



The Florida Senate

Interim Project Report 2002-216

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Committee on Ethics and Elections

Senator Debby P. Sanderson, Chairman

CONFIDENTIALITY OF ETHICS COMPLAINTS

SUMMARY

The public records and public meetings exemption for complaints and preliminary investigations of alleged violations of the Code of Ethics for Public Officers and Employees will be automatically repealed on October 2, 2002, unless reviewed and reenacted by the Legislature pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Section 112.324, F.S., provides that a complaint filed with the Commission on Ethics or a county Commission on Ethics and Public Trust, and all records and proceedings relating to the complaint, be confidential either until the alleged violator waives confidentiality or the preliminary investigation is completed. The stated public purpose of this exemption when enacted by the Legislature was to protect the good name or reputation of an individual under investigation until such time as the allegations could be substantiated through an investigation and to allow the Commission to conduct its investigation free from unnecessary scrutiny by the public or media.

It is recommended that the current public records and public meetings exemption for complaints of alleged ethics violations be maintained and reenacted.

to governmental records and meetings of the executive branch and other governmental agencies.

In November of 1992, the public affirmed its approval of Florida's tradition of "government in the sunshine" by enacting a constitutional amendment to guarantee the practice. Art. I, section 24, Fla. Const. The amendment had the effect of including in the Florida Constitution provisions similar to those of the Public Meetings Law and the Public Records Law and of applying those provisions to all three branches of government.

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

...all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency.

The definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided: (1) the law creating

BACKGROUND

Open Government Sunset Review Act of 1995

Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. The current Public Records law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided

the exemption states with specificity the public necessity justifying the exemption; and, (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment *expands* the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment *narrows* the scope of the exemption.

An exemption is repealed on October 2 of the fifth year after its enactment or substantial amendment, unless the Legislature acts to reenact the exemption.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

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

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the "identifiable public purpose" or goal of the exemption?

- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be created or maintained only if it serves an "identifiable public purpose." An "identifiable public purpose" is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

In addition, the exemption must be no broader than is necessary to meet the public purpose it serves. Finally, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

METHODOLOGY

Committee staff reviewed the legislative history of s. 112.324(1), F.S., and rules of the Florida Commission on Ethics. Staff also interviewed staff of the Commission and surveyed the Miami-Dade County Commission on Ethics and Public Trust. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

Section 112.324(1), Florida Statutes

The Commission on Ethics was created in 1974 to serve as “guardian of the standards of conduct for the officers and employees of the state and of a county, city, or other political subdivision of the state...” s. 112.320, F.S. The commission was authorized to receive and investigate complaints of the Code of Ethics for Public Officers and Employees and to report its findings to the proper disciplinary official. If the Commission determined that an officer or employee had committed a violation, the findings were transmitted to the person involved and the disciplinary official. At that time, the findings became a matter of public record. s. 112.322, F.S., (1974)

In 1975, the Legislature revised the procedures on complaints of violations and provided that “all proceedings, the complaint and other records relating to the preliminary investigation, ... including the dismissal of the complaint, shall be confidential either until the alleged violator requests in writing that such investigation and records be made public records or until the preliminary investigation is completed ...” s. 112.324, F.S., (1975) This provision was not substantially amended again until 1997 when the confidentiality provisions were expanded to include complaints, proceedings, and records of a Commission on Ethics and Public Trust established by a county. This 1997 amendment substantially changed the exemption and triggered the repeal and review required by the Open Government Sunset Review Act of 1995.

Section 112.324(1), F.S. currently provides:

- (1) Upon a written complaint executed on a form prescribed by the commission and signed under oath or affirmation by any person, the commission shall investigate any alleged violation of this part or any other alleged breach of the public trust within the

jurisdiction of the commission as provided in s. 8(f), Art. II of the State Constitution in accordance with the procedures set forth herein. Within 5 days after receipt of a complaint by the commission, a copy shall be transmitted to the alleged violator. *All proceedings, the complaint, and other records relating to the preliminary investigation as provided herein, or as provided by a Commission on Ethics and Public Trust established by any county defined in s. 125.011(1), shall be confidential and exempt from the provisions of s. 119.07(1), and s. 24(a), Art. I of the State Constitution, either until the alleged violator requests in writing that such investigation and records be made public records or the preliminary investigation is completed, notwithstanding any provisions of chapter 120 or s. 286.011 and s. 24(b), Art. I. of the State Constitution. In no event shall a complaint under this part against a candidate in any general, special, or primary election be filed or any intention of filing such a complaint be disclosed on the day of any such election or within the 5 days immediately preceding the date of the election. This subsection is repealed October 2, 2002, and must be reviewed by the Legislature before that date in accordance with s. 119.15, the Open Government Sunset Review Act of 1995.*

(emphasis added).

