



# The Florida Senate

*Interim Project Report 2005-203*

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Committee on Commerce and Consumer Services

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

## **OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTIONS FOR INVESTIGATION AND REVIEW INFORMATION AND SOCIAL SECURITY NUMBERS UNDER CAPCO PROGRAM, S. 288.99(15) & (16), F.S.**

### **SUMMARY**

Florida's Certified Capital Company Act includes exemptions for: 1) Any information relating to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO); 2) OFR employees' personal information if employees are involved in an investigation or review that may endanger the lives or physical safety of those persons or their families; 3) all information obtained by OFR from any person which is only made available on a confidential basis; and 4) the social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business. These public records exemptions, codified in s. 288.99(15) and (16), F.S., expire on October 2, 2005, unless the Legislature saves them from repeal after reviewing them under the Open Government Sunset Review Act (act).

After evaluating the public records exemptions against the criteria prescribed in the act, this report recommends that the Legislature reenact the public records exemption for information relating to an investigation or OFR review of a CAPCO. Without the exemption, an early-stage company that submits sensitive business information to a CAPCO risks having competitors access that information contained in an investigation or OFR review file. This report recommends that the Legislature consider allowing the other three exemptions to expire.

### **BACKGROUND**

#### **Public Records Law**

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to

public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides that:

Every person has 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. 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 Public Records Law<sup>1</sup> also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term "public records" to include:

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.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with

<sup>1</sup> Chapter 119, F.S.

official business which are “intended to perpetuate, communicate, or formalize knowledge.”<sup>2</sup>

Under s. 24(c), Art. I of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (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.

### Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. 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.”<sup>3</sup>

Under s. 119.15(2), F.S., an exemption may be maintained only if: “(a) The exempted record or meeting 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), F.S., requires, as part of the review process, the consideration of the following 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?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of

the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption 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 exemption 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.”
- The exemption 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.”<sup>4</sup>

### Certified Capital Company Act

In 1998, the Legislature enacted ch. 98-257, L.O.F., titled the Certified Capital Company Act, which was codified in s. 288.99, F.S. The primary purpose of the act is to “stimulate a substantial increase in venture capital investments in this state by providing an incentive for insurance companies to invest in certified capital companies in this state which, in turn, will make investments in new businesses or in expanding businesses.” The act is designed to contribute to employment growth in the state through the investments in the new or expanding businesses, create jobs with wages that are greater than the county average wage where the jobs are created, and expand or diversify the economic base of the state.<sup>5</sup> The incentives to insurance companies for investing are in the form of insurance premium tax credits in amounts equal to the investments in the certified capital companies, known as CAPCOs.

The Office of Financial Regulation (OFR), the Governor’s Office of Tourism, Trade, and Economic Development (OTTED), and the Department of Revenue (DOR) have roles in administering the CAPCO Program. OTTED allocates tax credits to CAPCOs and provides an annual report to the

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

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

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

<sup>5</sup> Section 288.99(2), F.S.

Governor, the President of the Senate, and the Speaker of the House of Representatives; DOR accounts for tax credits claimed by insurance companies through the program; and OFR certifies capital companies and performs an annual review of each CAPCO.

Under Program One of the act, the insurance industry was authorized to invest up to a maximum of \$150 million in CAPCOs and claim insurance premium tax credits totaling \$15 million per year for 10 years.<sup>6</sup> Under Program Two, which has not been executed, an additional \$150 million in insurance premium tax credits may be allocated by OTTED once certain insurance premium tax collection criteria are met as determined by the Revenue Estimating Conference.<sup>7</sup>

Under Program One, there are three certified companies eligible to receive investment funds from insurance companies and to invest these funds as venture capital.<sup>8</sup> Insurance companies invested a total of \$150 million in these three CAPCOs. Examples of industries in which the three CAPCOs in turn made investments include electronic imaging, medical technology, boat manufacturing, credit card payment processing, vehicle fleet managements systems, and an Internet portal for fisherman.

