



The Florida Senate

Interim Project Report 2006-212

September 2005

Committee on Domestic Security

Senator Alex Diaz de la Portilla, Chair

OPEN GOVERNMENT SUNSET REVIEW OF s. 381.95, F.S., TERRORISM RESPONSE AND MEDICAL FACILITIES

SUMMARY

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Chapter 2001-363, L.O.F., created a public records exemption for medical facility information maintained for terrorism response purposes. The exemption applies to any information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan to defend against an act of terrorism.

BACKGROUND

Government in the Sunshine

The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians approved an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the State Constitution provides:

- (a) 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.

In addition to the State Constitution, the Public Records

Law¹ specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

The term *public records* has been defined by the Legislature in s. 119.011(11), F.S., 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.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24 (c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (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. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Section 286.011, F.S., requires all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, city, or political subdivision at which official acts are to be taken to be

¹ Chapter 119, Florida Statutes.

public, and held after reasonable notice, with minutes taken.

Open Government Sunset Review Act

Section 119.15, F.S., the *Open Government Sunset Review Act of 1995*, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Section 286.0111, F.S. applies s. 119.15, F.S. to the provisions of law which provide exemptions to s. 286.011, F.S. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to 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.²

As part of the review process, s. 119.15(6) (a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?

² s. 119.15(2), F.S.

- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

The Committee Substitute for Senate Bill 1144 amended the act so that consideration also must be given to whether a record or meeting is protected by another exemption and whether it would be appropriate to merge the exemptions.³

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
2. 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; or
3. 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., 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 an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

³ The CS for SB 1144 takes effect October 1, 2005, and therefore, does not technically apply to reviews conducted prior to that time.

2001 Legislative Findings

In creating s. 381.95, F.S., the Legislature found the public necessity to exempt medical facility information because information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained or regulated by the Department of Health as part of the state's plan to defend its residents against future acts of terrorism is information that could be used by terrorists in planning acts of terrorism.⁴ The finding further stated that if terrorists were able to discover this information used to defend the state and its residents and visitors against an act of terrorism, they could use it to craft a terrorist act to which the state may not be as well prepared to respond. This information could be used to increase the number of people injured or killed in a terrorist act.

Although some skill would be required to use such information to further an act of terrorism, ample evidence of the capabilities of terrorists to conduct complicated acts of terrorism exist. The September 11, 2001 attack on the World Trade Center and the Pentagon, as well as the intentional spread of anthrax in this country and state, which resulted in the death of one Floridian, provide evidence that such capabilities exist. These events also have shown the importance of maintaining the need to ensure that the locations of pharmaceutical depositories are protected.

The bombing of four crowded commuter trains in Madrid on March 11, 2004 and three subway trains and a bus in London on July 7, 2005 illustrate that international terrorists are as capable and motivated today as they were at the time the Legislature found the exemption necessary in 2001.

Exempted Medical Facility Information

Section 381.95, F.S., exempts any information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan to defend against an act of terrorism as defined in s. 775.30, F.S.

Emergency Preparedness is Fundamental in Responding to a Terrorist Act

The goal of Florida's preparedness operation is to help ensure a timely and effective response to, recovery from, and mitigation of the impacts and consequences associated with an emergency/disaster situation.⁵

The Department of Health (DOH), as part of that goal, is

⁴ Chapter 2001-363, L.O.F.

⁵ State of Florida, *Comprehensive Emergency Management Plan 2004*, (February 2004).

designated as the primary state agency tasked with coordinating health and medical services under the State's Comprehensive Emergency Management Plan.

In the event of an emergency or disaster, including a terrorist act, the department performs its coordinator function as a member of the State Emergency Operations Center team, providing the means for a public health response, triage, treatment and transportation of victims of a disaster, assistance in the evacuation of victims out of the disaster area after the event, immediate support to hospitals and nursing homes, provision of emergency mental health crisis counseling for disaster responders, and the re-establishment of all health and medical systems.⁶

To perform its preparedness mission, the department must compile and maintain detailed information about available medical resources and facilities, location of pharmaceutical stores, and other information such as the capabilities of medical, storage, and laboratory facilities throughout the state. Just as the Legislature found in 2001, such information could still be used today by potential terrorists to the detriment of Floridians.

Sufficiency Certification

Section 381.95, F.S., allows the Governor to publicly certify the sufficiency of medical response capabilities while protecting detailed location and facilities information relating to the state's plan to defend against an act of terrorism.

