



The Florida Senate

Interim Project Report 2003-203

November 2002

Committee on Banking and Insurance

Senator James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR NOTICES OF INJURY OR DEATH RECEIVED BY THE DIVISION OF WORKERS' COMPENSATION (SECTION 440.185(11), F.S.)

SUMMARY

The Open Government Sunset Review Act provides for the automatic repeal of an exemption to the public records and public meeting requirements 5 years after it is initially enacted unless it is reviewed and reenacted by the Legislature. The act establishes a process for identifying those exemptions that are subject to review in a particular year, as well as provides the standard of review for the exemptions that are subject to review.

The Division of Statutory Revision has identified s. 440.185(11), F.S., as being subject to review during the interim and, unless the Legislature reenacts it, it will repeal on October 2, 2003. This provision requires that any information in a report of injury or illness filed pursuant to s. 440.185, F.S., with the Division of Workers' Compensation of the Department of Insurance, that would identify an ill or injured worker is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Chapter 98-497, L.O.F., provides the following public necessity for this public records exemption:

"...the release of such information could lead to discrimination against the employee by coworkers, potential employers, and others. The harm caused to such employee by the release of this information outweighs any public benefit derived from its release."

Staff recommends that the exemption not be reenacted or reenacted and amended since the current statutory exemption, as implemented, fails to maintain the confidentiality of an injured worker and fails to meet all of the Open Government Sunset Review standards necessary to be recommended for reenactment. The legislative intent or public purpose of the exemption is to protect the identity of an ill or injured worker. However, the exempt information concerning injured

workers is readily available by alternative means by carriers and other parties which subscribe to claims' databases provided by private sector companies or the Division of Workers' Compensation. Also, documents generated through the request for assistance process, an optional, informal resolution process administered by the division, are not subject to the public records exemption.¹ Alternatively, persons can contact the Division of Administrative Hearings' website or office to access information contained in a petition for benefits filed by an injured persons or a final order (relating to dispute concerning an injury or illness) issued by a judge of compensation claims. If the statute is reenacted, it is recommended that s. 440.185(11), F.S., be amended to:

1. Specify that personal identifying information contained in any report of injury or illness that is filed with the Division of Workers' Compensation (division) pursuant to ch. 440, F.S., is confidential and exempt. To ensure consistency in the administration of this exemption, the exemption should apply to personal identifying information in all reports filed with the division.
2. Limit the release of information contained in the notices of injury or death to an aggregate reporting format. The division's current practice of releasing an individual record of an injured worker (with the name and social security number redacted) to a third-party that provides the name of the person and a social security number totally eviscerates the public policy and intent of the legislation, namely to protect the identity of the injured worker.
3. Authorize the division to disclose such confidential and exempt information pursuant to a court order. Presently, the division will release such information to a third-party, if the person to whom

¹ The Employment Assistance Office is created pursuant to s. 440.191, F.S.

the record pertains signs a consent and waiver authorization for the release of the information. Employee advocates have indicated that the consent and waiver process could be misused or circumvented by an employer requiring, as a routine part of the employment application process, the employee signing a waiver, thereby releasing the information to the employer.

- 4. Authorize the release of such confidential and exempt information to an administrative or law enforcement agency in furtherance of its official duties, if the agency maintains the confidentiality of the information. This would codify the division's current practice of releasing the information to other governmental entities in the performance of their duties. In recent months, the division has provided such information to the Department of Health for use in the disability determination process.

BACKGROUND

Florida has a long history of providing public access to the records of governmental and other public entities. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.² Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.³ The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

- (a) Every person has the right to inspect or copy any public records 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.

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment "grandfathered" exemptions that were in effect on July 1, 1993, until they are repealed.⁴

The State Constitution, the Public Records Law,⁵ and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution. Section 119.07(1)(a), F.S., requires:

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 or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency⁶ records are to be available for public inspection. 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.⁷

⁴ Article 1, s. 24(d) of the State Constitution.

⁵ Chapter 119, F.S.

⁶ 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."

⁷ Section 119.011(1), F.S.

² Section 1, ch. 5942, 1909; RGS 424; CGL 490.

³ Chapter 67-125 (1967 L.O.F.)

