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Committee on Education

Senator Evelyn Lynn, Chair

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION OF THE FLORIDA COLLEGE SAVINGS PROGRAM (S. 1009.981(6), F.S.)

SUMMARY

Information that identifies the benefactors and the beneficiary, and individual account activities conducted under the Florida College Savings Program are exempt from the state's open government requirements. This public records exemption, codified in s. 1009.981(6), F.S., expires on October 2, 2005, unless the Legislature reenacts the exemption following review under the Open Government Sunset Review Act of 1995 (act).¹

Evaluating the public records exemption against the criteria prescribed in the act, this report finds that the exemption protects information of a sensitive personal nature concerning Florida College Savings Program participants. Without the exemption, the safety of the program participants would be jeopardized by creating the potential for identity theft and fraud. The public records exemption, however, may be overbroad. Therefore, this report recommends that the Legislature save from repeal the public records exemption of the Florida College Savings Program but also revise the exemption to narrow its coverage.

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 Law² also specifies conditions under which the public must have access to governmental records. Section 119.011(1), F.S., defines the term *public record* 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 the official business by any agency.

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. Article I, s. 24(a), of the State Constitution provides that:

Every person has the right to inspect or copy any

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used "to perpetuate, communicate, or formalize knowledge."³ Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.⁴

² Chapter 119, F.S.

³ *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

¹ Section 119.15, F.S.

Under Article I, s. 24(c), 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.”⁵

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.” However, only information that would identify the individual is exempted.
- 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.”

The Florida College Savings Program

The 1999 Legislature enacted the Florida College Savings Program to allow individuals to make contributions to an account to meet qualified education expenses of a designated beneficiary consistent with federal law authorizing these accounts under s. 529 of the Internal Revenue Code.⁶ Unlike the Florida Prepaid College Program⁷, which locks in tuition through an advance payment contract, the Florida College Savings Program does not provide any qualified guarantees that the contributions will be sufficient to meet tuition requirements. In providing the qualified guarantee under the Florida Prepaid College Program, the Florida Prepaid Board manages the contributions of account holders for the benefit of all program participants. In the Florida College Savings Program, the benefactor makes the investment decisions and the contributions and returns are maintained in a specific account for the benefit of the beneficiary.

The Florida College Savings Program Public Records Exemption

The Florida College Savings Program prohibits the public disclosure of information that identifies the benefactors or designated beneficiary of any account initiated under the program as well as any information

⁵ Section 119.15(3)(b), F.S.

⁶ Section 1, ch. 99-220, L.O.F.

⁷ Section 1009.98, F.S.

regarding individual account activities.⁸ These records are confidential and exempt.⁹ The Florida Prepaid College Board may release the protected information to a community college, college, or university in which a beneficiary may enroll or is enrolled; however, the postsecondary institution must maintain the exempted and confidential status of the records.¹⁰

Related Public Records Exemption in the Florida Prepaid College Program

The Florida Prepaid College Program prohibits the public disclosure of information that identifies the purchasers or beneficiary of any prepaid plan under the program and their advance payment activities.¹¹ However, this exemption predates the 1992 constitutional amendment relating to access to public records. The records are exempt from disclosure but are not confidential and exempt. The Florida Prepaid College Board may release the protected information to a community college, college, or university in which a beneficiary may enroll or is enrolled.¹² The postsecondary institution must maintain the exempted status of the records.¹³

METHODOLOGY

Committee staff reviewed the enactment of the public records exemption as well as the public necessity statement. Committee staff surveyed the Florida Prepaid College Board for information on the operation of the public records exemption and for opinions on the reenactment, repeal, or modification of the exemption. In addition, committee staff contacted the First Amendment Foundation.¹⁴ Finally, committee staff contacted certain postsecondary institutions.

⁸ Section 1009.981(6), F.S.

⁹ Id.

¹⁰ Id.

¹¹ Section 1009.98(6), F.S.

¹² Id.

¹³ Id.