The statute requires OFR, as part of its annual review, to determine if each CAPCO is abiding by the requirements of certification, to advise the CAPCO as to the eligibility status of its investments, and to ensure that no investment has been made in violation of the statute governing CAPCOs.<sup>9</sup> During the course of the review, OFR may examine CAPCOs due diligence files on companies under consideration for investment. These files may include business plans, product descriptions, processes, formulas, internal product cost information, and competitive strategies of companies under consideration for investment. A typical office review begins with OFR contacting a CAPCO and establishing an appointment date for a site visit to the CAPCO; visiting the CAPCO and making copies of various documents that will help OFR determine if the CAPCO is in compliance with the CAPCO statute; and releasing a letter to the CAPCO following the review stating whether the CAPCO has met all the requirements of the CAPCO statute.

## Public Records Exemptions

### *Investigation or Review Information*

In 2000, the Legislature enacted a public records exemption for the Certified Capital Company Act which provides confidentiality to, and exempts from the open government provisions, any information relating to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO), including a consumer complaint, until the investigation or review is complete or ceases to be active.<sup>10</sup> Even if the investigation or review ceases to be active or is complete, the information remains confidential and exempt if the information is submitted to any law enforcement or administrative agency for further investigation, until that agency's investigation is complete or ceases to be active. The statute specifies that:

an investigation or review shall be considered "active" so long as the office, a law enforcement agency, or an administrative agency 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.<sup>11</sup>

This exemption provides that information relating to an investigation or office review<sup>12</sup> may remain confidential and exempt after an investigation or review is complete if disclosure would: 1) reveal a trade secret; 2) jeopardize the integrity of another active investigation or review; or 3) disclose the identity of a confidential source or investigative techniques or procedures.<sup>13</sup>

### *Personal Information of OFR Employees*

Additionally, the statute specifies that, if OFR employees are or have been involved in an investigation or review that would endanger their lives or the lives of their families, the following information is confidential and exempt from the open government provisions: 1) the home addresses, telephone numbers, places of employment, and photographs of such personnel; 2) the home addresses, telephone numbers, photographs, and places of employment of spouses and children of such personnel; and 3) the names and

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<sup>6</sup> Section 288.99(7)(a), F.S.

<sup>7</sup> Section 288.99(17), F.S.

<sup>8</sup> The three CAPCOs are: Willshire Partners, LLC; Advantage Capital Partners; and Stonehenge Capital Corporation.

<sup>9</sup> Section 288.99(10)(a), F.S.

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<sup>10</sup> Section 1, ch. 2000-311, L.O.F.; s. 288.99(15)(a), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> OFR staff explained that there is no real distinction in practice between an investigation or review. Because OFR has received only one complaint, it has not been necessary to make a formal distinction between a review and an investigation, which may be prompted by a complaint.

<sup>13</sup> Section 288.99(15)(b), F.S.

locations of schools and day care facilities attended by the children of such personnel.<sup>14</sup>

### ***Documents Provided on a Confidential Basis***

The statute also provides confidentiality and an exemption from the open government provisions for “[a]ll information obtained by the office from any person which is only made available to the office on a confidential or similarly restricted basis.”<sup>15</sup>

### ***Social Security Numbers***

Lastly, the CAPCO statute provides that the “social security number of any customer of a certified capital company, complainant, or person associated with a certified capital company or qualified business<sup>16</sup>” is exempt from the open government provisions.<sup>17</sup>

These public records exemptions expire on October 2, 2005, unless they are reviewed and reenacted by the Legislature. The purpose of this report is to evaluate these public records exemptions under the criteria of the Open Government Sunset Review Act.

## **METHODOLOGY**

Committee staff surveyed and interviewed staff of the Office of Financial Regulation within the Financial Services Commission. In addition, committee staff provided copies of the survey to, and solicited input from, the Department of Revenue, the Governor’s Office of Tourism, Trade, and Economic Development, the state’s three certified capital companies, and the First Amendment Foundation.