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.⁸ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁹

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government.¹¹ The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.¹²

Exemptions to open government requirements are subjected to a review and repeal process 5 years after their initial enactment.¹³ An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended under the act if it ". . . expands the scope of the exemption to include more records or information or to include meetings as well as

records."¹⁴ The Open Government Sunset Review Act of 1995¹⁵ establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must 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.¹⁶ If the division does not include an exemption on the certified list that should have been included that exemption ". . . is not subject to legislative review and repeal under this section."¹⁷ If the division later determines that an exemption should have been certified, it ". . . shall include the exemption in the following year's certification after that determination."¹⁸

As part of the review process, the Legislature is to consider:

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?¹⁹

Under s. 119.15(4)(b), F.S., 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 specified criteria, one of which must be met by the exemption, are if the exemption:

1. allows the state or its political subdivisions to effectively and efficiently administer a

⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

¹⁰ Art. I, s. 24(c) of the State Constitution.

¹¹ *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

¹² *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied *sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

¹³ An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

¹⁴ Section 119.15(3)(b), F.S.

¹⁵ Section 119.15, F.S.

¹⁶ Section 119.15(3)(d), F.S.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Section 119.15(4)(a), F.S.

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 their safety; 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 that 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.²⁰

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.²¹ The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. 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 an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

METHODOLOGY

Committee staff interviewed representatives of the Division of Workers' Compensation under the Department of Labor and Employment Security as well as under the Department of Insurance, and other stakeholders.²² Staff also reviewed information

provided by the International Association of Industrial Accident Boards and Commissions, the National Council of State Legislators, and the First Amendment Foundation. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

Notices of Injury and Death Reported to the Division of Workers' Compensation and the Confidentiality of the Notices

Pursuant to s. 440.015, F.S., the Division of Workers' Compensation, within the Department of Insurance, is charged with administering the Workers' Compensation Law in a manner that facilitates the self-execution of the system. Insurance carriers and self-insured employers are required to report certain information relating to injuries and death to the Division of Workers' Compensation (division) within the Department of Insurance (department).

Presently, the Division of Workers' Compensation is organized into the following program areas: Monitoring and Audit, Compliance, Employee Assistance, Legal Services, Data Quality and Collection, and Operations and Support. The Bureau of Monitoring and Audit is primarily responsible for monitoring the accuracy and timeliness of benefit payments, assessing penalties for late payments or reporting, and auditing carriers and self-insured employers to determine compliance with statutory requirements for timeliness and accuracy of payment.

Section 440.185, F.S., establishes reporting requirements for employers and carriers relating to injured employees. In addition to the First Report of Injury (DWC-1), employers and carriers are required to file subsequent reports with the division relating to an injured worker that also contain information that would identify an injured worker. These reports or forms include, but are not limited to the: Wage Statement, Request for Wage Loss/Temporary Partial Benefits, Notice of Action/Change, Notice of Denial, and Claim Cost Report. The information submitted by an employee in a request for assistance form and used by the division in the informal dispute resolution process, is not subject to the public records exemption since the form and process are established pursuant to s. 440.191, F.S.

²⁰ Section 119.15(4)(b), F.S.

²¹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla.)

²² Effective July 1, 2002, the Department of Labor and Employment Security was abolished and the majority of the functions and programs that were within the Division of Workers' Compensation of this department were transferred to the Department of Insurance. [ch. 2002-194, L.O.F.] Effective January 7, 2003, the Division of

Workers' Compensation will be transferred to the Department of Financial Services. [ch. 2002-404, L.O.F.]

The Office of Data Quality and Collection collects, maintains, and analyzes data and disseminates information pursuant to public-records' request. Chapter 440, F.S., provides two provisions pertaining to the confidentiality of information relating to injured workers. Section 440.125, F.S., provides that medical records and medical reports identifying an injured worker, which are provided to the department pursuant to s. 440.13, F.S., are confidential and exempt.

In 1998, the Legislature created the second public records exemption pertaining to injured workers for certain information contained in the report of injury or death. Section 440.185(11), F.S., provides that any information contained in a report of injury or illness that is filed pursuant to s. 440.185, F.S., that would identify an ill or injured employee is confidential and exempt from the provisions of s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution. The Legislature found that it is a public necessity to exempt such information because such information is of a sensitive, personal nature. The public necessity for the creation of the exemption also provided that the release of such information could lead to the discrimination against the employee by coworkers, potential employers, and others. The harm caused by the release of this information outweighs any public benefit derived from its release.²³

Prior to the implementation of the s. 440.185(11), F.S., public records exemption in 1998, some stakeholders in the workers' compensation system had expressed concerns regarding the readily available public records, pertaining to injured workers, that were maintained by the division. According to the division, some attorneys were obtaining records relating to the notice of injury filed with the division and contacting injured workers and offering their legal services. The division indicated that some of the communications by attorneys implied that the division either endorsed the particular attorney or had referred the name of the injured worker to the attorney for legal representation. The division received some complaints from injured workers regarding these contacts and also concerns regarding the availability of information pertaining to their injury.

