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Committee on Agriculture

Senator Rod Smith, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 403.067(7)(D)2, F.S., AGRICULTURAL RECORDS

SUMMARY

The Total Maximum Daily Load program includes exemptions for 1) individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information reported to the Department of Agriculture and Consumer Services (DACs); and 2) the information if furnished by DACs upon request of the Department of Environmental Protection (DEP) or any water management district. These public records exemptions, codified in s. 403.067(7)(d) 2, F.S., expire on October 2, 2006, unless the Legislature saves them from repeal after reviewing them under the Open Government Sunset Review Act.

After evaluating the public records exemptions against the criteria prescribed in the act, this report recommends that the Legislature retain the public records exemptions for individual agricultural records. Without the exemptions, an agricultural producer that submits proprietary business information to the DACs risks having competitors access information of a confidential nature regarding production practices, which would injure the affected entity in the market place. Also, without the exemptions, the DACs would not have the ability to effectively and efficiently administer the Best Management Practices (BMPs) Program under which agricultural producers are able to voluntarily make significant contributions toward the water quality programs of the state.

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 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 official business which are "intended to perpetuate, communicate, or formalize knowledge."

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 in October of that year 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.”

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.”

Establishment and Implementation of Total Maximum Daily Loads

In 1999, the Legislature enacted ch. 99-223, L.O.F., titled the Establishment and Implementation of Total Maximum Daily Loads, which was codified in s. 403.067, F.S. The primary purpose of the act is to “... declare that the waters of the state are among its most basic resources and that the development of a TMDL program for state waters as required in the Clean Water Act, will promote improvements in water quality throughout the state through the coordinated control of point and non-point sources of pollution.” The Legislature found the same year that, while point and non-point sources of pollution have been managed through numerous programs, better coordination among these efforts and additional management measures may be needed in order to achieve the restoration of impaired water bodies. The scientifically based TMDL program is necessary to fairly and equitably allocate pollution loads to both point and non-point sources. Implementation of the allocation must include consideration of a cost-effective approach coordinated between contributing point and non-point sources of pollution for impaired water bodies or water body segments and may include the opportunity to implement the allocation through non-regulatory and incentive-based programs. The DEP was designated by the Legislature to be “the lead agency to administer the program and was directed to coordinate with local governments, water management districts, the DACS, local soil and water conservation districts, environmental groups, regulated interests, other appropriate state agencies, and affected pollution sources in developing and executing the TMDL program.”

Public Records Exemptions

In 2001, the Legislature amended the statutes regarding the establishment and implementation of TMDL to provide a public records exemption for individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information which are not public records, but are reported to the DACS pursuant to this paragraph or pursuant to any rule adopted pursuant to this paragraph. This information shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution. Upon request of the DEP or any water management district, the DACS shall make such individual agricultural records available to that agency, provided that the confidentiality specified by this subparagraph for such records is maintained.

This public records exemption will expire on October 2, 2006, unless it is reviewed and reenacted by the Legislature. The purpose of this report is to evaluate this public records exemption under the criteria of the Open Government Sunset Review Act.

METHODOLOGY

Committee staff reviewed the statutory history of the subparagraph pertaining to agricultural records subject to the Open Government Sunset Review Act, as well as its application since legislative enactment.

Committee staff surveyed and interviewed staff of the Office of Agricultural Water Policy within the Office of the Commissioner of Agriculture. In addition, committee staff interviewed and solicited input from the Department of Environmental Protection, the water management districts, 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.

What specific records does the exemption affect?

The public records exemption under review applies to “individual agricultural records” such as those with information pertaining to production, for example: the composition of fertilizer or pesticides; rates of application, frequency of application, and timing of applications; irrigation volumes and timing; crop production costs; and farm operation and maintenance costs.

Whom does the exemption uniquely affect?

The public records exemption under review requires any agricultural producer participating in the Department of Agriculture and Consumer Services’ Best Management Program to maintain and have available for review by its department personnel individual records documenting BMP implementation. Participation in BMP programs by agricultural producers is voluntary.

What is the exemption’s public purpose or goal?

The Legislature has declared that the waters of the state are among its most basic resources and the development of a TMDL program promotes improvements in water quality. Scientifically based programs are to provide for the fair and equitable allocation of pollution loads. Implementation may include non-regulatory incentive-based programs. Such a non-regulatory incentive based program has been developed through the cooperation of federal and state regulatory agencies and the state’s agriculture producers for certain commodities such as citrus, forestry, vegetables, and cattle.

The public records exemption provided in section 403.067(7)(d)2, F.S., ensures the availability of proprietary business information for review by the DACS and other governmental agencies in order to maintain the quality of the state’s waters in an effective and efficient manner.

Is the information otherwise readily obtainable?

The information typically reviewed or obtained by the DACS regarding TMDLs and compliance with BMPs such as the composition of fertilizer, rates, frequency, and timing of fertilizer and pesticide applications is not readily available to other governmental agencies or private entities. Any such records provided to the DACS under the BMP program and subsequently made available to another governmental agency such as the DEP or any water management district is provided the same confidentiality as the record had at the DACS.

This confidentiality ensures that the potential availability of proprietary business information does not become a disincentive to agricultural producers to their participation in the program, and also serves the public purpose of promoting voluntary efforts to improve water quality.

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. 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 that the purpose is “sufficiently compelling” to take priority over the state’s policy 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 the Office of Agricultural Water Policy staff, input received from organizations representing agricultural producers, and input from the First Amendment Foundation, the exemption pertaining to agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information principally serves the public purpose of allowing for effective and efficient administration of a governmental program and also protects confidential information about (agricultural) entities. The files containing business plans, product descriptions, formulas, processes, and similar information often used by agricultural producers 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 records of an agricultural producer would provide competitor businesses with previously inaccessible insights into the strategies and operations of these individuals or companies and could potentially injure the individuals or companies in the marketplace. Additionally, the loss of the exemption would affect the effective and efficient administration of the program because agricultural producers will be reluctant to provide information to the DACS pertaining to TMDLs and compliance with BMPs if they risk the information becoming public by doing so.

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption for individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information which are otherwise not public records, which are reported to the Department of Agriculture and Consumer Services for the purpose of implementation of TMDLs through BMPs or other suitable interim measures as contemplated under section 403.067, F.S. It is also recommended that the public records exemption for those records be maintained when they have been furnished to the Department of Environmental Protection or water management districts, at their request, to carry out the provisions of the section.