## **FINDINGS**

### **Sunset Review Questions**

The Open Government Sunset Review Act prescribes questions to be considered by the Legislature in deciding whether to save a public records exemption from its scheduled repeal.<sup>18</sup>

### ***What specific records does the exemption affect?***

The public records exemptions under review apply to “any information” relating to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO); OFR employees’ personal

information if OFR employees are involved in an investigation or review that may endanger the lives or physical safety of those persons or their families; “all information” obtained by OFR from any person which is only made available on a confidential basis; and the social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business.

The term “any information” relating to an investigation or OFR review of a CAPCO is not specifically defined within the CAPCO statute. However, OFR staff reported that “information” would refer to: 1) a CAPCO’s due diligence files on companies under consideration for investment, which may include business plans, product descriptions, processes, formulas, internal product cost information, and competitive strategies; and 2) a CAPCO’s corporate and financial records. In the opinion of the CAPCOs that provided input for this report, if the public has access to the information within the due diligence files, early-stage companies will not look to CAPCOs as potential investment partners because they would lose their competitive advantage over other companies. OFR similarly noted that a company that a CAPCO is considering for investment and the CAPCO will sign a confidentiality agreement prior to negotiations, further signaling the importance of confidentiality to the business community.

The exemption also provides that information from an investigation, office review, or consumer complaint remains exempt after an investigation or review is complete or ceases to be active if disclosure would: 1) reveal a trade secret as defined in s. 688.002, F.S., or s. 812.081, F.S.; 2) jeopardize the integrity of another investigation or review; or 3) disclose the identity of a confidential source or investigative techniques or procedures.<sup>19</sup>

The First Amendment Foundation suggested narrowing the trade secret provision by requiring that the provider of the information file an affidavit of confidentiality with OFR describing the materials submitted and why the documents should remain confidential. Further, OFR would be required to make a finding, prior to application of the exemption, that the information will reveal a trade secret, jeopardize another active investigation or review, or disclose the identity of a confidential source or investigative technique or procedure. The typical approach of an agency to requests for information is to review the information on file and follow the criteria established in statute to

<sup>14</sup> Section 288.99(15)(d), F.S.

<sup>15</sup> Section 288.99(15)(e), F.S.

<sup>16</sup> In general, a qualified business means a company that a CAPCO is considering for investment purposes. See s. 288.99(3)(j), F.S.

<sup>17</sup> Section 288.99(16), F.S.

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

<sup>19</sup> Section 288.99(15)(b), F.S.

determine whether it should be released. OFR staff noted that the suggested approach may inadvertently limit what may be released because the office could not release what was approved as confidential and exempt in the finding, although circumstances may have changed since that finding was made.

The exemption in the CAPCO law for personal identifying data of investigators and their families is comparable to an exemption in s. 395.3025(11), F.S., which makes confidential and exempt identifying data of hospital personnel. In order for the information to be confidential and exempt, the hospital employee must make a written request and have a reasonable belief, based upon specific circumstances reported in accordance with procedures adopted by the facility, that, if released, the information may be used to threaten, harass, or harm the employee or the employee's family. OFR reported that the CAPCO exemption has never been used, perhaps suggesting the reviews under the CAPCO Act are not typically or inherently risky to the reviewer. However, the office has requested that the exemption be maintained in the event it should become necessary in the future. If the Legislature elects to maintain this exemption, it may wish to consider adding qualifying language similar to that in s. 395.3025(11), F.S., to require an OFR employee to request in writing that his or her information be kept confidential based upon specific circumstances that have been reported to OFR.

Also exempt from disclosure is a social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business. Although not defined in the statute, presumably a customer of a CAPCO would either be an employee of an insurance company that invests in the CAPCO or an employee of a company in which a CAPCO is considering making an investment. A complainant is a person who files a consumer complaint regarding a CAPCO. The statute does not clarify who is a person "associated with" a CAPCO or qualified business. OFR reported that it does routinely view social security numbers during the annual review process. This exemption is somewhat duplicative of s. 119.0721, F.S., which makes confidential and exempt from the open government provisions social security numbers held by an agency or its agents, employees, or contractors. However, s. 119.0721, F.S., does provide exceptions for the release of a social security number to another governmental agency, which must maintain the confidentiality of the social security number, and to a commercial entity that makes a written request for the

