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Interim Project Report 2005-217

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Committee on Judiciary

Senator Daniel Webster, Chair

REVIEW OF PUBLIC RECORDS EXEMPTION FOR CERTAIN SHERIFF AND STATE ATTORNEY RECORDS RELATING TO INTERFERENCE WITH CUSTODY, s. 787.03, F.S.

SUMMARY

A report filed with a sheriff or state attorney by a spouse involved in an interference with custody situation is exempt from the state's open government requirements. This public records exemption, codified in s. 787.03, F.S., expires on October 2, 2005, unless the Legislature saves it from repeal after reviewing it under the Open Government Sunset Review Act.

Evaluating the public records exemption against the criteria prescribed in the act, this report finds that the exemption protects information of a confidential nature relating to identifying, contact, and underlying reasons contained in a report provided to a sheriff or state attorney in certain interference with custody cases. Without the exemption, the safety may be jeopardized of the person who submits the report or the person that was taken. The public records exemption, however, could be more narrowly drawn to capture only that information related to identifying the whereabouts of the person who took the child or incompetent person, and of the child or incompetent person. Therefore, this report recommends that the Legislature retain but also revise the exemption.

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 Law¹ 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.

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:

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."² Unless the

¹ Chapter 119, F.S.

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

Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

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.”⁴

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- (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?

³ See *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

⁴ s. 119.15(3)(b), F.S.

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.”⁵

Interference with Custody

The Legislature passed a law in 1974 which provided for a third degree felony for the offense of “Interference With Custody” as follows:

- (1) Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under or any incompetent person from the custody of the child or incompetent person’s parent, his or her guardian, a public agency having the lawful charge of the child or incompetent person, or any other lawful custodian commits the offense of interference with custody and commits a felony of the third

⁵ s. 119.15(4)(b), F.S.

degree....

(2) In the absence of a court order determining rights to custody or visitation with any child 17 years of age or under or with any incompetent person, any parent of the child or incompetent person, whether natural or adoptive, stepparent, legal guardian, or relative of such child or incompetent person who has custody thereof and who takes, detains, conceals, or entices away that child or incompetent person within or without the state, with malicious intent to deprive another person of his or her right to custody of the child or incompetent person, commits a felony of the third degree....⁶

Defenses apply in the following situations:

- The defendant reasonably believes his or her action was necessary to protect the child or the incompetent person from danger to his or her welfare;
- The defendant was the victim of domestic violence or had reasonable cause to believe that acting was necessary to protect him or herself from domestic violence; or
- The child or incompetent person was taken at his or her own instigation without enticement and without purpose to commit a crime with or against the child or incompetent person.⁷

The statute provides:

This section does not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence...or believes that his or her action was necessary to preserve the child or the incompetent person from danger to his or her welfare seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger.⁸

To avoid prosecution, the spouse who takes a child must file a report with the sheriff's office or the state attorney's office of the county where the child resided at the time the child was taken. The report must be filed within 10 days of taking the child and is required

to contain the following:

- The name of the person taking the child;
- The current address and phone number of the person and child; and
- The reasons the child was taken.⁹

The report filing requirement and the information contained in it was added by the Legislature in 2000.¹⁰ The Legislature also enacted a public records exemption for the information provided to a sheriff or state attorney during the 2000 session.¹¹ In its statement of public necessity for the public records exemption, the Legislature found that:

Exempting information provided to sheriffs and state attorneys under s. 787.03(6)(b), F.S., by persons fleeing from domestic violence or the threat of it is a public necessity. The information is of a sensitive, personal nature and concerns individuals who are under threat of physical and psychological harm if their whereabouts is revealed.¹²

This public records exemption is subject to the Open Government Sunset Review Act of 1995, and is repealed on October 2, 2005, unless reviewed and reenacted by the Legislature before that date.¹³ The purpose of this report is to evaluate, under the Open Government Sunset Review Act, this public records exemption for identification, contact, and justification information provided to sheriffs and state attorneys by a spouse taking a child or incompetent person in specific situations.

METHODOLOGY

In conjunction with the House, staff surveyed various organizations. These organizations include the following: the Office of the State Courts Administrator, the Florida Sheriffs Association, the Florida Prosecuting Attorneys Association, the Florida Public Defenders Association, the Florida Coalition Against Sexual Violence, the Florida Coalition Against Domestic Violence, and the Florida Bar. Staff received completed questionnaires from the Florida Public Defenders Association and the Florida Coalition Against Domestic Violence. Additionally, staff

⁶ s. 787.03, F.S.

⁷ s. 787.03(4), F.S.

⁸ s. 787.03(6)(a), F.S.

⁹ s. 787.03(6)(b), F.S.

¹⁰ Chapter 2000-231, L.O.F.

¹¹ Chapter 2000-357, L.O.F.

¹² *Id.*

¹³ s. 787.03(6)(c), F.S.

requested and received input from the First Amendment Foundation.¹⁴

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 (s. 119.15(4)(a), F.S.).

