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Committee on Criminal Justice

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OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR TAPED VIDEO STATEMENTS OF MINORS (S. 119.07(3)(S)2., F.S.)

SUMMARY

Pursuant to s. 119.15, F.S., the Open Government Sunset Review Act of 1995, an exemption to the public records law found at s. 119.07(3)(s)2., F.S., which makes confidential and exempt the videotaped statement of a minor who is alleged to be or who is a victim of a sexual act, is under sunset review for the purpose of determining whether the exemption should be reenacted or repealed.

Staff recommends that the exemption in s. 119.07(3)(s)2., F.S., be reenacted because it meets the criteria in s. 119.15, F.S., for its reenactment. However, staff also recommends a technical, clarifying amendment to clearly indicate who is the custodian of the videotaped statement and when and in what manner disclosure of information is authorized to governmental entities, and to remove surplus verbiage.

BACKGROUND

Constitutional Access to Public Records and Meetings -- Section 24(a), Art. I of the State Constitution provides every person with "... 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 behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution."

Section 24 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." *Id.*

Section 24(c), Art. I of the State Constitution authorizes the Legislature to statutorily exempt "... records from the requirements of subsection (a) . . . , provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." A law creating a records exemption only exempts requirements relating to public records and only relates to one subject.

Open Government Sunset Review Act of 1995 -- Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review-and-repeal process for exemptions to requirements relating to public records or public meetings. A new exemption, or substantial amendment of an existing exemption, is repealed on October 2nd of the fifth year after enactment of the exemption, unless the Legislature acts to reenact the exemption. "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 and that the exemption must be reviewed by the Legislature before the scheduled repeal date." Section 119.15(3)(a), F.S.

"... [A]n 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." Section 119.15(3)(b), F.S.

By June 1st of the year before repeal of an exemption, 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 which meets the criteria of an exemption as defined in [s. 119.15, F.S].” Section 119.15(3)(d), F.S. If the exemption is not identified and certified by the Division, it is not subject to legislative review and repeal. In the event “. . . the [D]ivision fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year’s certification after that determination.” *Id.*

Section 119.15(2)(a) - (c), F.S., provides that an exemption is to be created or maintained only for the following reasons:

- (a) The exempted record . . . is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

Section 119.15(4)(a)1. - 4., F.S., requires that the following specific questions be considered as part of the open government sunset review process:

- (1) What specific records . . . 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 . . . be readily obtained by alternative means? If so, how?

Section 119.15(4)(b), F.S., provides that “[a]n exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves.” (This provision codifies the identical requirements in s. 24(c), Art. I of the State Constitution.) An identifiable public purpose is served if: 1) the exemption meets one of the purposes described in s. 119.15(4)(b)1. – 3., F.S.; and 2) “. . . 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 . . .” *Id.* The following purposes are described in s. 119.15(4)(b)1. – 3., F.S:

- (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 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. (However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted); 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.

Section 119.15(4)(e), F.S., provides that, “[n]otwithstanding 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.”

Public Records Exemption for Videotaped Statement of a Minor Who is a Sexual Assault Victim -- Section 119.07(3)(s)2., F.S., provides:

Any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct proscribed in chapter 800 or in s. 794.011, s. 827.071, s. 847.012, s. 847.0125, s. 847.013, s. 847.0133, or s. 847.0145, which reveals that minor’s identity, including, but not limited to, the minor’s face; the minor’s home, school, church, or employment telephone number; the minor’s home, school, church, or employment address; the name of the minor’s school, church, or place of employment; or the personal assets of the minor; and which identifies that minor as the victim of a crime described in this subparagraph, is confidential and exempt from subsection (1) and

s. 24(a), Art. I of the State Constitution. Any governmental agency that is authorized to have access to such statements by any provision of law shall be granted such access in the furtherance of the agency's statutory duties, notwithstanding the provisions of this section. This subparagraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2003.¹

