



# The Florida Senate

*Interim Project Report 2006-208*

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Committee on Community Affairs

Senator Michael S. "Mike" Bennett, Chair

## OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.07(6)(i)5., F.S., CODE ENFORCEMENT OFFICERS

### SUMMARY

Code enforcement officers are responsible for the administration of a wide range of health, safety, and environmental regulations. Section 119.07(6)(i)5., F.S., exempts from the disclosure requirements of the Public Records Law certain personal identifying information regarding code enforcement officers. Pursuant to the Open Government Sunset Review Act and in accordance with s. 119.15, F.S., this public records exemption is repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Evaluating the records exemption against the criteria prescribed in the act, this report finds that the exemption generally protects information of a sensitive personal nature and furthers the effective administration of governmental programs. However, the exemption includes certain information that is exempted elsewhere in the Public Records Law, as well as information that is not collected and maintained by agencies.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act, and determined that, with modification, the exemption meets the requirements for reenactment.

### BACKGROUND

#### Florida 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 1892. In 1992, the electors of Florida approved an amendment to the State Constitution which 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> specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency<sup>2</sup> records are to be available for public inspection.

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

<sup>2</sup> The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state

Section 119.011(11), 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 official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”<sup>3</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>4</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>5</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>6</sup> A bill enacting an exemption<sup>7</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>8</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>9</sup> If a record is not made confidential but is simply exempt from

constitution.

<sup>3</sup> *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>5</sup> Article I, s. 24(c) of the State Constitution.

<sup>6</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

<sup>7</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>8</sup> Art. I, s. 24(c) of the State Constitution.

<sup>9</sup> Attorney General Opinion 85-62.

mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>10</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>11</sup> 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. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if: (1) it serves an identifiable public purpose; and (2) if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption:

- “[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- “[p]rotects 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.”
- [p]rotects 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

<sup>10</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>11</sup> Section 119.15, F.S.

who do not know or use it, the disclosure of such information would injure the affected entity in the marketplace.”<sup>12</sup>

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

In addition to these considerations, pursuant to the Committee Substitute for Senate Bill 1144,<sup>13</sup> which is effective October 1, 2005, consideration must also be given to the following questions:

- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.<sup>14</sup> The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes it explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act chapter is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

### Exemption for Code Enforcement Officers

Section 119.07(6)(i)5., F.S., prohibits the public disclosure of certain personal identifying information relating to code enforcement officers.<sup>15</sup> Specifically, this public records exemption includes home addresses, telephone numbers, social security numbers, and photographs of current or former code enforcement officers. In addition, the exemption extends to the names, home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel.

In the accompanying statement of public necessity for this exemption the Legislature found that the exemption was justified because the previous exemption did not completely shield the identities of county and municipal code enforcement officers. The enacting legislation further stated:

*The responsibilities of these employees regularly take them into areas of neglect, abuse, and personal danger. Citations issued in response to violations that they encounter often lead to retribution by the offenders. Their personal files are reviewed on numerous occasions by code violators seeking information relating to code enforcement officers and their families. The disclosure of this personal information has led to threats, acts of violence, and unwarranted risk to the officers and their families.*<sup>16</sup>

This exemption expires October 2, 2006, unless it is reviewed and reenacted by the Legislature.

<sup>12</sup> Section 119.15(6)(b), F.S.

<sup>13</sup> Ch. 2005-251 Laws of Florida.

<sup>14</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

<sup>15</sup> Chapter 2001-249, Laws of Florida.

<sup>16</sup> *Ibid.*

## METHODOLOGY

Committee staff surveyed counties and municipalities for information on the operation of the public records exemption and for opinions on the reenactment, repeal, or modification of the exemption. In addition, staff solicited input from representatives of the Florida Association of Code Enforcement, the Florida Animal Control Association, and the Building Officials Association of Florida. Finally, staff requested that the Florida First Amendment Foundation offer comments relative to the reenactment of this exemption.<sup>17</sup>

## FINDINGS

### Statutorily Prescribed Sunset Review Questions

The Open Government Sunset Review Act prescribes specific questions to be considered by the Legislature in deciding whether to save a public records exemption from its scheduled repeal (s. 119.15(6)(a), F.S.).

#### *What Specific Records Does the Exemption Affect?*

The public records exemption under review includes the following identifying information:

- the home addresses, telephone numbers, social security numbers, and photographs of current or former code enforcement officers;
- the names, home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such personnel; and
- the names and locations of schools and day care facilities attended by the children of such personnel.

Based on survey responses and interviews with code enforcement officials, local governments generally maintain the specified information pertaining to code enforcement officers in agency personnel files. In the case of photographs of code enforcement officers, most survey respondents indicated that they maintain a photograph of the employee for purposes of issuance of

identification badges. In some instances, agencies also maintain a copy of the officer's driver's license photograph.

