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Committee on Children, Families, and Elder Affairs

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 63.0541, F.S., RELATING TO THE FLORIDA PUTATIVE FATHER REGISTRY

SUMMARY

Section 63.054, F.S., establishes the Putative Father Registry (the Registry), which requires an unmarried biological father to file a claim of paternity form, prior to the birth of a child and before a petition for termination of parental rights is filed, in order to protect his parental rights to the child.

The information contained in the Registry is made confidential and exempt from public disclosure, except to certain, specified individuals, by s. 63.0541, F.S. This exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will sunset on October 2, 2008, unless saved from repeal through reenactment by the Legislature.

This report reviews the public records exemption relating to the Registry, and recommends that the exemption be retained with modification relating to the exceptions to the exemption.

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.²

Consistent with this constitutional provision, Florida's Public Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.³

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.⁴

BACKGROUND

Florida Public Records Law

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:

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

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency⁵ in connection with official business, which are used to "perpetuate, communicate or

² Fla. Const. art. I, s. 24(a).

³ Section 119.07, F.S.

⁴ Section 119.011(11), F.S.

⁵ 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."

¹ Sections 1390, 1391 F.S. (Rev. 1892).

formalize knowledge.”⁶ Unless made exempt, all such materials are open for public inspection as soon as they become records.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.⁹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption or substantially amending an existing exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹²

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.¹³ If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁴ If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information.¹⁵

Open Government Sunset Review Act

Section 119.15, F.S., the Open Government Sunset Review Act, provides for the systematic review of exemptions from the Public Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.¹⁶ Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.¹⁷

Pursuant to the Open Government Sunset Review Act, an exemption may be created, revised or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves.¹⁸ An identifiable public purpose is served if the exemption meets one of three specified purposes and 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 exemption meets the statutory criteria if it:

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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 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 would injure the affected entity in the marketplace.¹⁹

The Act also requires the Legislature to consider six questions that go to the scope, public purpose and necessity for the exemption.²⁰

Putative Father Registry

In 2003, pursuant to the unanimous vote of the House and Senate, Florida enacted a Putative Father Registry

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984).

⁸ Fla. Const. art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pursuant to s. 119.15 (4)(b), F.S., an existing exemption is considered substantially amended if the exemption is expanded to cover additional records.

¹² Fla. Const. art. I, s. 24(c).

¹³ *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA), *review denied*, 892 So.2d 1015 (Fla. 2004).

¹⁴ *Id.*

¹⁵ *Id.* at 54.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(5)(a), F.S.

¹⁸ Section 119.15(6)(b), F.S.

¹⁹ *Id.*

²⁰ Section 119.15(6)(a), F.S. See the Findings section of this report for a review of the six questions as they relate to this particular exemption.

(Registry),²¹ joining at least 23 other states with similar legislation.²²

The Office of Vital Statistics in the Department of Health maintains the Registry. In order to establish parental rights, an unmarried biological father must file a claim of paternity form with the Registry prior to the birth of the child and before a petition for termination of parental rights is filed.²³

The claim of paternity form includes the registrant's name, address, date of birth, and physical description; the date, place, and location of conception; the mother's name, address, date of birth, and physical description; and the name, date, and place of birth of the minor child or estimated date of birth of the expected minor child, if known.²⁴

By filing with the Registry, the potential father claims paternity for the child and confirms his willingness to support the child.²⁵ Additionally, he consents to DNA testing, and may ultimately be required to pay child support.²⁶

The putative father may change his mind and, prior to the birth of the child, execute a notarized revocation of the claim of paternity.²⁷ Once that revocation is received, the claim of paternity is deemed null and void. Additionally, if a court determines that a registrant is not the father of a minor, the court will order the man's name removed from the Registry.²⁸

Section 63.0541, F.S., provides that all information contained in the Registry is confidential and exempt

from public disclosure, **except** that such information shall be disclosed to the following:

- (a) An **adoption entity**, upon the filing of a request for a diligent search of the Florida Putative Father Registry in connection with the planned adoption of a child;
- (b) The **registrant unmarried biological father**, upon receipt of a notarized request for a copy of his registry entry only; and
- (c) The **court**, upon issuance of a court order concerning a petitioner acting *pro se* in an action under this chapter.²⁹

The information in the Registry database is to be maintained separately from all other databases and is inaccessible, except as provided, to any other state or federal agency or entity.³⁰

The statement of public necessity for making information contained in the Registry exempt and confidential was based on the Legislature's finding that the well-being of adopted persons and their birth and adoptive parents depends on the termination of existing parental rights, in accordance with due process law.³¹ The Legislature concluded that protecting the confidentiality and precluding the disclosure of information contained in the Registry would:

- Encourage unmarried biological fathers to register, in order to claim paternity and preserve their parental rights;
- Prevent unnecessary and unwarranted intrusion into the privacy of the individuals involved, by preventing the revelation of details about intimate, sexual relations; and
- Promote the collection of information "integral to the best interests" of the child who is the subject of the registration.