This exemption was created by s. 1, ch. 98-9, L.O.F.²

The Legislature provided the following legislative findings in support of the exemption:

The Legislature finds that there is a public necessity to protect minors who are victims of sexual crimes from having exposed to the public videotaped statements that contain the minor's statements regarding sexual abuse or misconduct perpetrated against them. This protection is necessary to enable the state to prosecute effectively and efficiently persons who commit such crimes and at the same time to minimize the trauma to the minor victims and the inhibitions that will result if the minors, or their guardians, are fearful that such videotapes can be released for public consumption during or after any court proceedings. If such videotapes were subject to release, the state's ability to prosecute sexual crimes and abuse involving minor victims would be significantly impaired. The identity of minors who are victims of sexual abuse or sexual crimes is information of a sensitive personal nature. The release of such information by the release of videotaped statements given by these minors would compound the tragedy already visited upon

their lives and would be defamatory to or cause unwarranted damage to the good name or reputations of the minors. Accordingly, such information requires the protection of this exemption.³

s. 2, ch. 98-9, L.O.F.

To facilitate the open government sunset review of the exemption in s. 119.07(3)(s)2., F.S., staff sent a survey questionnaire to the Office of the Attorney General (AG), Division of Victim Services and Criminal Justice Programs; the Florida Prosecuting Attorneys Association (hereinafter referred to as the "Prosecutors Association"), the Florida Public Defender Association, the Florida Police Chiefs Association (hereinafter referred to as the "Police Chiefs Association"), the Florida Sheriffs Association, and several victim advocacy organizations. Staff received and reviewed substantive responses from the Prosecutors Association and the Police Chiefs Association, who substantively responded to each question in the survey about the exemption.

Staff also reviewed the responses of the Florida Department of Law Enforcement (FDLE) and the Department of Children and Family Services (DCF) to a survey questionnaire regarding the exemption that was prepared by the House Committee on State Administration. The following information was provided in response to all of the noted survey questionnaires:

1. All of the survey respondents identify the minor victim as affected by the exemption. Both DCF and the Police Chiefs Association state that the exemption affects school officials. DCF also

¹ Section 119.07(3)(s)3. F.S., provides that "a public employee or officer who has access" to such videotaped statement "may not willfully and knowingly disclose videotaped information that reveals that minor's identity to a person who is not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense." A violation of subparagraph 3. is a first-degree misdemeanor. s 119.07(3)(s)4., F.S.

² Effective April 11, 1998. This chapter, in subsection (3)(s) of 119.07, F.S., designated subparagraph 1. and added subparagraph 2.

³ The legislative findings, which are supported by the findings herein, answer the question posed in s. 119.5(4)(a)3., F.S.: "what is the identifiable public purpose or goal of the exemption?" The findings also indicate two purposes for the exemption that override the strong public policy of open government: s. 119.15(4)(b)1., F.S. (allows effective and efficient administration of a governmental program) and s. 119.15(4)(b)2., F.S. (protects information of a sensitive personal nature).

includes: the victim's family or caregiver, defense attorneys, state attorneys, courts, law enforcement, DCF, public officials, and the general public. The Police Chiefs Association also includes "any other agency that is not directly involved in the criminal investigation."⁴

2. FDLE states that it and other law enforcement agencies are responsible for videotaping the statement of the minor victim and are considered custodians of such videotape.

DCF states that Department of Health (DOH) child protection teams and law enforcement are responsible for the videotaping and are considered custodians. However it appears that DOH is already covered by a public records exemption in s. 39.202(5), F.S., concerning child protection teams and does not rely upon s. 119.07(3)(s)2., F.S., when keeping the videotaped statements confidential and exempt. It appears that only law enforcement agencies actually utilize the exemption contained in s. 119.07(3)(s)2., F.S.

3. The list of information in the videotaped statement that could identify the minor victim and that is confidential and exempt is not exhaustive (the statutory exemption does not include an exhaustive list). As DCF notes, "[i]t is difficult to develop an exhaustive list, since utterances of the minor vary from tape to tape."