Some stakeholders contended that the enactment of a public records exemption for information in a report of injury submitted to the division would protect the identity of the injured worker, reduce solicitation of injured workers by attorneys, thereby reducing attorney involvement and litigation costs in the system, and

encourage the use of the informal resolution of disputes by injured workers.²⁴ The Employee Assistance Office (EAO) administers the informal dispute resolution process.²⁵ The division noted that attorneys were involved in filing over 95 percent of the requests for assistance. For fiscal years 1996-1998, the number of disputes resolved through the request for assistance process declined, most notably for injured workers having attorney representation. For these 2 years, EAO had an average resolution rate of approximately 13 percent. If the worker was not represented by an attorney, EAO achieved an average resolution rate of 52 percent.

Many other interested parties, including employers, carriers, accident research companies, and researchers collect information concerning injured workers. Insurers often use external and internal claims databases as investigative tools to detect potential fraudulent claims. Some of these external databases contain loss data and other information provided by law enforcement agencies.

Information concerning an injured worker is also used by employers to assist them in screening job applicants, to verify applicants' statements, and to qualify for second injury fund coverage. One of the goals of the federal Americans with Disabilities Act (ADA) is to protect disabled persons from discrimination in employment.²⁶ The ADA provides that in workplaces with more than 15 employees, employers are prohibited from asking job applicants about medical information prior to offering employment.²⁷ However, an employer can make preoffer inquiries about the ability of an applicant to perform employment-related duties. An employer covered under the ADA is also prohibited, at the preoffer stage, from making inquiries as to whether an applicant is an individual with a disability, about the

²⁴ Section 440.34(4), F.S., provides that attorney fees do not attach until 30 days after the date the carrier or employer receives the petition.

²⁵ Effective July 1, 2002, the mandatory request for assistance process was eliminated. Therefore, workers were no longer required, as a prerequisite for filing a petition for benefits with the Office of the Judges of Compensation Claims, to exhaust the informal dispute resolution process by filing a request for assistance with the Employee Assistance Office. [ch. 2002-236, L.O.F.]

²⁶ Whether an injured worker is protected under the ADA is contingent upon whether the person meets the ADA definitions of an individual with disability and qualified individual with a disability. 42 USC 12102(2) and 29 CFR 1630.2

²⁷ 42 USC s. 12101 et seq.

²³ Ch. 98-407, L.O.F.

nature or severity of the disability, or about an individual's workers' compensation history at the preoffer stage.²⁸ An employer is allowed to inquire about an applicant's workers' compensation history as part of a postoffer medical inquiry or examination that is required of all applicants for the same employment category.

These interested parties can readily obtain records concerning an injured worker by providing the division with the name and social security number of an injured worker. The division provides the requestor with a copy of the record or form with the name and social security number of the injured worker redacted. Alternatively, a person can subscribe to the division's claims database and access information concerning an injured worker, if they have the person's name and social security. By providing the reports with redacted information, the requestor of the information has identified an employee that has an injury or illness.

The implementation of the public records exemption was interpreted by the division, which was under the Department of Labor and Employment and Security at that time, to apply to certain information contained in the First Report of Injury or Death, Form DWC-1. On July 15, 1998, the Division of Workers' Compensation issued a memorandum to "Workers' Compensation Data Recipient" which stated that any information contained in the first report of injury or illness filed with division, which identified an injured or ill worker, would be confidential and no longer subject to public release. The memorandum specified that the division would no longer provide certain information on injured workers, including the Social Security numbers, names, addresses, and telephone numbers. The memorandum also stated that "all subscriptions containing such information, whether on diskette, tape, microfiche, or paper documents, are discontinued." Subsequent to the release of this memorandum, division management acknowledged that this confidential information was readily available on other forms submitted to the division, pursuant to s. 440.185, F.S., and would not be protected by the exemption.

In a memorandum, dated June 24, 1999, to Senate Banking and Insurance Committee staff, the division indicated that if a subscriber to the division's website database has identifying information regarding an injured worker (name, social security, and city), the user could review or access claims information

maintained by the division. The current management of the division continues to allow subscribers to access claims' information regarding injured workers, via the website database, if the subscriber has the name and social security of the person. The result of the database query does not reflect certain personal, identifying information concerning an injured worker, such as the name and social security number. However, the query results verify that the person has been identified as an injured worker. In 2002, 1,000 users, representing 468 companies, subscribed to the division's claims database.