The Legislature concluded that due process and privacy rights outweighed any benefits of disclosure.³²

METHODOLOGY

Staff reviewed applicable Florida statutes, as well as the statutes of other states and uniform laws on the

²¹ Section 63.054, F.S.

²² Child Welfare Information Gateway, *Rights of Presumed (Putative) Fathers: Summary of State Laws* (October 2004), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/putativeall.pdf. The information in this summary is not current as to Virginia, which established a putative father registry effective July 1, 2007; this report, however, reflects that update.

²³ Section 63.054(1), F.S.

²⁴ Section 63.054(3), F.S. *See also*, Florida Putative Father Registry Claim of Paternity, Form DH 1965 (Rev.7/05), available at http://www.doh.state.fl.us/planning_eval/vital_statistics/putative.htm (last visited June 13, 2007).

²⁵ Section 63.054(1), F.S.

²⁶ Section 63.054(2), F.S.

²⁷ Section 63.054(5), F.S.

²⁸ *Id.*

²⁹ Section 63.0541(1), F.S.

³⁰ Section 63.0541(2), F.S.

³¹ Section 3, L.O.F. 2003-56.

³² *Id.*

subject. Staff surveyed the Department of Health, Office of Vital Statistics, and interviewed the Child Support Enforcement program staff of the Department of Revenue.

FINDINGS

At least 24 states, including Florida, have statutes authorizing the establishment of putative father registries.³³ Provisions for access to the information maintained in the registries vary by state. Categories of persons and entities entitled to access in various states include the following:³⁴

- Birth mothers;³⁵
- Courts;³⁶
- Attorneys;³⁷
- Licensed adoption agencies;³⁸
- Prospective adoptive parents;³⁹
- State departments or divisions of social services;⁴⁰
- State offices of child support enforcement;⁴¹
- Any other person upon a court order for good cause shown;⁴²
- Registries of other States;⁴³
- The child who is the subject of the registration;⁴⁴ and

³³ Child Welfare Information Gateway, *Rights of Presumed (Putative) Fathers: Summary of State Laws* (October 2004), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/putativeall.pdf (last visited June 12, 2007).

³⁴ *Id.*

³⁵ *Id.* (Arkansas, Delaware, Illinois, Indiana, Iowa, Minnesota, Missouri, Montana, New Mexico, Ohio, Texas, Virginia.)

³⁶ *Id.* (Alabama, Arizona, Delaware, Florida, Indiana, Iowa, Louisiana, Missouri, New Mexico, New York, Oklahoma, Texas, Virginia, Wyoming.)

³⁷ *Id.* (Arizona, Arkansas, Delaware, Georgia, Illinois, Indiana, Iowa, Minnesota, Missouri, Montana, New Mexico, Ohio, Texas, Virginia.)

³⁸ *Id.* (Arizona, Delaware, Florida, Georgia, Indiana, Louisiana, Missouri, Montana, New Mexico, New York, Ohio, Oklahoma, Texas, Virginia, Wyoming.)

³⁹ *Id.* (Delaware, Illinois, Indiana, Montana, and Oregon.)

⁴⁰ *Id.* (Arizona, Arkansas, Georgia, Illinois, Iowa, Missouri, Nebraska, New Mexico, and Oklahoma.)

⁴¹ *Id.* (Arkansas, Delaware, Iowa, Minnesota, Texas, Virginia.)

⁴² *Id.* (Alabama, Iowa, Louisiana, Missouri, Nebraska, New Mexico, New York, Oklahoma, and Wyoming.)

⁴³ *Id.* (Delaware, Texas, Virginia.)

- The registered father.⁴⁵

The Uniform Parentage Act of 2000 provides that information contained in a putative father registry is confidential and may be released on request only to:

- A court or a person designated by a court;
- The mother of the child who is the subject of the registration;
- An agency authorized by other law to receive the information;
- Licensed child-placing agencies;
- Child support-enforcement agencies;
- A party or the party's attorney of record in a proceeding under this [Act] or in a proceeding for adoption of, or for termination of parental rights regarding, a child who is the subject of the registration; and
- The registry of paternity in another State.⁴⁶

The Uniform Act also provides that the agency maintaining the registry must send a copy of the registration to the birth mother if her address is available.⁴⁷

The Legislature's statement of public necessity for this exemption suggests that the purpose for the exemption is to protect sensitive, personal information, the release of which could damage the reputation of the individuals involved:

The Legislature . . . finds that the confidentiality and exemption from public disclosure provided by this act **prevents unnecessary and unwarranted intrusion into the right of privacy of personal and sensitive information**, including the existence of intimate sexual relations (emphasis added).⁴⁸

In addition, the Legislature found that the goal of the Registry, to ensure that a child is legally free for adoption, is accomplished when existing parental rights are fairly and finally terminated. The Legislature concluded that if an unmarried biological father knew that his personal information was confidential and exempt from public disclosure, he would be more likely to register, thus advancing the goal of finality:

⁴⁴ *Id.* (Arkansas and Indiana.)