What Specific Records Does The Exemption Affect?

To avoid prosecution, the spouse must file a report with the sheriff's office or the state attorney's office within 10 days of taking the child or incompetent person. The public records exemption under review applies to the report provided to a sheriff or state attorney where a spouse who is the victim of domestic violence seeks shelter with his or her child or an incompetent person or who believes action is necessary to preserve the child or an incompetent person from danger. The report is required to contain the spouse's name, the child's or incompetent person's name, and the reasons the child or an incompetent person was taken. The information contained in the report is the subject of the public records exemption.

Whom Does The Exemption Uniquely Affect?

The public records exemption under review has the potential to uniquely affect a spouse who takes a child or an incompetent person in an interference with custody situation.

The public records exemption also has the potential to uniquely affect the other spouse who has custody of the child or incompetent person.

The public records exemption additionally may affect sheriffs and state attorneys who receive the reports that are the subject of the exemption.

Lastly, the public records exemption also affects a child or incompetent person.

¹⁴ The First Amendment Foundation is a non-profit foundation 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 www.floridafaf.org

What Is The Exemption's Public Purpose Or Goal?

In the statement of public necessity accompanying the creation of the public records exemption, the Legislature identified as justification for the public records exemption: to protect persons who are under threat of physical and psychological harm if their whereabouts is revealed.¹⁵

Is The Information Otherwise Readily Obtainable?

Petitioner's Request For Confidential Filing Of Address

Section 741.30, F.S., creates a cause of action for injunctions to be issued in cases of domestic violence. Section 784.046, F.S., authorizes a cause of action for injunctions to be issued in cases of repeat, sexual and dating violence. Regarding all of these injunctions, a petitioner may furnish his or her address to the court in a separate confidential filing, if, for safety purposes, the petitioner requires that the location of his or her present residence be confidential.¹⁶

Moreover, an adult person or a parent or guardian acting on behalf of a minor or an incapacitated person may apply to the Attorney General to participate in the Address Confidentiality Program, provided that the applicant drafts a sworn statement that he or she has good reason to believe that the applicant, or the minor or incapacitated person on whose behalf the application is made is a victim of domestic violence, and that the applicant fears for his or her safety, or that of the person on whose behalf the application is made. A public records exemption exists to make certain information confidential, as follows:

- (1) The addresses, corresponding telephone numbers, and social security numbers of program participants in the Address Confidentiality Program for Victims of Domestic Violence held by the Office of the Attorney General are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except the information may be disclosed under the following circumstances: to a law enforcement agency for purposes of assisting in the execution of a valid arrest warrant; if directed by a court order, to a person identified in the order; or if the certification has been canceled. For purposes of this section, the term

¹⁵ Chapter 2000-357 L.O.F.

¹⁶ See sample form provided in s. 741.30, F.S.

“address” means a residential street address, school address, or work address, as specified on the individual’s application to be a program participant in the Address Confidentiality Program for Victims of Domestic Violence.

(2) The names, addresses, and telephone numbers of participants in the Address Confidentiality Program for Victims of Domestic Violence contained in voter registration records held by the supervisor of elections are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except the information may be disclosed under the following circumstances: to a law enforcement agency for purposes of assisting in the execution of an arrest warrant or, if directed by a court order, to a person identified in the order.¹⁷

Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was enacted in 1997, and has been adopted in all states.¹⁸ The purposes of the UCCJEA in Florida are as follows:

- To avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
- To promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child;
- To discourage the use of the interstate system for continuing controversies over child custody;
- To deter abductions of children;
- To avoid relitigating the custody decisions of other states in this state;
- To facilitate the enforcement of custody decrees of other states;
- To promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same

child.¹⁹

The UCCJEA requires information to be provided through initial pleading or an attached affidavit, specifying the child’s present address or whereabouts, the places where the child has lived during the previous five years, and the names and present addresses of the persons with whom the child has lived during that period.²⁰ Also required is whether either party knows the names and addresses of any person not a party to the proceeding who has physical custody of the child, along with the names and address of that person.²¹ Local law supersedes, however, where it provides for protection of names and other identifying information in certain cases, such as cases involving domestic violence and child abuse.²² There is such a provision in Florida that makes this information confidential in the event of a concurrent case of an injunction for protection against domestic violence. The UCCJEA Affidavit form in Florida references the “Petitioner’s Request for Confidential Filing of Address”, and authorizes the petitioner to write “confidential” in any space on the form that would require the address where the petitioner is currently living.²³ To the extent that an interference with custody situation involves domestic violence, and the spouse who took the child or incompetent person has filed a petition for domestic violence, along with a Petitioner’s Request for Confidential Filing of Address, this information is not otherwise readily obtainable.

Florida Statute On Public Records

Florida law requires custodians of public records to permit reasonable access to the records by any person who requests access, unless an exemption in statute provides otherwise.²⁴ Section 119.07(6)(s)1., F.S., provides an exemption for:

Any document that reveals the identity, home or employment telephone number, home or employment address...of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime, is

¹⁷ s. 741.465, F.S.