In 2002, the division, under the administration of the Department of Insurance, implemented an additional procedure to allow the release of exempt information to third parties, if the person to whom the record pertains signs a consent and waiver form authorizing the release of the information. The division is in the process of adopting a rule which would codify the consent and waiver process and specify what type of information would identify an injured employee and should be redacted from public records. The Joint Administrative Procedures Committee noted that the statutes listed as rulemaking authority and law implemented are silent with regard to a waiver and has requested that the division provide the authority upon which such provisions are based.²⁹ Employee advocates have indicated that the consent and waiver process could be misused or circumvented by an employer requiring, as a routine part of the employment application process, the employee signing a waiver, thereby releasing the information to the employer.

If an injured worker is unable to resolve medical or indemnity disputes with a carrier, the worker may file a petition for benefits with the Office of the Judges of Compensation Claims (Office) of the Division of Administrative Hearings in Tallahassee. Once a Petition for Benefits is received and processed by the Office, the petition is posted on the Office's website. However, the injured worker's social security number is redacted from the public record that is posted on the website. The Office also posts final orders issued by the judges of compensation claims on the website. The social security number is not included on the final order posted on the website.

As part of the exemption review process, as provided in s. 119.15(4), F.S., staff determined the persons and

²⁸ 29 C.F.R. 1630.13(a), Regulations to Implement the Equal Employment Provisions of the ADA

²⁹ November 13, 2002, letter from John Rosner, Joint Administrative Procedures Commission, to Tom Valentine, Department of Insurance.

records affected by the exemption, the public purpose of the exemption, and whether the information could be readily obtained by alternative means. The current statutory exemption, as implemented, does not maintain the confidentiality of an injured worker and fails to meet all of the Open Government Sunset Review standards necessary to be recommended for reenactment. The legislative intent or public purpose of the exemption is to protect the identity of an ill or injured worker. However, the exempt information concerning an injured workers' can be readily obtained by alternative means by carriers and other parties which subscribe to claims' databases provided by third parties, such as the Division of Workers' Compensation. Also, documents generated through the request for assistance process, an optional, informal resolution process administered by the division, are not subject to the public records exemption. Alternatively, persons can contact the Division of Administrative Hearings' website or office to access information contained in a petition for benefits filed by an injured persons or a final order (relating to dispute concerning an injury or illness) issued by a judge of compensation claims.

Although s. 440.185(11), F.S., does not authorize the release of the confidential and exempt information to any third party, including administrative or law enforcement agencies, the division has historically provided such information to the Department of Health for the disability determinations. According to the Department of Health representatives, this information would no longer be requested, since it did not provide adequate information concerning an injured workers' injury or disability.

RECOMMENDATIONS

It is recommended that the exemption not be reenacted or reenacted and amended since the current statutory exemption, as implemented, does not maintain the confidentiality of an injured worker and fails to meet all of the Open Government Sunset Review standards necessary to be recommended for reenactment. The legislative intent or public purpose of the exemption is to protect the identity of an ill or injured worker. However, the exempt information concerning injured workers can be readily obtained by alternative means by carriers and other parties which subscribe to claims' databases provided by private sector companies-or the Division of Workers' Compensation. Also, documents generated through the request for assistance process, an optional, informal resolution process administered by the division, are not subject to the public records

exemption.³⁰ Alternatively, persons can contact the Division of Administrative Hearings' website or office to access information contained in a petition for benefits filed by an injured persons or a final order (relating to dispute concerning an injury or illness) issued by a judge of compensation claims.

If the statute is reenacted, it is recommended that s. 440.185(11), F.S., be amended to:

1. Specify that personal identifying information contained in any report of injury or illness that is filed with the Division of Workers' Compensation (division) pursuant to ch. 440, F.S., is confidential and exempt. To ensure consistency in the administration of this exemption, the exemption should apply to personal identifying information in all reports filed with the division.
2. Limit the release of information contained in the notices of injury or death to an aggregate reporting format. The division's current practice of releasing an individual record of an injured worker (with the name and social security number redacted) to a third-party that provides the name of person and a social security number totally eviscerates the public policy and intent of the legislation, namely to protect the identity of the injured worker.
3. Authorize the division to disclose such confidential and exempt information pursuant to a court order. Presently, the division will release such information to a third-party, if the person to whom the record pertains signs a consent and waiver authorization for the release of the information. Employee advocates have indicated that the consent and waiver process could be misused or circumvented by an employer requiring, as a routine part of the employment application process, the employee signing a waiver, thereby releasing the information to the employer.
4. Authorize the release of such confidential and exempt information to an administrative or law enforcement agency in furtherance of its official duties, if such agencies maintain the confidentiality of the information. This would codify the division's current practice of releasing the information to other governmental entities in the performance of their duties. In recent months, the division has provided such information to the Department of Health for use in the disability determination process.

³⁰ The Employment Assistance Office is created pursuant to s. 440.191, F.S.