Section 112.317, F.S.

Section 112.317(6), F.S., provides that a person who discloses his or her intention to file a complaint, the existence or contents of a filed complaint, or any other information regarding a confidential preliminary investigation of the commission before it becomes public, is guilty of a first degree misdemeanor. In 1988, the United States District Court, Southern District of Florida, declared this provision facially unconstitutional. *Doe v. Gonzalez*, 723 F.Supp. 690 (S.D.Fla. 1988) Therefore, although still on the books, this penalty provision has not been enforced for over a decade.

The practical result of the court decision is that the Commission on Ethics is the only entity not allowed to disclose information regarding a complaint, or even acknowledge the existence of a complaint. The

complainant and witnesses are free to discuss the issues surrounding a complaint.

Procedures Regarding Complaints

Upon receipt, the staff of the Commission on Ethics reviews each complaint to insure that the proper form has been used, that all information required has been provided, and that the complaint has been signed under oath. Rule 34-5.001, F.A.C. Within 5 days after its receipt, the Commission sends a copy of the complaint to the alleged violator. s. 112.324(1), F.S. Once the complaint is determined to be in the proper form, the Executive Director reviews the complaint to determine whether the Commission on Ethics has jurisdiction over the allegations. If the complaint is found to be legally insufficient by the Executive Director, it is brought before the Commission for a final determination. If the Commission agrees with the recommendation of the Executive Director, the complaint is dismissed and all records and documents relating to the complaint become a public record. Rule 34-5.002, F.A.C.

If the Executive Director determines that a complaint is legally sufficient, an investigation is ordered. Although the investigation is limited to the allegations of the complaint, any facts and persons materially related to the complaint are also investigated. Rule 34-5.004, F.A.C. Once the preliminary investigation is completed, the respondent is provided a copy of the investigator's report. The investigatory file and complaint file are then made available for inspection and copying by the respondent and the respondent's counsel.

Unless confidentiality has been waived by the respondent, only the respondent and the complainant and their counsel are allowed to attend the probable cause hearing. Once a probable cause determination is made, all documents relating to the complaint and proceeding become public.

Answers to Questions Posed by the Open Government Sunset Act

Section 119.15(4)(a), F.S., requires the consideration of specific questions as part of the review process.

What specific records or meetings are affected by the exemption?

The records embraced by the exemption include the complaint and all records and documents relating to the

preliminary investigation, including the investigative report. In addition, the meeting at which the Commission makes a determination of probable cause is not an open meeting and only the complainant and respondent, along with their counsel, may attend. Once probable cause is determined, or when the Commission determines that a complaint is found legally insufficient, all records and documents which were confidential until that time become public.

Whom does the exemption uniquely affect, as opposed to the general public?

The exemption uniquely affects the complainant, the alleged violator, and any witnesses involved in the preliminary investigation.

What is the identifiable public purpose or goal of the exemption?

Chapter 97-293, L.O.F., stated the public purpose of the exemption when it was expanded to include records and meetings of local ethics commissions as follows:

The Legislature finds it a public necessity that information concerning individuals under investigation for alleged violations of the ethics standards be kept confidential and exempt from the public records law. The release of such information could potentially be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals. In addition, the Legislature finds it a public necessity that records be protected and meetings be closed to the public so that administration of the Commission...is not otherwise significantly impaired. The exemption of this information would minimize the possibility of unnecessary scrutiny by the public or media of individuals under investigation and their families, and will create a secure environment in which the Commission... may conduct its business.

There have been no significant changes during the past five years that would alter the public purpose of the exemption as stated above.

Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so how?

There is no means of obtaining most of the information other than through the Commission on Ethics or the local commission. The complaint, however, could be obtained from the complainant, provided he or she wanted to make it available.

The Open Government Sunset Review Act allows an exemption to be maintained only if it serves an identifiable public purpose. This exemption appears to serve not just one but two of the three identifiable public purposes outlined in the Act. See *infra* p. 2 (identifying specific purposes.) It allows the Commission on Ethics or a local commission to conduct the investigation free from interference and scrutiny from the media, the accused violator, and the complainant. In addition, the exemption protects the accused from potential unwarranted damage to his or her good name or reputation until such time as the allegations are substantiated through an investigation and probable cause determination.

RECOMMENDATIONS

Staff recommends that the public records and public meetings exemption in s. 112.324(1), F.S., relating to complaints and preliminary investigations of alleged violations of the Code of Ethics for Public Officers and employees, or other breach of the public trust, be maintained and reenacted.