¹⁴ The First Amendment Foundation is a not-for-profit organization whose stated purpose is “to protect and advance the public’s constitutional right to open government by providing education and training, legal aid and information services.” See <http://www.floridafaf.org>.

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.¹⁵

What specific records does the exemption affect?

The public records exemption under review applies to information that identifies the benefactors or the designated beneficiary of any account initiated under the Florida College Savings Program and information regarding individual account activities conducted through the savings program under s. 1009.981(6), F.S. The term *benefactor* means any person making a deposit, payment, contribution, gift, or other expenditure into the savings program.¹⁶ The term *designated beneficiary* means:

- Any individual designated in the participation agreement, which is the savings agreement between the board and the benefactor on behalf of the beneficiary;
- Any individual defined in s. 152(a)(1)-(8) of the Internal Revenue Code; or
- Any individual receiving a scholarship from interests in the program purchased by a state or local government or an organization described in s. 501(c)(3) of the Internal Revenue Code.

The term *individual account activities* is not defined within the provisions relating to the Florida Prepaid College Board programs. However, the Florida Prepaid College Board collects the following information from program participants: the names of the account owner and the beneficiary; the social security numbers of the account owner and the beneficiary; contact information including the addresses, telephone numbers, and e-mail addresses; the family income of the account owner and relationship to the beneficiary; and the grade, the birth date, and the race and sex of the beneficiary. In addition, the Florida Prepaid Board collects account information, which includes the investment option selected, the allocation between investment options, the cost and market value of the investment options, the amount invested by the account owner, the investment income or loss on the amounts invested, sources of

¹⁵ Section 119.15(4)(a), F.S.

¹⁶ Section 1009.97(3)(i), F.S.

funding, payment methods, fees paid, and distributions from the account.

Whom does the exemption uniquely affect?

The public records exemption under review has the potential to uniquely affect 13,689 account holders, their families, and the designated beneficiaries under the Florida College Savings Program.¹⁷

The public records exemption also has the potential to uniquely affect qualified tuition plans in other states, which, absent the exemption, would be able to contact and solicit program participants to the potential detriment of the Florida College Savings Program. The Florida Prepaid College Board alleges that if a sufficient number of program participants terminate their participation in the savings program at the insistence of other qualified tuition plans in other states, the cost of participation for the remaining participants would increase.

What is the exemption's public purpose or goal?

The Legislature determined that the Florida College Savings Program serves a legitimate public purpose by fostering timely financial planning for postsecondary education.¹⁸ In the statement of public necessity accompanying the creation of the public records exemption, the Legislature articulated three justifications for exempting the identities of the account benefactors and the beneficiary and the individual account activities from disclosure: 1) to prevent a chilling effect upon the willingness of persons to participate in the program because the information would necessarily contain personal information, 2) to prevent acts of fraud that may be committed upon the benefactors, beneficiaries, and their families, and 3) to prevent an unwarranted invasion into the lives and personal privacy of program participants.¹⁹

Is the information otherwise readily obtainable?

The identities and account information of the benefactors and beneficiaries do not appear to be readily accessible to the general public. Much of the individual account information collected by the Florida Prepaid Board is required by s. 529 of the Internal Revenue Code for tax return purposes. In general, federal tax returns and return information are

confidential under 26 USC s. 6103(a). Similarly, under Florida law, information in returns and reports received by the Department of Revenue is confidential and exempt from the state's open government requirements, with specific exceptions.²⁰

In addition, the Gramm-Leach-Bliley Act protects against the disclosure of personally identifiable information by financial institutions.²¹ The Gramm-Leach-Bliley Act defines the term *financial institutions* as any entity engaging in activities that are financial in nature.²² This may include the activities of the Florida Prepaid College Board as the board invests on behalf of the program participants.²³ The Gramm-Leach-Bliley Act bars disclosure of personal information to nonaffiliated parties without providing notice to the consumer that the personal information would be disclosed absent consumer action to bar the disclosure.²⁴ The Florida Prepaid College Board has followed the terms of the Gramm-Leach-Bliley Act and has informed program participants that the board does not release information concerning the participants with the exception of the postsecondary institution in which the beneficiary may enroll or is enrolled.²⁵