¹⁸ Uniform Child Custody Jurisdiction And Enforcement Act (1997), Prefatory Note; s. 61.501, F.S.

¹⁹ s. 61.502, F.S.

²⁰ s. 61.522, F.S.; U.C.C.J.E.A., Article 2, Section 209. (a)

²¹ *Id.*

²² U.C.C.J.E.A., Article 2, Section 209. Comment.

²³ s. 61.522, F.S.; Florida Supreme Court Approved Family Leave Form 12.902(d), U.C.C.J.E.A. Affidavit.

²⁴ s. 119.07(1)(a) and (b), F.S.

exempt from the provisions of subsection (1) and s. 24(a), Art. 1 of the State Constitution. Any information not otherwise held confidential or exempt...which reveals the home or employment telephone number, home or employment address...of a person who has been the victim of sexual battery, aggravated child abuse...or domestic violence is exempt...upon written request by the victim, which must include official verification that an applicable crime has occurred. Such information shall cease to be exempt 5 years after the receipt of the written request.

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.²⁵ A satisfactory public purpose includes the following:

- Allowing for effective and efficient administration of a governmental program;
- Protecting sensitive personal information about individuals; or
- Protecting 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

A domestic violence advocacy group indicates the following:

- This exemption is critical to the safety of abused victims and their children, as the most dangerous time for a victim of domestic violence is the point at which he or she decides to leave. Giving notice to the abuser that the victim is leaving and of the victim’s new location greatly increases the potential for harm.
- The status of who can receive the exemption should be broadened to include that of parents,

consistent with another section of the Interference with Custody statute.²⁶

- The 10 day reporting requirement should be extended to that of reporting within a reasonable time period, consistent with that mandated under the UCCJEA in custody actions. A battered person who has just fled his or her home is likely to learn about this reporting requirement only when consulting an attorney, counselor or domestic violence advocate in the new state or county where he or she has moved.
- The underlying reasons why the abused parent left with his or her children should remain confidential, as long as this information is not otherwise provided, such as in a petition for protection from domestic violence. Reasons cited include increased danger to the person who took the child.

The Florida Public Defender Association generally agrees that the exemption should be continued for safety purposes.

The First Amendment Foundation indicates that the public necessity statement only addresses harm in the context of contact information. In their view, the exemption is broader than necessary to fulfill this objective. They recommend amending language in the statute to make only identifying and locating information exempt. They additionally suggest allowing access to the information upon a showing of good cause before a court of competent jurisdiction.

Parties who responded to staff’s request for information agree that an identifiable public purpose exists for this public records exemption, which is that safety may otherwise be in jeopardy if this public records exemption were not in place. Parties differ, however, in whether to broaden or narrow the exemption. The domestic violence advocacy group recommends expanding the 10 day reporting requirement. This may, however, impede discovery of critical information by law enforcement and communication of that information between law enforcement entities, particularly where a criminal charge has been filed. Additionally, other legal actions may exist and are likely connected to this situation, such as a custody dispute, domestic violence injunction, or other criminal actions. The other party involved may not have sufficient due process if this deadline for filing a report is extended.

²⁵ s. 119.15(4)(b), F.S.

²⁶ s. 787.03(2), F.S.

The First Amendment Foundation suggests narrowing this exemption to allow limited access to the information, but did not provide examples. Without having examples of sufficient justification for doing so, it is recommended that this not be pursued at this time.

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.²⁷ 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.²⁸ The public records exemption under review applies a “confidential and exempt” status to information provided to a sheriff or state attorney pursuant to complying with the reporting requirement in an interference with custody situation.²⁹

Coverage of the Exemption

The public records exemption currently protects identifying and contact information and the underlying reasons for committing the act of interference with custody. It appears that these types of information are generally appropriate subjects for exemption, in that they are of a sensitive, personal nature concerning individuals.³⁰ Representative parties and organizations agree that the exemption is necessary to protect safety and prevent retaliation, and that this is an identifiable public purpose. However, it is uncertain that providing an exemption for underlying reasons accomplishes this objective. The statement of public necessity accompanying the public records exemption only references public harm by citing disclosure of the person who interfered with custody and their whereabouts. The underlying reasons for committing an interference with custody are not addressed in the statement of public necessity. Our broad public records law in Florida requires that an exemption be no broader than necessary. Therefore, it is recommended that the public records exemption be retained, but that language relating to underlying reasons be considered for

removal from the public records exemption, in keeping with this requirement.

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption in s. 787.03, F.S., for the name of the person taking the child or incompetent adult and their present contact information. Committee further recommends, however, that the Legislature consider revising the public records exemption to remove the underlying reasons for taking the child or incompetent person from its coverage.

²⁷ See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So.2d 289 (Fla. 1991).

²⁸ See Inf. Op. to Chiaro, January 24, 1997.

²⁹ s. 787.03(6)(c), F.S.

³⁰ See s. 119.15(2)(a), F.S.