All of the survey respondents believe that the victim's voice is exempted identifying information. The majority of respondents include the victim's face (the Police Chiefs Association refers to a "visual depiction of the child"), home address, and school. FDLE and the Police Chiefs Association include the victim's church and place of employment. FDLE and the Prosecutors Association include the names of the victim's parents and the alleged suspect (the Prosecutors Association also includes the suspect's relationship to the victim). The Prosecutors Association and DCF include the victim's telephone number and age (DCF refers to the victim's date of birth and also includes any telephone numbers identified in the statement).

⁴ This response answers the question posed in s. 119.15(4)(a)2., F.S.: "Whom does the exemption uniquely affect?"

FDLE also includes the location of the crime, name of the victim's doctor and hospital, and the victim's property. The Police Chiefs Association also includes any statement made by the investigator or child that would lead to the identity of victim, as provided in the exemption. DCF also includes the victim's body, gestures, and social security number.⁵

4. All of the survey respondents believe the victim's exempted statement could include the body of the victim's testimony (e.g., a description of the victim's attack or abuse) if it provides victim-identifying information. The Police Chiefs Association states that such testimony "could be used to identify the victim."⁶
5. The Prosecutors Association states that prosecutors; guardians ad litem; probation officers in preparing certain presentence-investigations, and DCF (pursuant to s. 39.201, F.S., notes FDLE) are authorized to have access to the minor victim's videotaped statement. The Police Chiefs Association says authorized access includes "[a]ny other law enforcement agency doing an investigation where the child's video statement could be pertinent to their investigation."
6. The Police Chiefs Association believes that the information made confidential and exempt pursuant to s. 119.07(3)(s)2., F.S., is also made confidential and exempt pursuant to s. 119.07(3)(f), F.S., relating to victims of sexual abuse. DCF believes the information is also made confidential and exempt pursuant to s. 39.202, F.S.
7. None of the survey respondents indicate that they have received a request from any person (this does not include governmental entities) for information made confidential and exempt pursuant to s. 119.07(3)(s)2., F.S., or that they have made such a request⁷
8. Of those survey respondents who responded to a question as to what, if anything, in the videotaped

⁵This response answers the question posed in s. 119.15(4)(a)1., F.S.: "What specific records are affected by the exemption?" The response indicates that the records are limited to information identifying the minor victim.

⁶ See previous note.

⁷ Responses to this question did not concern information requested pursuant to a subpoena. FDLE was not questioned as to whether it ever made a request.

statement could be made available to the public, the consensus is that little, if anything, could be made available if the victim's image is depicted on the video. The Police Chiefs Association states that "[i]n practicality, the video itself would be exempt. However if the child was 'blacked' out, portions of the tape could be released that contained information that could not lead to the identity of a child." FDLE states that the types of information contained in the videotaped statement that could be made available to the public are "[a]ny information that does not identify the victim or that is otherwise exempt from disclosure."

9. FDLE was questioned about how an agency, if presented with a public records request for the videotape recording, would remove confidential and exempt information from the videotape recording before releasing such recording to the public. FDLE's response is that it has "not received a request, but it would take a lot of technical and electronic expertise to redact confidential information. It would likely require not releasing any statements made by the minor victim, or requiring the electronic masking of the voice of the victim. It would also require redacting of information that could identify the victim. . . . It would also require the 'masking' of the victim's face and thus limit the release of video images."

10. None of the survey respondents believe that the information made confidential and exempt pursuant to s. 119.07(3)(s)2., F.S., should be released to the public.

11. All of the survey respondents believe that s. 119.07(3)(s)2., F.S., prevents disclosure of public records. With the exception of FDLE, the survey respondents believe the exemption does not prevent voluntary disclosure to another governmental entity that has requested the information (this does not include requests by subpoena). There is a difference of opinion among respondents on whether the exemption prevents disclosure if subpoenaed. DCF does not believe that the exemption prevents disclosure if subpoenaed; FDLE and the Prosecutors Association believe it does.⁸ Most survey respondents agree that the exemption does not prevent disclosure if subpoenaed followed by an order in support of the subpoena.⁹

⁸ The Police Chiefs Association doesn't know the answer to this question.