number for certain approved legitimate business purposes.<sup>20</sup>

The broadest exemption in the CAPCO statute applies to "all information" obtained by OFR from any person that is only made available on a confidential or similarly restricted basis. Potentially, any person or business, including a CAPCO, may offer OFR information and request that the information be kept confidential. OFR staff reported that this provision has only been invoked once – by a CAPCO during the initial application process. This exemption is qualified in that it "shall not be construed to prohibit disclosure of information which is specifically required by law to be filed with the office or which is otherwise subject to" the open government provisions.<sup>21</sup> The First Amendment Foundation suggested that this provision either be rewritten or allowed to expire because it may be unconstitutional in that it is overly broad and permits a provider of information, which may be a CAPCO, to unilaterally determine what is confidential without any legislative guidelines.

#### *Whom does the exemption uniquely affect?*

The public records exemptions under review have the potential to uniquely affect a certified capital company (CAPCO) and companies CAPCOs may be considering for investment. The records acquired by a CAPCO during the course of its business dealings with early-stage companies include business plans, product descriptions, processes, formulas, internal product cost information, and competitive strategies. These types of records are, at times, the only thing of value to a company since these companies are in early-stage development. The CAPCOs have indicated that if these types of records are made public, the release of these records would harm the ability of an early-stage company to be successful. The CAPCOs stated that companies interested in receiving CAPCO investment funds likely would not provide this information to a CAPCO if the information may later become public. OFR staff stated that, during the course of an investigation or review, they routinely make copies of this kind of information to ascertain compliance with the CAPCO statute.

The public records exemptions under review also have the potential to uniquely affect OFR employees involved in an investigation or review of such nature as to endanger their lives or physical safety or that of their families. The employees' personal information and

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<sup>20</sup> Section 119.0721(2) & (3), F.S.

<sup>21</sup> Section 288.99(15)(e), F.S.

their families' personal information are exempt from disclosure in this situation. OFR has three CAPCO examiners on staff. However, OFR indicated that this exemption has not been used in the past. The exemption also does not specify how OFR should make a determination that an investigation or review was of such a nature that withholding OFR employees' personal information was necessary.

Also affected by the public records exemptions under review is any person who provides information to OFR on a confidential or similarly restricted basis. However, the determination of what records are to be exempt under a particular public records exemption is usually made by agency employees based upon criteria in the particular exemption statute, not by the person submitting the information.

The public records exemptions under review also have the potential to uniquely affect individuals whose social security numbers have been provided either to a CAPCO or to OFR for various reasons. The exemption specifically applies to any customer of a CAPCO, consumer complainant, or a person associated with a CAPCO or qualified business. OFR reported that it does routinely view social security numbers during reviews of CAPCOs.

***What is the exemption's public purpose or goal?***

When it enacted the exemptions, the Legislature stated that "it is a public necessity to exempt from public records requirements certain information obtained during an investigation or annual review of a certified capital company" in order to "protect the integrity of contract negotiations inherent to this industry, which include complex financial transactions and negotiations" between CAPCOs and insurance companies that invest in CAPCOs.<sup>22</sup> The Legislature further stated that if information collected during an investigation or review is not protected, "critical proprietary information regarding investment contracts and the structuring of investments in certified capital companies will be revealed."<sup>23</sup> The Legislature also stated that:

Disclosure of this information would place those certified capital companies at a competitive disadvantage in all states in which the companies currently operate or intend to operate. Consequently, companies whose records are not otherwise open to public inspection may refrain from seeking

certification as certified capital companies in Florida, or expanding their current presence in Florida. As a result, Florida would lose a significant source of venture capital for small early-stage businesses, economic growth resulting from the establishment of new businesses funded by certified capital, tax revenue generated by new jobs and businesses, and employment opportunities for the citizens of this state.<sup>24</sup>

Additionally, according to OFR, without the exemption, a CAPCO would not be able to guarantee that the sensitive business information provided by the early-stage companies, such as business plans, formulas, and processes, would not become public and available to competitors. Based upon input received from two of the three CAPCOs, the CAPCOs would concur with OFR that the CAPCOs themselves would be unable to make any investments without this exemption.