⁴⁵ *Id.* (Arkansas, Florida and Indiana.)

⁴⁶ Uniform Parentage Act (2000), art. 4, part 2, s. 412 (b).

⁴⁷ Uniform Parentage Act (2000), art. 4, part 2, s. 412 (a).

⁴⁸ Section 3, L.O.F. 2003-56.

The Legislature finds that protecting the confidentiality and preventing the disclosure of the information contained in the Florida Putative Father Registry **will encourage putative fathers who wish to claim paternity and assert parental rights to register** in order to preserve their right to receive notice and consent to an adoption (emphasis added).⁴⁹

The Legislature also noted that making the information in the Registry confidential and exempt would ensure that necessary information, even though personal and sensitive in nature, would be available to serve the best interests of the child involved in a proceeding:

Disclosure of information in the registry may also deter the collection of information integral to the best interests of a child who is or may become the subject of a proceeding for the termination of parental rights pending adoption or other relevant proceeding (emphasis added).⁵⁰

The exemption thus appears to have an identifiable public purpose that meets the goal of protecting sensitive personal information as stated in s. 119.15(6)(b)2, F.S. This public purpose is compelling and cannot be accomplished without making the sensitive information confidential and exempt.

While the exemption appears to meet the public purpose requirement of subsection (6)(b) of the Open Government Sunset Review Act, consideration must also be given to whether it is broader than necessary to meet the public purpose it serves.

Because the information in the Registry is confidential as well as exempt, it may be released only to the individuals or entities designated in the statute:⁵¹

- An adoption entity;
- Registrant unmarried biological father; and
- Court in a *pro se* case.⁵²

No other individual or entity may have access to the information in the Registry.

In some states, however, individuals and entities other than those designated in Florida's statute are allowed access to information in their putative father registries. At least half the states that have putative father registries, for example, allow the birth mother to access information contained in it, and 25 percent allow the state's child support enforcement unit to have access.⁵³

The limited exceptions to this exemption may render the exemption broader than necessary to meet its public purpose. For example, allowing the birth mother to have access to the information contained in the Registry would not affect the public purpose of protecting sensitive information, since the information concerns the birth mother. It seems reasonable that the birth mother should be allowed to access information about a man who has registered as the biological father of her child.

Consideration was also given to whether allowing the Florida Child Support Enforcement program (CSE) to have access to the Registry would constitute a benefit that would outweigh the public purpose of protecting sensitive information.

According to the CSE, locating non-custodial parents is the most difficult and time-consuming part of the child support enforcement process, because non-custodial parents often move, work "off the books," or don't work at all, in order to avoid paying child support.⁵⁴

The CSE accesses various databases in its efforts to locate non-custodial parents. The databases include employer new hire reports, financial institution records, IRS information, driver and other license records, government program records, utility company records and Internet databases.⁵⁵

The CSE was asked to consider whether the program would benefit from access to the information contained in the Registry. In response, the CSE acknowledged that it might be possible to identify a potential father or obtain location information for a father from the Registry, but noted that the likelihood of obtaining any valuable information was limited because the data in the Registry is so limited.⁵⁶ The CSE expressed

⁴⁹ Section 3, L.O.F. 2003-56.

⁵⁰ Section 3, L.O.F. 2003-56.

⁵¹ *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA), review denied, 892 So.2d 1015 (Fla. 2004).

⁵² Section 63.0541(1), F.S.

⁵³ See "Findings" section of this report, *supra*.

⁵⁴ See

<http://dor.myflorida.com/dor/childsupport/works.html#no>

⁵⁵ *Id.*

⁵⁶ Patterson Poulson, Establishment Process Manager, Child Support Enforcement Program, *CSE Access to the Florida Putative Father Registry* (August 3, 2007) (on file

concerns that the limited utility of access to the Registry would be outweighed by the additional responsibilities it might create for the program.⁵⁷

Because the potential benefit to the CSE is so slight, creating an additional exception to the confidentiality of the information contained in the Registry for the CSE is not warranted at this time.

Statutorily Prescribed Sunset Review Questions

The Open Government Sunset Review Act requires the Legislature to consider six questions when it is deciding whether to save a public records exemption from scheduled repeal.