Maintenance of the Exemption

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.²⁶ A satisfactory public purpose includes: allowing for effective and efficient administration of a governmental program; protecting sensitive personal information about individuals; or protecting confidential information about entities.²⁷ Additionally, the Legislature must find the purpose is *sufficiently compelling* to take priority over the state's policy tradition of open government.²⁸

Public Purpose Analysis

Based upon the insights provided by the Florida Prepaid College Board, the exemption for the identities of the benefactors and beneficiary, and their account

¹⁷ Survey response of the Florida Prepaid College Board dated September 10, 2004.

¹⁸ Section 2, ch. 2000-203, L.O.F.

¹⁹ Id.

²⁰ Section 213.053, F.S.

²¹ 15 U.S.C. ss. 6801-6809

²² 15 U.S.C. s. 6809(3)

²³ See id. and 12 U.S.C. s. 1843(k)(4)

²⁴ 15 U.S.C. ss. 6801-6809

²⁵ Survey response of Florida Prepaid College Board dated September 10, 2004.

²⁶ Section 119.15(4)(b), F.S.

²⁷ Id.

²⁸ Id.

activities principally serves the public purpose of protecting sensitive personal information about individuals. The identities of the account participants and their account activities are not typically accessible to the public and may be used by individuals or entities to commit fraud or visit economic harm upon program participants and their families.

For example, the Florida Prepaid College Program prohibits the public disclosure of information that identifies the purchasers or beneficiaries, and the individual account activities of program participants.²⁹ This exemption was enacted in 1992 following the request by numerous financial entities for information about account owners and beneficiaries.³⁰ Pursuant to chapter 119, F.S., the Florida Prepaid College Board was required to release the requested information to the entities, which in turn proceeded to solicit account participants.³¹ One of these companies, Metropolitan Life Insurance Company (MetLife) solicited a large number of program participants and allegedly urged them to cancel their prepaid program accounts and purchase whole life insurance policies.³² Many of the individuals claim they were misled by MetLife and filed a class action lawsuit which ended with a settlement in which MetLife agree to pay to reinstate the claimant's prepaid accounts.³³ Accordingly, proponents of the reenactment of the public records exemption fear that a similar situation could occur if the public records exemption were allowed to sunset.³⁴

In addition, program participants may suffer economic harm in the form of increased costs if there is a significant reduction in the number of account holders.³⁵

However, s. 119.15, F.S., authorizes the reenactment of a public records exemption on the basis of protecting sensitive personal information concerning individuals, if the exemption only prohibits the disclosure of information that would identify the individuals involved.³⁶

In addition, the research for this report, on balance, suggests that the public records exemption does

contribute to effective and efficient administration of the Florida Prepaid College Board of the Florida College Savings Program. However, the extent to which program administration would be impaired without the exemption has not been proffered as a public purpose in support of reenactment of the exemption.

Coverage of the Exemption

The public records exemption contained in the Florida College Savings Program prohibits public disclosure of any information that identifies the benefactors or beneficiary of any account under the program. In addition, the exemption prohibits the public disclosure of any individual account activities conducted through the program.

Although the public records exemption shields *individual account activities* from disclosure, it does not specifically define the term. The Legislature, in enacting the public records exemption, determined that the individual account activities prohibited from disclosure was information that must necessarily contain personal information.³⁷ The Florida Prepaid College Board for all intents and purposes prohibits the disclosure of any individual account activities in conformance with the statute.

However, if the term *individual account activities* means any record that identifies the benefactors or beneficiary, the term is superfluous because any information that identifies the benefactors or beneficiary is exempted from public disclosure. On the other hand, if the exemption prohibits the disclosure of any individual account activities and that prohibition includes items that are not information that would identify the benefactors or beneficiary, there is the potential that the exemption may be challenged as being overbroad.³⁸ The First Amendment Foundation

²⁹ Section 1009.98(6), F.S.