Many survey respondents reported that they maintain the names, telephone numbers, and places of employment of spouses. This information is typically retained as a contact in the event of an emergency. Similarly, this information is sometimes reflected in employee benefit (health care, dental, life insurance, etc.) documentation. Relatively few survey respondents indicated that they maintain a record of the names and locations of schools attended by the children of code enforcement officials. Local agencies do not appear to maintain photographs of the spouses and children of such personnel.

#### *Whom Does the Exemption Uniquely Affect?*

The exemption under review uniquely affects current and former local government code enforcement officers and their immediate family members. The precise number of individuals impacted by this exemption is unknown. Membership in the Florida Association of Code Enforcement, which is not inclusive of all code enforcement officers, exceeds 2,600. The inclusion of spouses and children of code enforcement officials significantly increases this number.

Survey responses and interviews indicated widespread support for the inclusion of code enforcement officers and their immediate family members within the scope of this exemption. A majority of respondents also indicated support for the inclusion of *former* code enforcement officers and their family members within the exemption. Several survey respondents suggested that the records exemption should be expanded to include certain personal identifying information (home address, home telephone number, and social security number) for all public employees.

In a written statement, the Florida Animal Control Association recommended that the Legislature amend s. 119.07(6)(i)5., F.S., to specifically reference animal control officers within this exemption. The Association indicated that while most local governments recognize animal control personnel as code enforcement officers, a number of cities and counties do not. The Association maintains that this leaves animal control officers in those jurisdictions particularly vulnerable to belligerent and potentially violent individuals they may encounter while on duty.

<sup>17</sup> 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>.

***What is the Exemption's Public Purpose or Goal?***

In the statement of public necessity for this exemption the Legislature found that the exemption is justified because, if the information were not exempt from public disclosure, code enforcement officials or their family members could be harmed or threatened with harm as a result of their official duties. Similarly, the exemption contributes to the effective administration of local county and municipal ordinances by protecting enforcement officials from possible intimidation and coercion.

Survey responses and interviews confirmed that code enforcement officials are often subjected to threats and intimidation. Virtually all of the survey respondents indicated they were aware of at least one instance where a code enforcement officer within their agency had been threatened. Several cited the recent murder of a code enforcement officer in Commerce, Texas as evidence of the inherent dangers faced by officers. Code enforcement officials asserted that the exemption allows officers to perform their jobs with less fear of reprisal or retaliation. Additionally, respondents acknowledged that while the exemption has limitations in terms of its effectiveness, it provides a measure of protection for individuals who, as a result of their work environment, face significant safety concerns.

*Code Enforcement and Animal Services employees provide a law enforcement service by enforcing county ordinances, but do not have the skills, experience, or training of law enforcement deputies to protect themselves if attacked. It is imperative that these individuals are protected from malicious or violent threats or acts against themselves and their families. If even one employee is severely injured or killed because of their private information is made public, then this is one too many.*

- Hernando County Code Enforcement Officer

***Is the Information Otherwise Readily Available?***

Some of the information specified in the exemption could be obtained through other means. For example, an officer's home address could be obtained through the telephone directory, local property records, public utility records, and drivers' license records. Likewise, an officer's home telephone number could be available through the local telephone directory (unless the employee had requested an unlisted number). Moreover, the tremendous growth in the availability of

personal information via the Internet, has increased accessibility to personal identifying information.

With regard to social security numbers, s. 119.0721, F.S., provides that all social security numbers held by an agency, its agents, employees, or contractors are confidential and exempt from disclosure. In addition, s. 119.07(6)(x)1., F.S., stipulates that the social security numbers of current and former agency employees which are contained in agency employment records are exempt from disclosure. In addition, growing public awareness of identity theft and the associated economic crimes has probably reduced accessibility to social security numbers.

With certain exceptions, photographs of code enforcement officers and their family members would probably not be accessible by the general public. One notable exception is the fact that governmental employees are increasingly required to wear a photo identification badge as part of his or her daily work routine. In response to this finding several survey respondents suggested that there is a substantial difference between temporarily viewing a photograph, and physically possessing a photograph that could be circulated among family and friends. For this reason, code enforcement officers expressed support for the continued exemption of photographs.

Information identifying an employee's children and their places of daycare, school, or work likely would not be available from another source.

***Is the Record Protected by Another Exemption?*<sup>18</sup>**

Under Florida law the home addresses and telephone numbers of public employees and their family members are generally not exempt from disclosure. However, the Legislature has enacted a number of exemptions for certain categories of public employees who face heightened risks as a result of the potentially dangerous nature of their work (see the following section of the report for additional discussion).

As previously noted, ch. 119, F.S., currently provides several exemptions that address social security numbers. Section 119.0721, F.S., provides that all social security numbers held by an agency, its agents, employees, or contractors are exempt from disclosure. Section 119.07(6)(x)1., F.S., provides that the social

<sup>18</sup> Although this records exemption question is not statutorily mandated until after October 1, 2005, it is included within this review for discussion purposes.

security numbers of current and former agency employees which are contained in agency employment records are exempt from disclosure.

