise be significantly impaired.<sup>49</sup>

## RECOMMENDATIONS

This report recommends that the Legislature retain the public records exemptions established in s. 119.071(5)(a) and (b), F.S., which exempt social security numbers and financial account numbers in records held by clerks of the circuit court and county recorders. These exemptions are drawn as narrowly as possible to meet the public necessities identified, protecting only these numbers within public documents.

This report further recommends the following statutory changes to address the issues discussed in the *Findings* section:

- merge the s. 215.322(6), F.S., exemption for credit card numbers with s. 119.071(5)(b), F.S.;
- clarify the applicability of ch. 119, F.S., to the judiciary and judicial records;
- amend s. 119.07(6), F.S., to include the exemptions that are the subject of this review;
- amend s. 119.011, F.S., to revise the definition of *exempt* and add a definition of *confidential and exempt*; and
- make other clarifications to ch. 119, F.S., as identified in the *Findings* section.

<sup>46</sup> Section 119.15(6)(b), F.S.

<sup>47</sup> *Id.*

<sup>48</sup> Section 119.15(6)(b)2., F.S.

<sup>49</sup> Section 119.15(6)(b)1., F.S.