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Committee on Regulated Industries

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

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR INFORMATION RELATIVE TO AN INVESTIGATION INTO LAND SALES PRACTICES BY THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION (S. 498.047(8), F.S.)

SUMMARY

The public records exemption for information relative to an investigation into land sales practices by the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation, as set forth in s. 498.047(8), F.S., is scheduled for repeal on October 2, 2003, unless reviewed and reenacted by the Legislature, pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

It is recommended that the current public records exemption and confidentiality be maintained and reenacted.

. . . 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.

This 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).

BACKGROUND

Constitutional Access to Public Records

Article I, s. 24 of the State Constitution provides every person 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

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

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 that: (1) the law creating 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.

The 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 public records 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 five 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.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the fifth year, 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.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

1. The exempted record or meeting is of a sensitive, personal nature concerning individuals;
2. The exemption is necessary for the effective and efficient administration of a governmental program; or
3. The exemption affects confidential information concerning an entity.

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

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?

Further, under the Open Government Sunset Review Act, 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, 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(3)(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 discussed the exemption with staff of the Division of Florida Land Sales, Condominiums, and Mobile Homes within the Department of Business and Professional Regulation (the division) and reviewed information provided by the division. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

Investigations of Land Sales Practices and the Confidentiality of Investigative Information

Chapter 498, F.S., is the “Florida Uniform Land Sales Practices Law.” In enacting the law, the Legislature recognized that:

[t]he severe impact upon the land sales industry and upon the economic and political climate of the state of false, misleading, and fraudulent methods in the disposition of any interest in subdivided lands, and the probable detrimental effects of default by companies and persons engaged in the disposition of any interest in subdivided lands, create a danger to the economic well-being of the people of the State of Florida.

s. 498.003(2), F.S. The Land Sales Practices Law was enacted to provide safeguards regulating the disposition of any interest in subdivided lands, and to prevent fraudulent and misleading methods and unsound financing techniques which could detrimentally affect not only remote land purchasers, but also the land sales industry, the public, and the state's economic well-being. s. 498.003(3), F.S.

The law sets forth unlawful and fraudulent acts (s. 498.022, F.S.) and both civil and criminal penalties for committing those acts (ss. 498.022, 498.007, 498.049, and 498.059, F.S.). The law designates the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (the division) to regulate land sales practices (s. 498.007, F.S.) and authorizes it to conduct investigations (s. 498.047, F.S.).

According to the division, complaints typically allege fraud or misrepresentation as to the ability to develop the property. In some cases, the representations relate to the condition of the property itself, i.e., the infamous swamp land sales. In others, the representations relate to the suitability of the property for development when

in fact such development is prohibited by environmental or other regulations.

In 1998, the Legislature enacted s. 498.047(8), F.S., making information relative to an investigation of land sales practices confidential. ch. 98-54, L.O.F. The general exemption is set forth in paragraph (a) of this subsection and provides that, except as otherwise provided by this subsection, information relative to an investigation by the division pursuant to the Land Sales Practices Law, including any consumer complaint, is confidential and exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution. The information remains confidential and exempt from public records law until ten days after a notice to show cause has been filed by the division, or, in the case in which no notice to show cause is filed, the investigation is completed or ceases to be active. For purposes of this section, an investigation is considered “active” so long as the division or any law enforcement or administrative agency or regulatory organization is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license or registration. However, in response to a specific inquiry about the registration status of a registered or unregistered subdivider, the division may disclose the existence and the status of an active investigation. This subsection is not to be construed to prohibit disclosure of information which is required by law to be filed with the division and which, but for the investigation, would be subject to s. 119.07(1), F.S.

The information remains confidential under circumstances set forth in paragraph (b). Except as necessary for the division to enforce the provisions of the Land Sales Practices Law, a consumer complaint and other information relative to an investigation remains confidential and exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution, after the filing of a notice to show cause or the investigation is completed or ceases to be active to the extent disclosure would:

1. Jeopardize the integrity of another active investigation;
2. Reveal the name, address, telephone number, social security number, or any other identifying number or information of any purchaser or account holder, or social security number or any account number of a complainant; or
3. Reveal a trade secret as defined in s. 688.002, F.S.

If information subject to the general exemption is offered in evidence in any administrative, civil, or criminal proceeding, the presiding officer may, in his or her discretion, prevent the disclosure of information which would be confidential as set forth in paragraph (b).

Nothing in the subsection is to be construed to prohibit the division from providing information to any law enforcement or administrative agency or regulatory organization. Any law enforcement or administrative agency or regulatory organization receiving confidential information in connection with its official duties is to maintain the confidentiality of the information as provided for in this subsection.

The subsection is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and will be automatically repealed on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature.

In enacting the exemption, the Legislature made the following findings of public necessity:

1. The untimely disclosure of information relating to an investigation into land sales practices could jeopardize the investigation.
2. An investigation can be jeopardized when the person or entity being investigated, or his or her agent, obtains copies of the investigation file and uses that information in order to alter records or otherwise thwart the investigation.
3. The untimely disclosure of certain identifying and location information relating to complainants could jeopardize the integrity of investigations by providing a mechanism for the person or entity being investigated to contact the complainant prior to the filing of a notice to show cause, or other resolution of the investigation, and to interfere with the investigation.
4. This may also have the effect of discouraging complainants from coming forward.
5. The name and specified identifying information of the complainant must remain confidential in order to encourage individuals to report illegal activity without fear of reprisal.
6. The disclosure of information, such as customer lists, could reveal trade secrets which would give competitors an economic advantage, and could cause financial harm to the entity whose trade secrets are being disclosed.