The stated public purpose for the exemption regarding the protection of personal information of OFR employees who may be involved in an investigation or OFR review is to prevent the release of information which could:

jeopardize the safety and welfare of departmental<sup>25</sup> investigatory personnel and their families. The release of this personal information would not benefit the public or aid it in monitoring the effective and efficient operation of government. The exemption of this personal information would minimize the possibility that those persons under investigation might use the information to threaten, intimidate, harass, or cause physical harm or other injury to these persons or members of their family.<sup>26</sup>

However, as noted, in practice, the likelihood of OFR employees being placed in danger because of a CAPCO investigation or review appears remote.

The Legislature stated that the exemption for information received by the office from a person who makes the information available only on a confidential or similarly restricted basis is needed because:

<sup>24</sup> *Id.*

<sup>25</sup> The Department of Banking and Finance was reorganized, and the Office of Financial Regulation assumed CAPCO duties.

<sup>26</sup> Section 2, ch. 2000-311, L.O.F.

<sup>22</sup> Section 2, ch. 2000-311, L.O.F.

<sup>23</sup> *Id.*

Maintaining the confidentiality of such information protects the concerns of the persons regarding privacy, trade secrets, physical safety, or other such reason. The public benefit of maintaining the confidentiality outweighs the public benefit derived from release of such information, since such information would otherwise not be available to the department to carry out its regulatory or investigatory duties.<sup>27</sup>

As noted in this report, the use of this exemption has been limited, and the exemption is restricted by the qualification that the exemption cannot be construed to prohibit disclosure of information that is required to be filed with OFR or is otherwise subject to the open government provisions.

The public purpose for the exemption for social security numbers for a customer of a CAPCO, a complainant, or a person associated with a CAPCO or qualified business is to prevent “unnecessarily exposing those individuals to an invasive scrutiny of personal information.” The Legislature indicated that protecting this information will help promote the growth of the CAPCO industry. As noted in this report, this exemption is somewhat duplicative of an existing exemption in the Public Records Law.

#### ***Is the information otherwise readily obtainable?***

The items that are typically obtained in an investigation or Office of Financial Regulation (OFR) review do not appear to be readily accessible to the general public. Items such as business plans, product descriptions, processes, formulas, internal product cost information, and competitive strategies are closely guarded by companies in general, but especially by early-stage companies since these items may constitute the only value of the company.

Although the exemption for personal information of OFR employees who may be involved in an investigation or review that may endanger their lives or that of their families has not been used, if the exemption were evoked to protect an OFR employee’s information, in this circumstance, the personal information would not be readily available to the general public.

Information provided by a person to OFR on a confidential or similarly restricted basis is also not likely readily obtainable or the person would have no reason to provide the information under such restrictions.

Social Security numbers are not otherwise readily obtainable and are also protected under a general exemption for social security numbers found in s. 119.0721, F.S.

#### **Maintenance of the Exemptions**

Under the Open Government Sunset Review Act, a public records exemption may be maintained only if it serves an identifiable public purpose, and an exemption may be no broader than necessary to meet that purpose.<sup>28</sup> A satisfactory public purpose includes one that: allows for effective and efficient administration of a governmental program; protects sensitive personal information about individuals; or protects confidential information about entities. Additionally, the Legislature must find the purpose is “sufficiently compelling” to take priority over the state’s policy tradition of open government. (See discussion of the Open Government Sunset Review Act in the Background section, above.)

#### ***Public Purpose Analysis***

Based upon the insights shared by Office of Financial Regulation (OFR) staff, input received from certified capital companies (CAPCOs), and input from the First Amendment Foundation, the exemption for information obtained in an investigation or OFR review principally serves the public purpose of protecting information of a confidential nature about entities – early-stage companies a CAPCO may be considering for investment. The due diligence files containing business plans, product descriptions, formulas, processes, and similar information often used by a CAPCO to make an investment decision are not typically accessible to the public and may be used by a company to protect or further an advantage over those who do not know the information. Disclosing the information in the due diligence files would provide competitor businesses with previously inaccessible insights into the strategies and operations of these companies and thereby potentially injure the companies in the marketplace. Additionally, the loss of the exemption would effect the effective and efficient administration of the program because early-stage companies will be reluctant to provide information to CAPCOs if they risk the information becoming public.