⁹ See previous note.

12. FDLE and the Prosecutors Association do not believe the exemption prevents the information from being used in open court (establishes an evidentiary privilege).¹⁰ FDLE and the Police Chiefs Association do not believe that the exemption prevents hearings or meetings from being open to the public, or prevents testimony from being given in court regarding a particular matter.¹¹

13. FDLE, the Prosecutors Association, and the Police Chiefs Association do not believe that the videotaped recording can be obtained from another source (*e.g.*, another agency or at the courthouse).¹²

14. FDLE, the Prosecutors Association, and the Police Chiefs Association do not believe that the exemption for the minor victim's identifying information ever expires (*e.g.*, when the former minor reaches the age of majority),¹³ nor should the exemption expire. The Police Chiefs Association states that the exemption should not expire "due to the nature of the crime itself."

15. FDLE, the Prosecutors Association, and DCF believe the exemption protects information of a sensitive personal nature that would defame an individual, cause unwarranted damage to the good name or reputation of an individual, or jeopardize the safety of an individual if the information were released to the public.¹⁴ DCF believes the exemption "protects sensitive information concerning a child victim of sexual abuse. FDLE believes that "[d]isclosing the identity of a minor victim of a sex crime could cause damage to the person's reputation and possibly jeopardize the safety of the individual."¹⁵

¹⁰ The Prosecutors Association and DCF don't know the answer to this question.

¹¹ See previous note.

¹² This response answers the question posed in s. 119.15(4)(a)4., F.S.: "Can the information contained in the records . . . be readily obtained by alternative means? If so, how?" It does not appear that comparable, alternative means are available.

DCF is uncertain if there is another source.

¹³ DCF doesn't know the answer to this question.

¹⁴ The Police Chiefs Association doesn't know the answer to this question.

¹⁵ This response indicates that there is a purpose for the exemption that overrides the strong public policy of open government: s. 119.15(4)(b)2., F.S. (protects information of a sensitive personal nature).

16. FDLE and the Prosecutors Association believe that the efficient and effective administration of a governmental program would be significantly impaired without the exception. FDLE states that “[v]ictims who are minors might not cooperate with investigators without the exemption.” The Prosecutors Association states that the release of identifying information that could embarrass the minor “could have a ‘chilling’ effect on prosecution.”¹⁶
17. FDLE recommends reenactment of the exemption because “[t]he exemption encourages victim cooperation with law enforcement and helps to provide protection and safety for the victim.” The Prosecutors Association recommends reenactment “to prevent embarrassment of minor victims of sexual abuse.” The Police Chiefs Association recommends reenactment because “[t]he identity of children who are victims of a sexual act should be protected at all costs. Most children who are victims of such acts require years of therapy. Releasing information that could lead to their identity serves no social, political, or law enforcement purpose.”¹⁷
18. FDLE believes that if the exemption is not reenacted “[v]ictim cooperation with law enforcement might decrease and thereby prevent the effective investigation and prosecution of criminal acts. It might also affect victim safety.” The Prosecutors Association, as previously noted, sees the release of the information as having a ‘chilling’ effect on prosecution. The Police Chiefs

Association states that “[o]nce the identity of the child is known, it serves only to hamper law enforcement investigation. Children are easily ‘tainted’ and could be compelled by outside sources to change or modify their statements.”¹⁸

METHODOLOGY

Staff reviewed relevant statutory provisions and case law. Staff also sent out a survey questionnaire to numerous agencies, associations, and victim advocacy groups that staff identified as possibly being affected by the exemption. Substantive responses to staff’s survey were received from the Florida Prosecuting Attorneys Association (responding on behalf of Florida’s State Attorneys) and the Florida Police Chiefs Association (responding on behalf of its members).¹⁹ The Office of the Attorney General, Division of Victim Services and Criminal Justice Programs, responded that the information requested in staff’s survey does not apply to it.