Freedom of Information Act - Exemption of Security Sensitive Information

In 1966, Congress passed the Freedom of Information Act (FOIA) to increase public access to federal government documents. All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. However, the FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records.⁷ Records of federal agencies in Florida are not covered by the state's Public Records Law.⁸

Cooperative Efforts between Florida and Other States, Agencies, and Private Sector Entities Are Necessary

⁶ Id.

⁷ U.S. Department of Justice, *Freedom of Information Act Reference Guide*, (April 2005).

⁸ Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide*.

Florida state agencies such as the DOH routinely coordinate with federal agencies such as the Center for Disease Control (CDC), the Department of Homeland Security, other states, and private sector entities in performing domestic security related functions. For example, detailed information such as stockpiles and distribution methods for medicines capable of combating biological attacks is important in formulating attack responses. The CDC's Cities Readiness Initiative that includes Miami in a pilot medicines and medical supplies emergency distribution program is one such example. Cooperation with outside agencies to share intelligence information and analyze situation data is a necessary part of preparing for and responding to potential terrorist attacks.

In addition, the department and county emergency management operations centers serve as focal points for domestic security coordination with privately owned hospitals throughout the state. In an emergency event, the ability to efficiently perform triage and coordinate the use of available medical facility resources is critical to saving lives.

Florida also has a history of cooperation with adjacent states in sharing information about safety and security planning and disaster preparedness. For example, multi-state and federal security and response teams have worked together in Florida for the Super Bowl, the Free Trade Area of the Americas (FTAA) and Organization of American States (OAS) meetings while Florida has provided support to Georgia and the federal government for the G-8 Conference in Savannah. Events such as these have bio-terrorism and chemical weapon components that must be considered in venue security planning.

During the hurricanes of 2004, Florida received assistance from over 35 other states and Florida regularly sends firefighting teams to assist western states during the wildfire season. Florida has already dispatched several Disaster Medical Assistance Teams and Urban Search and Rescue Teams to assist our neighboring states in response to Hurricane Katrina through an Emergency Management Assistance Compact with these states. These cooperative efforts are critical to the state's successful management of major events and require the sharing of infrastructure and security information in order to be effective.

FDLE and DOH staff reported that without the ability to keep certain security information protected, cooperative efforts with outside agencies and other states would be hampered.

Efforts to Limit Disclosure

Prior to the September 11, 2001 events, widespread public access existed to information that is now routinely protected. For example, precise locations of hazardous chemicals stored on university campuses was published on the Internet to afford first responders ready access in case of emergency. Public school diagrams likewise are another example of

formerly readily obtainable information that is now limited in publication. The need to protect similar information related to domestic security was recognized and efforts have been undertaken by custodians to remove it from public access.

As a result, medical facility information exempted by s. 381.95, F.S., is no longer readily obtainable through other public access means.

METHODOLOGY

To complete this review, committee staff researched applicable statutory provisions and federal laws and regulations. Additionally, staff interviewed and surveyed, in conjunction with House of Representatives staff, the Department of Law Enforcement, the Department of Health, and the Agency for Health Care Administration, concerning the use and need for the exemption. Staff also spoke to a representative of the First Amendment Foundation regarding reenactment.

FINDINGS

The 2001 Legislature found that exemption for medical facility information maintained for terrorism response purposes is a public necessity because it contains components that address public safety and security. The exemption allows the State or its political subdivisions to effectively and efficiently provide protections against terrorist attacks and prepare for response to such attacks, the effectiveness of which would be significantly impaired without the exemption. The exemption from public disclosure for any information identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan to defend against an act of terrorism as defined in s. 775.30, F.S., is narrowly tailored to serve a public purpose and is necessary to ensure the safety of the public.

As discussed in the "Background" section of this report, the Open Government Sunset Review Act prescribes that a public records exemption may be maintained only if it serves an identifiable public purpose, and the statute provides conditions supporting a public purpose finding. It is found that the exemption contained in s. 381.95, F.S., meets the specified criteria set forth in s. 119.15(6)(b)1, F.S., as it protects confidential information concerning entities, disclosure of which could be detrimental to the safety and security of the public.

RECOMMENDATIONS

Committee staff recommends the exemption found in s. 381.95, F.S., be reenacted. The exemption provided for medical facility information maintained for terrorism response purposes continues to be sufficiently compelling to override the strong public policy of open government.

Staff further recommends that the reenacted statute be renumbered and included in s. 119.071, F.S., along with other security related public records exemptions.