The House staff analysis on the exemption bill gave the following background:

1. As a result of 1993 amendments to s. 498.022, F.S., there had been an increase in the number of criminal referrals the division made to law enforcement and state prosecutors.
2. In making these referrals, the division sought to provide detailed and comprehensive intelligence without alerting the alleged wrongdoers prior to the filing of charges.
3. At that time, these investigation files were open to the public.
4. Public access to this information made a prosecution based upon a division investigation more difficult and made complainants less willing to come forward with information relating to an investigation.

House Staff Analysis on 1998 HB1903, citing to 1998 Department of Business and Professional Regulation Legislative Proposal, Uniform Land Sales Practices Act, Jim Mullins, Chief Land Sales Registration.

Answers to Questions Posed by the Open Government Sunset Act

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

The first question is what specific records are affected by the exemption?

According to the division, confidential information is contained both in records directly related to the real estate transaction and in records relating to the division's efforts to locate a respondent or a respondent's assets. These records may include: the letter of complaint; purchase contracts; Regulation Z federal financing disclosures; purchasers' personal account records; personal bank account records of complainant, respondent, and other persons and entities; financial records of both licensed and unlicensed persons or entities (i.e., contracts receivable records, debt instruments, financial statements, etc.); subpoenaed information from any source relative to an investigation; information defined as a trade secret; criminal background information on a respondent and other persons; report of personal assets of respondent and others; public records of all sorts relating to a respondent and other persons; letters of referral to other agencies of administrative, civil or criminal import; letters directed to and from various sources relative to an investigation; internal memoranda; reports and analysis relative to an investigation including documents protected by attorney client privilege under

Chapter 119, Florida Statutes; other communications relative to an investigation; and any other record types protected under Chapter 119, F.S.

The second specific question is whom does the exemption uniquely affect, as opposed to the general public?

According to the division, those persons uniquely affected are: a consumer who files a complaint that results in a division investigation and the division when an investigation is initiated in its own name; licensees, prospective licensees, purchasers of subdivided lands, and prospective purchasers of subdivided lands; corporations, regarding any information relative to an investigation that would reveal a "trade secret"; any law enforcement or administrative agency, or other regulatory organization who is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license or registration; and presiding officers over any administrative, civil, or criminal proceedings resulting from or related to an investigation.

The third question is what is the identifiable public purpose or goal of the exemption?

The Legislative findings made when enacting the exemption state that the public necessity and purpose of the exemption is to encourage complainants to report illegal activity without fear of reprisal; to protect investigations from interference by the person or entity being investigated by altering records, contacting the complainant, or otherwise thwarting the investigation; and to prevent disclosure of information, such as customer lists, that could reveal trade secrets which would give competitors an economic advantage, and could cause financial harm to the entity whose trade secrets are being disclosed.

The fourth and final specific question for consideration is can the information contained in the records be readily obtained by alternative means, and, if so, how?

Yes. According to the division, information concerning respondents' real estate transactions, vital statistics, personal property, stocks, bonds, motor vessels, motor vehicles, UCC information, proprietary information, and SEC information can be obtained from various other state and local governmental entities.

Section 119.15(4)(b), F.S., also provides that an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption meets one of the following purposes:

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.

According to the division, the exemption meets these purposes as follows:

1. It allows the division to effectively and efficiently administer its land sales regulation program in that the exemption is necessary to encourage complainants to come forward and to allow the division to provide full and complete information to law enforcement agencies to which it refers criminal investigations without disclosure jeopardizing further investigation or prosecution;
2. It protects information of a sensitive personal nature concerning individuals in that personal information of complainants, such as financial information, social security numbers, and other personal information is often contained in the investigative files and release of this information may cause additional harm to the individual consumer; and
3. It protects information of a confidential nature concerning entities the disclosure of which would injure the entity in the marketplace in that investigations often compile information on a regulated party's business records, manner of marketing and selling, customer lists, computerized information, and business alliances with lenders and other companies.

Finally, s. 119.15(4)(b), F.S., provides that an exemption must be no broader than is necessary to meet the public purpose it serves. Subparagraph 498.047(8)(b)2., F.S., provides that the public records exemption continues even after filing the notice to show cause or completing the investigation to the extent that the disclosure would “reveal the name, address, telephone number, social security number, or any other identifying number or information of any purchaser or account holder, or social security number or any account number of a complainant.” The division indicated that this continued exemption is necessary to protect those who have been victims of fraudulent land sales from further predation. As the information becomes public when an investigation is complete, except to the extent necessary to protect a complainant’s personal information, the exemption is no broader than necessary to meet the public purpose.

RECOMMENDATIONS

Staff recommends that the public records exemption in s. 498.047(8), F.S., be maintained and reenacted.