All survey responses were shared with staff of the House Committee on State Administration, which shared with this staff the responses to a House survey questionnaire received from FDLE and DCF, and also non-survey information received from DOH.

FINDINGS

The records exemption in s. 119.07(3)(s)2., F.S., meets the statutory criteria in s. 119.15(2), F.S. (and almost identical criteria in s. 119.15(4), F.S.) for its reenactment.

The exempted information –the videotaped statement of the minor sexual victim-- is of a “. . . sensitive, personal nature, concerning individuals.” Sections 119.15(2)(a) and (4)(b)2., F.S. Public disclosure of this

¹⁶ FPCA doesn’t know the answer to this question and DCF is uncertain.

This response indicates there is a purpose for the exemption that overrides the strong public policy for of open government: s. 119.15(4)(b)1., F.S. (allows effective and efficient administration of a governmental program).

¹⁷ DCF takes no official position on the question of repealing or reenacting the exemption. (“This is not a statute that is in our realm of administration.”)

This response answers the question posed in s. 119.15(4)(a)2., F.S.: “Whom does the exemption uniquely affect?” It also answers the question posed in s. 119.15(4)(a)3., F.S.: “What is the identifiable public purpose or goal of the exemption?”

This response indicates that there are two purposes for the exemption that override the strong public policy of open government: s. 119.15(4)(b)1., F.S. (allows effective and efficient administration of a governmental program) and s. 119.15(4)(b)2., F.S. (protects information of a sensitive personal nature).

¹⁸ See previous note.

¹⁹ No response was received from the Florida Sheriffs Association, other surveyed associations (except as noted herein), or any surveyed victim advocacy group.

The Florida Public Defenders (through the Florida Public Defender Association) respond, in part, that its official position was “as long as counsel in the criminal case involving the minor has immediate access to the restricted information. . . .” it “would not oppose the exemption as it stands. The exemption appears to be applied in various fashions throughout the state, but as long as counsel of record has access, we do not believe that the exemption would have a negative impact on this Association.”

information could defame the minor; cause unwarranted damage to the good name or reputation of the minor; and possibly jeopardize the minor's safety.

The exemption is also “. . . necessary for the effective and efficient administration of a governmental program . . .” Sections 119.15(2)(b) and (4)(b)1., F.S. Without the exemption minor victims of sexual assaults might not cooperate with investigators, and there could be a ‘chilling’ effect on prosecution.

There is no indication that these purposes can be accomplished without the exemption.

The exemption is no broader than is necessary to meet the public purposes it serves. The information exempted is limited to information in the videotaped statement that identifies the minor sexual victim.

Based on these findings, it appears that the benefits of retaining the exemption far outweigh any remote benefits that might accrue as a result of its repeal. However, based on the survey responses, it appears that, in addition to reenacting the exemption, it would be beneficial to have a technical, clarifying amendment

of the exemption. It is apparent that, with regard to this exemption, custodian of records are law enforcement agencies. This could be stated. There may also be some uncertainty as to the extent of disclosure to governmental entities and their responsibility to maintain the confidential and exempt status of the videotaped statements. This can be clarified by adding boilerplate language from other exemptions. Finally, there appears to be surplus verbiage in the exemption that restates that the information in the videotaped statement of the minor is limited to information identifying the minor victim. This restatement can be removed.

RECOMMENDATIONS

Staff recommends that the exemption in s. 119.07(3)(s)2., F.S., be reenacted because it meets the criteria in s. 119.15, F.S., for its reenactment. However, staff also recommends a technical, clarifying amendment to clearly indicate who is the custodian of the videotaped statement and when and in what manner disclosure of information is authorized to governmental entities, and to remove surplus verbiage.