



# The Florida Senate

*Interim Project Report 2003-204*

*November 2002*

Committee on Banking and Insurance

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

## **OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR INVESTIGATORY RECORDS RELATING TO WORKERS' COMPENSATION EMPLOYER COMPLIANCE (SECTION 440.108, FLORIDA STATUTES)**

### **SUMMARY**

The Open Government Sunset Review Act provides for the automatic repeal of an exemption to the public records and public meetings requirements of open government 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 of the Office of Legislative Services has identified s. 440.108, 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 all investigatory records of the Division of Workers' Compensation made or received pursuant to an investigation necessary to determine compliance coverage requirements of chapter 440, F.S., are confidential and exempt until the investigation is completed or ceases to be active. Once an investigation is completed or ceases to be active, certain records relating to an investigation remain confidential and exempt if certain criteria are met.

It is recommended that the public records exemption relating to the compliance-investigatory records of the Division of Workers' Compensation, s. 440.108, F.S., be reenacted and amended, based upon a staff review of the exemption in accordance with the Open Government Sunset Review requirements, s. 119.15(4)(a), F.S. The current exemption provides the division with an effective investigatory tool to assist in the performance of its compliance and enforcement duties relating to chapter 440, F.S., coverage requirements. The exemption is necessary to protect the integrity of ongoing investigations, the identity and safety of persons reporting alleged violations to the division, business or financial information of

employers, and the good name or reputation of individuals. If the names of persons providing such information to the division were made public, such persons could be vulnerable to retribution. The disclosure of the financial and tax records of an employer could place an employer at a competitive disadvantage with competitors. Employers would be hesitant to provide such information willingly, if the information was not exempt.

It is also recommend that s. 440.108, F.S., should be amended to authorize the Division of Workers' Compensation of the Department of Insurance to share such investigatory records with administrative and law enforcement agencies, if such agencies maintain the confidentiality of such records, as specified by s. 440.108, F.S. Presently, s. 440.108, F.S., does not authorize the release of these confidential and exempt records to any third party, including governmental entities. In recent years, the division has provided copies of files to the Division of Insurance Fraud of the Department of Insurance and the Internal Revenue Service.

### **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.<sup>1</sup> 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.<sup>2</sup> The act has been amended numerous times since its enactment.

<sup>1</sup> Section 1, ch. 5942, 1909; RGS 424; CGL 490.

<sup>2</sup> Chapter 67-125 (1967 L.O.F.)

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.<sup>3</sup>

The State Constitution, the Public Records Law,<sup>4</sup> 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 agency<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

---

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.”

<sup>6</sup> Section 119.011(1), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Art. I, s. 24(c) of the State Constitution.

<sup>10</sup> *Christy v. Palm Beach County Sheriff’s Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

<sup>11</sup> *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

<sup>3</sup> Article 1, s. 24(d) of the State Constitution.

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

<sup>5</sup> 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

Exemptions to open government requirements are subjected to a review and repeal process 5 years after their initial enactment.<sup>12</sup> 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.”<sup>13</sup>

The Open Government Sunset Review Act of 1995<sup>14</sup> 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 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.<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>17</sup>

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?

---

(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).

<sup>12</sup> 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.

<sup>13</sup> Section 119.15(3)(b), F.S.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(3)(d), F.S.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?<sup>18</sup>

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 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.<sup>19</sup>

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.<sup>20</sup> 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

---

<sup>18</sup> Section 119.15(4)(a), F.S.

<sup>19</sup> Section 119.15(4)(b), F.S.

<sup>20</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla.)

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 previously under the Department of Labor and Employment Security, as well as the Department of Insurance, insurers, employee representatives, and other stakeholders. Staff also contacted the International Association of Industrial Accident Boards and Commissions, and the National Council of State Legislators. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

## FINDINGS

**Investigatory Records Relating to Workers' Compensation Employer Compliance and the Confidentiality of Such Investigatory Records** Pursuant to s. 440.015, F.S., the Division of Workers' Compensation, within the Department of Insurance,<sup>21</sup> is charged with administering the Workers' Compensation Law in a manner that facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. The Bureau of Compliance and Enforcement within the division is charged with the responsibility of ensuring that employers, subject to the Workers' Compensation Law, maintain coverage for their employees and maintain certain records relating to proof of coverage or exemption from coverage. Employers are required to provide workers' compensation coverage, unless they obtain an exemption from coverage from the Division of Workers' Compensation.<sup>22</sup> According to a study released by Construction Education Concepts entitled, *A Study On the Magnitude of Loss of Workers' Compensation Premiums in 1997 Due to Employer Fraud and Exemptions in the Construction Industry* (2001), an estimated \$1.2 - \$2.8 billion in workers' compensation premiums is lost, on an annual basis, due

---

<sup>21</sup> Effective July 1, 2002, the Department of Labor and Employment Security was abolished and the majority of the functions and programs of the Division of Workers' Compensation were transferred from the Department of Labor and Employment Security to the Department of Insurance. Effective January 7, 2003, the functions are transferred to the Department of Financial Services. [ch. 2002-404, L.O.F.]

<sup>22</sup> Section 440.38, F.S.

to employer premium fraud and exemptions in the construction industry.

