



The Florida Senate

Interim Project Summary 2004-208

November 2003

Committee on Communication and Public Utilities

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OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR THE WIRELESS 911 BOARD AND THE STATE TECHNOLOGY OFFICE

SUMMARY

The public records exemption set forth in section 365.174, F.S., for proprietary confidential business information submitted by a wireless service provider to the Wireless 911 Board or the State Technology Office will be repealed on October 1, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

The exemption protects proprietary confidential business information, helps ensure that the Wireless 911 Board gets the information it needs to administer the Wireless Emergency Telephone System Fund and the E911 system, and customers' unlisted phone numbers. As such, it is recommended that the exemption be reenacted.

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).

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.

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:

. . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form,

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 sent a questionnaire to the State Technology Office (Office) for a response on behalf of the Office and the Board of Directors of the Wireless 911 Board (Board) and reviewed the information provided pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

The exemption

Section 365.174, F.S., provides that all proprietary confidential business information submitted by a provider to the board or the office, including the name and billing or service addresses of service subscribers, and trade secrets is confidential and exempt from the open records provisions of the statutes and the constitution. Statistical abstracts of information collected by the board or the office may be released or published, but only in a manner that does not identify or allow identification of subscribers or their service numbers or of revenues attributable to any provider.

“Proprietary confidential business information” is defined to mean customer lists, customer numbers, and other related information, technology descriptions, technical information, or trade secrets, and the actual or developmental costs of E911 systems that are developed, produced, or received internally by a provider or by a provider's employees, directors, officers, or agents.

The exemption will be repealed on October 1, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

Operations of the Board and information gathered

Enhanced 911 (E911) services include automatic location identification and automatic number identification. The mobile nature of wireless communications service creates complexities in performing these functions and requires equipment and procedures not needed for landline phones.

The Wireless Emergency Communications Act, section 365.172, F.S., establishes a fee to fund the wireless E911 system and to ensure full recovery for providers and counties, over a reasonable period, of the costs associated with developing and maintaining an E911 system on a technologically and competitively neutral basis.

The wireless 911 fee is a monthly fee of 50 cents per service number, collected by each service provider. Each provider is to deliver revenues from the fee to the Board within 60 days after the end of the month in which the fee was billed, together with a monthly report of the number of wireless customers whose place of primary use is in each county.

The Board administers the funds with oversight by the Office. The Board disburses funds to the counties and wireless service providers to cover the costs of establishing, maintaining, and operating the E911 system. Funds are distributed to counties based on the number of wireless subscribers in each county and to wireless providers based on sworn invoices of actual costs incurred. The Board is to review each service provider's application for funds and approve or reject it, in whole or in part.

The Board is also authorized to establish a schedule for implementing E911 service by service area. It may prioritize disbursements to providers and rural counties in order to implement E911 services in the most efficient and cost-effective manner.

The Board is also authorized to ascertain the projected costs of establishing and maintaining the E911 system and the projected collections of the fee.

According to the Board, the information provided to the Board by the service providers contains information on market share and capital and operating costs, as well as customer wireless phone numbers, some of which are unlisted or unpublished.

Review of the exemption

Section 119.15, F.S., provides that when the Legislature is reviewing an exemption before its scheduled repeal it is to consider as part of the review process the following questions:

1. What specific records are affected by the exemption?

The wireless providers file information on their customers in connection with remitting fees and information on costs associated with E911 operations and proposed E911 enhancements in connection with cost recovery.

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

Wireless providers and their customers.

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

As discussed in more detail below, to protect proprietary confidential business information, to ensure that the Board continues to get the information it needs to administer the Wireless Emergency Telephone

System Fund and to oversee operations and expansion of the E911 system, and to protect confidential customer information.

4. Can the information contained in the records be readily obtained by alternative means? If so, how?

No.

Section 119.15, F.S., also provides that an 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. An identifiable public purpose is served if the exemption meets one of the purposes discussed below and 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.

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.

The Board states that the wireless service providers' filings with the Board contain information on the providers' customers, business plans, and operational and capital costs. If the exemption was not preserved, the providers may be less willing to provide full, accurate information, which may impair the Board's ability to administer the Wireless Emergency Telephone System Fund and to oversee operations and expansion of the E911 system.

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.

The exemption expressly protects customer lists and customer wireless phone numbers, information which customers may not wish to be made generally available.

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.

The Board states that the information each wireless service provider files to obtain disbursements or to enable the Board to ascertain projected costs and fee income contains information on the provider's customer list, market share and capital and operating costs. If this information was not kept confidential, other providers could use it to competitive business advantage.

Based on the above, the exemption serves an identifiable public purpose.

Additionally, the exemption appears to be no broader than necessary to meet this purpose. Statistical abstracts of information collected by the Board and other general information about the E911 fund and system are available to anyone interested. The exemption appears to protect only business information and customers' phone numbers, information not otherwise available to the public and for which there is an expectation of confidentiality and privacy.

RECOMMENDATIONS

Based on the above findings, the public purpose for the exemption contained in section 365.174, F.S., is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The exemption should be reenacted.