The documents in a due diligence file, such as business plans, product descriptions, formulas, processes, and similar information, are quite varied. Although the First Amendment Foundation recommended that this exemption be revised, OFR staff suggests that it would

<sup>27</sup> Section 2, ch. 2000-311, L.O.F.

<sup>28</sup> Section 119.15(4)(b), F.S.

not be feasible to make findings or place expiration dates or other such time limits on the exemption for these types of documents. OFR staff believes it is more feasible to rely on the criteria set out in the exemption that specifies the circumstances under which items remain confidential.

The exemption for OFR employees who may be involved in an investigation or review of such nature as to endanger their lives or the physical safety of their families appears to serve the purpose of allowing for the effective and efficient administration of a government program. Protecting the sensitive personal information of OFR employees from a person who may wish to harm or harass OFR employees because of a particular investigation or review may allow OFR to investigate or conduct annual reviews of CAPCOs as required in the CAPCO statute. Input from OFR staff suggests that this exemption probably would not be used in practice, as there is not likely to be an investigation or review of a CAPCO that would place OFR employees or their families in danger, although OFR staff would still like the exemption to be maintained in the event it is needed in the future. In light of the fact that this exemption has never been utilized, the Legislature may wish to allow this exemption to expire. However, if the Legislature decides to renew this exemption, it may wish to clarify it by adding language to s. 288.99(15)(d), F.S., that requires an OFR employee to submit a written request for confidentiality of their information. This request must be based upon the employee's reasonable belief, from specific circumstances reported to OFR, that release of the information may endanger the employee or the employee's spouse or children.

The catchall exemption for information made available by a person to OFR on a confidential basis appears, in concept, to serve two purposes: 1) allowing for the effective and efficient administration of a government program, and 2) protecting confidential information about entities. However, the exemption arguably may be overbroad because by allowing the person submitting information to determine what is confidential, the exemption may have the effect of capturing information that goes beyond the public necessity for the exemption.<sup>29</sup> The Legislature may wish to allow this exemption to expire because it does

not make clear what is exempt and does not establish any parameters to determine what is exempt.

The exemption for social security numbers appears to serve the purpose of allowing for the effective and efficient administration of a government program because during annual reviews OFR does view social security numbers. However, the Legislature may wish to let this exemption expire since this exemption is somewhat duplicative of the general exemption for social security numbers found in s.119.0721, F.S., although this section does allow some exceptions for the release of a social security number to another government agency or to a commercial entity for certain approved legitimate business purposes. Allowing the exemption to expire will ensure consistent application and eliminate potentially overlapping provisions in the statutes.

## RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption for information obtained in an investigation or Office of Financial Regulation (OFR) review of a certified capital company. The Legislature may wish to allow the exemption for personal identifying data of OFR examiners and their families to expire because CAPCO reviews do not appear to be inherently risky to investigators and the exemption has never been utilized. However, if the Legislature elects to retain this exemption, it may wish to add clarifying language that requires an OFR employee to request the use of the exemption based on specific circumstances reported to OFR. It is recommended that the Legislature allow the remaining two exemptions to expire because:

- the catchall exemption for a person who wishes to provide information to OFR on a confidential basis appears to be overbroad; and
- the exemption for social security numbers is duplicative of an existing exemption.

<sup>29</sup> See *Halifax Hosp. Medical Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 569-570 (Fla. 1999) (finding to be overly broad and unconstitutional a public meetings exemption because it applied to any discussion of a hospital's strategic plan even though not all aspects of the plan would be critical confidential information). (The Court noted that the statute did not define "strategic plan" nor provide a justification for the breadth of the exemption.)