***Would it be Appropriate to Merge the Exemption with Another Exemption?***<sup>19</sup>

Section 119.07(6)(i), F.S., establishes numerous public records exemptions for designated categories of public employees and their families. More specifically, this section of law provides the same records exemption applicable to code enforcement officers to the following categories of public employees:

- Active or former law enforcement personnel, including correctional and correctional probation officers (s. 119.07(6)(i)1., F.S.);
- Personnel of the Department of Children and Families whose duties include the investigation of child abuse or neglect (s. 119.07(6)(i)1., F.S.);
- Personnel of the Department of Health whose duties are to support the investigation of child abuse or neglect (s. 119.07(6)(i)1., F.S.);
- Current and former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors (s. 119.07(6)(i)1., F.S.);
- Firefighters certified in compliance with s. 633.35, F.S. (s. 119.07(6)(i)1., F.S.);
- Current and former federal prosecutors and judges; (s. 119.07(6)(i)3. and 4., F.S.);
- Personnel of the Department of Revenue or local government whose responsibilities include revenue collection and child-support enforcement (s. 119.07(6)(i)1., F.S.); and
- Current and former human resource managers (s. 119.07(6)(i)2., F.S.).

The Legislature may wish to consider consolidating one or more of these exemptions as part of a larger examination of the structure and operation of s. 119.07(6)(i), F.S.

**Additional Considerations**

Surveys and interviews with code enforcement officers indicated that most have taken steps to safeguard their personal identifying information. For example, almost all of the officers staff contacted reported they had unlisted home telephone numbers. Similarly, a number of officers reported that they had contacted private entities (credit reporting agencies, utility providers) and local governmental entities (property appraisers, tax collectors, and elections supervisors) to ensure that personal identifying information remained confidential.

Representatives of local governments and individual code enforcement officers expressed unanimous support for reenactment of this exemption. The overall consensus was that the exemption provided safeguards for at-risk public employees and enabled staff to carry out their responsibilities more effectively. In addition, several survey respondents reasoned that the exemption does not impact the public's ability to access meaningful agency or employee records, including documents that reflect an officer's qualifications, past performance evaluations, salary and work history, disciplinary actions, and complaints.

At the request of Senate staff, the First Amendment Foundation reviewed the exemption and provided its comments regarding reenactment. The Foundation recommended that the exemption be revised to require code enforcement officers to provide a written statement that he or she has made reasonable efforts to protect personal identifying information in all forms of public and non-public records. Additionally, the Foundation recommended that officers attest to a reasonable belief that this information must remain confidential for purposes of protection. Finally, the Foundation also recommended the exemption be revised to clarify that such information is confidential and exempt from the provisions of s. 119.07(2), F.S., but not s. 24(a) of Art. I of the State Constitution.

**Continued Necessity for the Exemption**

The Open Government Review Act specifies that a public records exemption may be maintained only if it serves an identifiable public purpose and only if the exemption is no broader than necessary to meet that purpose.<sup>20</sup> In addition, to maintain an exemption, the Legislature must find that the exemption's public purpose is "sufficiently compelling to override the

<sup>19</sup> *Ibid.*

<sup>20</sup> Section 119.15(4)(b), F.S.

[state's] strong public policy of open government."<sup>21</sup>  
An exemption's public purpose is sufficient, if:

- The exempted record is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.<sup>22</sup>

Although only one of the criteria must be met in order to maintain the exemption, the records exemption for code enforcement officers appears to satisfy two of the three criteria. First, the exemption protects code enforcement officers and their family members from potentially dangerous individuals. Based on the surveys and interviews, there is a reasonable basis to believe the release of the personal identifying information contained in the exemption could jeopardize the safety of officers and their families. Second, the exemption furthers the effective administration of governmental programs by enabling code enforcement personnel to perform their duties and responsibilities with reduced concern for possible retaliation.

Based on the findings of the Open Government Sunset Review, staff concluded that certain information currently contained within the exemption is protected by another exemption or is not maintained by agencies. For this reason, the following information should not be included within this public records exemption:

- Social security numbers (protected by existing public records exemptions contained in ss. 119.07, and 119.0721, F.S.), and
- Photographs of the employee's spouse and children (not collected by agencies).

In addition, staff concluded that it would be advisable to require code enforcement officers to provide a written statement that they have made reasonable efforts to protect such information from being accessible through other means available to the public before such information can be exempt from public disclosure. This requirement has recently been incorporated into public records exemptions for certain categories of non-law enforcement personnel.

<sup>21</sup> *Ibid.*

<sup>22</sup> Section 119.15(2), F.S.

## RECOMMENDATIONS

Staff recommends that the Legislature retain the public records exemption established in s. 119.07(6)(i)5., F.S., which exempts personal identifying information for code enforcement officers from public disclosure. Staff further recommends, however, that the Legislature revise the exemption consistent with the findings of this report.

The exemption should be narrowed to only exempt the following information:

- The home address, telephone number, and photographs of current and former code enforcement officers.
- The names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel.
- The identity of the daycare or school of such employee's children.

In addition, staff recommends that the exemption should be revised to require that code enforcement officers provide a written statement that they have made reasonable efforts to protect such information from being accessible through other means available to the public.