1. *What specific records does the exemption affect?*

The exemption at issue here makes “all information contained in the . . . Registry . . .” confidential and exempt.⁵⁸ The claim of paternity form, which collects the information that is added to the Registry database, includes the names, addresses, dates of birth, and physical descriptions of the registrant and the mother; the date, place, and location of conception; and the name, date, and place of birth of the minor child or estimated date of birth of the expected minor child, if known.⁵⁹ All of this information is “identifying” in nature and, as such, all information in the database would appear to be legitimately protected under the public necessity statement.

2. *Whom does the exemption uniquely affect, as opposed to the public?*

This exemption uniquely affects unmarried, putative, biological fathers who register with the Putative Father Registry, as well as the birth mothers and children who are the subject of the registrations.

As of July 2007, a total of 515 (or an average of 129 per year) unmarried biological fathers had registered with the Registry.⁶⁰ In Florida in 2005, there were 96,107 live births to unwed mothers, representing

almost 43 percent of all live births in the state.⁶¹ On average, approximately one-tenth of one percent of live births to unwed mothers results in a corresponding registration by a father with the Registry. The small number of registrants may indicate that very few unmarried biological fathers know about the Registry.⁶²

3. *What is the identifiable public purpose or goal of the exemption?*

As discussed above, making the information in the Registry confidential and exempt prevents the unnecessary and unwarranted disclosure of personal and intimate information, makes it more likely that putative fathers will register and, in turn, protects the integrity and stability of subsequent adoptions or other actions involving the child.

4. *Can the information be readily obtained by alternative means? If so, how?*

The information in the Registry cannot be readily obtained by alternative means.

5. *Is the record protected by another exemption?*

The information in the Registry may be partially protected by another exemption.

Section 63.089(8), F.S., provides that all records pertaining to termination of parental rights (TPR) proceedings are subject to the confidentiality provisions of s. 63.162, F.S., which generally makes all records relating to adoptions confidential and exempt from public disclosure.

with the Senate Committee on Children, Families and Elder Affairs).

⁵⁷ *Id.*

⁵⁸ Section 63.0541(1), F.S.

⁵⁹ Florida Putative Father Registry Claim of Paternity, Form DH 1965 (Rev.7/05), available at http://www.doh.state.fl.us/planning_eval/vital_statistics/Putative.htm (last visited June 13, 2007).

⁶⁰ Ken Jones, Deputy State Registrar, Department of Health, Office of Vital Statistics, Survey Response (July 2007) (on file with the Senate Committee on Children, Families and Elder Affairs).

⁶¹ Department of Health, Office of Vital Statistics, *Table 1: Resident Live Births . . . January through December 2005*, available at http://www.doh.state.fl.us/Planning_eval/Vital_Statistics/VitalNews/TABLE1_Jan_Dec_2005.pdf (last visited September 18, 2007).

⁶² In a recent case, the Florida Supreme Court held that an unmarried biological father, who is known or identified by the mother as the potential father and who is locatable by diligent search, may have his parental rights terminated based on his failure to file a claim with the Registry, but only if he was served with notice and failed to comply with the requirements of the notice. *Heart of Adoptions, Inc. v. J.A.*, ---So.2d---, 2007 WL 2002660 (Fla.), 32 Fla. L. Weekly S455 (July 12, 2007). *See also*, Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. Times, March 19, 2006, available at http://www.nytimes.com/2006/03/19/national/19fathers.html?_r=1&ei=5088&en=baf07e517cb5f44&ex=...&adxnln=1&oref=slogin&adxnlnx=1190221065-1vQg/A/DLEMflzcFxi16RA (last visited September 19, 2007).

A court may hold a TPR hearing only when it has received evidence that all parties whose consent to the adoption is required have received adequate notice of the hearing.⁶³ Evidence may be in the form of an executed consent to adoption, an affidavit of non-paternity, or a certificate from the Office of Vital Statistics stating that a search of the Registry has been made and no filing has been found or, if a filing has been found, stating the name of the father and the time and date of the filing.⁶⁴ The exemption provided by s. 63.089(8), F.S., makes the information obtained from the Registry and provided to the court confidential and exempt, but it does not protect the other information contained in the Registry.

6. Are there multiple exemptions for the same type of record that it would be appropriate to merge?

The information contained in the Registry is unique, and it does not appear that it would be appropriate to merge the exemption with any other statutory exemption.

RECOMMENDATIONS

This report recommends that the Legislature retain the public records exemption established in s. 63.0541, F.S., which makes information contained in the Putative Father Registry confidential and exempt from public disclosure. The exemption is narrowly drawn to meet the stated and compelling public necessity of protecting information of a sensitive and private nature and encouraging the use of the Registry.

The Legislature might consider narrowing the exemption by expanding the exceptions to allow birth mothers to have access to the information contained in the Registry.

⁶³ Section 63.089(2)(a), F.S.

⁶⁴ *Id.*