The Legislature in recent years has provided the Division of Workers' Compensation with additional enforcement and compliance tools to fight workers' compensation fraud and effectuate compliance with chapter 440, F.S. In 1997, a report issued by the Fourteenth Statewide Grand Jury entitled, *Report on Workers' Compensation Fraud*, prompted the Legislature to address workers' compensation fraud and noncompliance in 1998. This legislation provided greater enforcement and compliance tools for the Division of Workers' Compensation to enforce the coverage and exemption requirements of chapter 440, F.S.<sup>23</sup>

In conjunction with this 1998 legislation, the Legislature also enacted a public records exemption for certain investigatory records of the Division of Workers' Compensation which are obtained from employers pursuant to the division's compliance activities under s. 440.108, F.S., and any records necessary to complete the investigation.<sup>24</sup> Such records are confidential and exempt from the public records' requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until the investigation is completed or ceases to be active. Section 440.108, F.S., further provides:

An investigation is considered to be active while such investigation is being conducted by the division with a reasonable, good faith belief that it may lead to the filing of administrative, civil, or criminal proceedings.

However, s. 440.108, F.S., also provides that certain records remain confidential after an investigation is completed or ceases to be active: This includes any record that:

1. jeopardizes the integrity of another active investigation;
2. reveals a trade secret, as defined by s. 688.002, F.S.;
3. reveals business or financial information;
4. defames or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or
5. reveals investigative techniques or procedures.

---

<sup>23</sup> Chapter 98-174, L.O.F.

<sup>24</sup> Chapter 98-407, L.O.F.

The Bureau of Compliance provided the following statistics regarding activities of the bureau for the prior fiscal year, 2001-02:

- 34,268 cases opened,
- 29,932 cases closed,
- 1,582 referrals to the Division of Insurance Fraud of the Department of Insurance,
- 109 referrals to other agencies (Department of Business and Professional Regulation and local government permitting offices), and
- \$20,759,527 estimated workers' compensation premium generated as a result of compliance efforts.

In recent years, the division has released complete case files to the Division of Insurance Fraud and the Internal Revenue Service. According to the division, "there was no controversy regarding the release of this information, although the Office of General Counsel was consulted prior to the release of the information to the IRS." Although s. 440.108, F.S., does not authorize the division to release confidential and exempt records to any third party, the division contends that s. 440.108, F.S., as written, does not prevent voluntary disclosure to another governmental entity that has requested the exempt information.

During the scope of an investigation, the bureau obtains certain records and information relevant to the case, including employer financial and tax returns, and other records relating to an employer's business practices. The investigatory file would also include a narrative of the investigation, the names of persons who report an alleged violation, an employer or employee who provides information relative to the investigation, and the identities of the investigators. When asked whether the information contained in the investigatory records could be obtained by alternative means, the division indicated that most of the information obtained during investigations is personal or business related and are held confidential by those sources and can only be obtained by another authorized agency. The disclosure of the financial and tax information of employers could place an employer at a competitive disadvantage with competitors.

Currently, if an investigator of the Bureau of Compliance receives a request for copies of any record of the division, the investigator is required to document the request, noting the name of the requestor, date of the request, and information requested. Unless the record requested is considered confidential, the record

will be provided in accordance with the public records' law. According to procedures of the division, "all investigation records of the Division of Workers' Compensation and any records necessary to complete an investigation [are] considered confidential and exempt until a case file is ultimately closed."

If an investigatory file is completed or ceases to be active, certain information is provided and certain information is redacted, pursuant to a public records request. According to the division, the names of the persons who report violations are redacted in order to protect the identities of persons, since these persons may be vulnerable to retribution. The division cited the following examples of other redacted information:

- unemployment insurance information obtained through the unemployment insurance database,
- social security numbers,
- federal employer identification numbers
- claimant names,
- dates of accident,
- employer tax returns,
- specific dollar information on payroll records, and
- premium calculation from applications for workers' compensation coverage.

As part of the exemption review process, as provided in s. 119.15(4)(a), F.S., staff determined the persons and records affected by the exemption, the public purpose of the exemption, and whether the information could be readily obtained by alternative means. The current exemption provides the division with an effective investigatory tool to assist in the performance of its compliance and enforcements duties relating to chapter 440, F.S., coverage requirements. The exemption is necessary to protect the integrity of ongoing investigations, the identity and safety of persons reporting alleged violations to the division, business or financial information of employers, and the good name or reputation of individuals. If the names of persons providing such information to the division were made public, such persons could be vulnerable to retribution. The disclosure of the financial and tax records of an employer could place an employer at a competitive disadvantage with competitors. Employers would be hesitant to provide such information willingly, if the information was not exempt.

The current exemption does not expressly authorize the release of investigatory records that are confidential and exempt to law enforcement and administrative

agencies. The release of such records to other agencies would assist those agencies in the furtherance of their administrative or criminal investigations of a business entity. The public purpose of the exemption would be maintained, if such agencies were required to maintain the confidentiality of such investigatory records.

### **RECOMMENDATIONS**

It is recommended that the public records exemption relating to the investigatory records of the Division of Workers' Compensation, s. 440.108, F.S., be reenacted and amended, based upon the Open Government Sunset Review criteria. The current exemption provides the division with an effective investigatory tool to assist in the performance of its compliance and enforcements duties relating to chapter 440, F.S., coverage requirements. The exemption is necessary to protect the integrity of ongoing investigations, the identity and safety of persons reporting alleged violations to the division, business or financial information of employers, and the good name or reputation of individuals. If the names of persons providing such information to the division were made public, such persons could be vulnerable to retribution. The disclosure of the financial and tax records of an employer could place an employer at a competitive disadvantage with competitors. Employers would be hesitant to provide such information willingly, if the information was not exempt.

It is also recommended that s. 440.108, F.S., be amended to authorize the Division of Workers' Compensation of the Department of Insurance to share such investigatory records with administrative and law enforcement agencies, if such agencies maintain the confidentiality of such records, as specified by s. 440.108, F.S. Presently, s. 440.108, F.S., does not expressly authorize the release of these confidential and exempt records to any third party, including governmental entities. In recent years, the division has provided copies of files to the Division of Insurance Fraud of the Department of Insurance and the Internal Revenue Service.