³⁰ Survey response of Florida Prepaid College Board dated September 10, 2004.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Section 119.15(4)(b)2., F.S.

³⁷ See s. 2, ch. 2000-203, L.O.F.

³⁸ 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 discussion of a hospital's strategic plan even though not all aspects of the plan would be critical confidential information). The courts have required a "close and content-based fit" between a public records exemption and the justification for the exemption and have deemed an exemption to be overbroad where it suppresses information beyond the parameters of the justification. *Memorial Hospital-West Volusia, Inc., v. News Journal Corp.*, 2002 WL 390687; 30 Media L. Rep. 1300 (Fla. Cir. Ct. 2002).

has raised its concerns regarding the protection afforded “individual account activities” in this regard.

To ensure that the exemption is not overbroad, the Legislature may wish to revise the exemption concerning individual account activities by eliminating the reference. The exemption would then protect from public disclosure any information that identifies the benefactors or beneficiary. Alternatively, the Legislature could list specific sensitive items commonly submitted by program participants that are exempt from disclosure. Recognizing that the items in each case may be unique, however, the language could also include flexibility to cover other sensitive personal records, provided that they have not been disclosed or are not readily obtainable by the public, and are integral to the administration of the program by the Florida Prepaid Board in conformance with Internal Revenue Service regulations.

In any event, the Open Government Sunset Review Act is a policy decision made by a former Legislature. If this Legislature does not choose to adhere to the policy, it may reenact the exemption and thus override the act as long as the constitutional requirements are met.

Sharing of Protected Information

The exemption authorizes the Florida Prepaid College Board to release the information to a community college, college, or university in which a designated beneficiary may enroll or is enrolled.³⁹ The postsecondary institution must maintain the confidentiality of the information.⁴⁰ The Legislature determined that the disclosure of the personal information would be as detrimental as if it were released by the Florida Prepaid College Board.⁴¹ Furthermore, those postsecondary institutions that receive federal funds are prohibited from disclosing student records to third parties without student or parental consent unless the request falls within a limited number of exceptions.⁴² Failure to ensure the privacy of the student records jeopardizes the eligibility of postsecondary institutions to receive federal funds.⁴³ Accordingly, these records are not readily accessible by the public.

³⁹ Section 1009.981(6), F.S.

⁴⁰ Id.

⁴¹ Section 2, ch. 2000-203, L.O.F.

⁴² 12 U.S.C. s. 1232g(b)

⁴³ Id.

Exempt v. Confidential Status of Information

Public records law recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.⁴⁴ If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to the persons or entities designated in statute.⁴⁵ The public records exemption under review applies a *confidential and exempt* status.

Related Public Records Exemption in the Florida Prepaid College Program

The Florida Prepaid College Program prohibits the public disclosure of information that identifies the purchasers or beneficiary of any prepaid plan under the program and their advance payment activities.⁴⁶ In the interest of uniformity, the Legislature may wish to consider revising this exemption to conform to the report’s findings by eliminating the reference to advance payment activities. However, this exemption predates the 1992 constitutional amendment relating to access to public records. Accordingly, the exemption is not required to meet the more stringent public records enactment requirements. In addition, the Florida Prepaid College Program records are exempt from disclosure but are not confidential and exempt. If the Legislature intends to conform the exemption, it should amend the exemption to provide for confidentiality.

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption in s. 1009.981(6), F.S., for information that identifies the benefactors and the beneficiary of any college saving plan under the Florida College Savings Program. Committee staff further recommends, however, that the Legislature revise the public records exemption consistent with the findings of this report, to:

- Revise the exemption to eliminate the reference to individual account activities.

⁴⁴ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So. 2d 289 (Fla. 1991).

⁴⁵ See Inf. Op. to Chiaro, January 24, 1997.

⁴⁶ Section 1009.98(6), F.S.