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Committee on Government Efficiency Appropriations

Senator Jeffrey H. "Jeff" Atwater, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 213.053, F.S., COMMUNICATIONS SERVICES TAX LAW

SUMMARY

All information contained in returns, reports, accounts, or declarations received by the Department of Revenue pursuant to ch. 202, F.S., which governs the communications services tax, is confidential, except when used for official purposes, and is exempt from the state's open government requirements. This public records exemption, codified in s. 213.053(1)(b), F.S., is repealed on October 2, 2006, unless the Legislature reenacts the exemption following review under the Open Government Sunset Review Act of 1995.

This report finds that the exemption protects information of a sensitive nature concerning communications services taxpayers and their customers and suppliers, based on the criteria prescribed in the Open Government Sunset Review Act of 1995. The exemption protects the business interests of communications service companies and the security of the communications network. It also protects the privacy of communications service providers' customers and suppliers. An additional benefit of this exemption is that it fosters the trust of persons required to comply with the tax laws of the state; this trust is crucial to the effective and efficient administration of Florida's voluntary compliance tax system. Safeguarding the personal and financial information provided to the Department of Revenue by those persons is essential to establishing and maintaining that trust. This report recommends that the Legislature maintain this public records exemption.

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 Law¹ also specifies conditions under which the public must have access to governmental records. Section 119.011(1), F.S., defines the term *public record* to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form. Characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency.

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 that are used "to perpetuate,

¹ Chapter 119, F.S.

communicate, or formalize knowledge.”² Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

Under s. 24(c), Art. I, of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements under these conditions: (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

Section 119.15(2), F.S., describes the conditions under which an exemption may be created or maintained. An exemption must meet one of the following criteria:

- (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.

In order to ascertain whether an exemption meets any of these criteria, s. 119.15(4)(a), F.S., requires, as part of the review process, 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?

Section 119.15(4)(b), F.S., provides that 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 would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.” However, only information that would identify the individual is exempted.
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that 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.”

Communications Services Tax

Chapter 2000-260, Laws of Florida, enacted a major revision to the laws governing taxation of communications services in Florida. It created the “Communications Services Tax Simplification Law,” that was codified in ch. 202, F.S. The act combined seven different state and local taxes and fees and replaced those revenues with a two-tiered tax composed of a state tax and a local option tax on communications services. The new tax structure took effect October 1, 2001, at rates set by ch. 2001-140, Laws of Florida.

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

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

⁴ Section 119.15(3)(b), F.S.

The Communications Services Tax Public Records Exemption

Chapter 2001-139, Laws of Florida, was enacted to provide a public records exemption for information in the possession of the Department of Revenue relating to the tax imposed pursuant to ch. 202, F.S. It provides that all information contained in returns, reports, accounts, declarations received by the department, investigative reports and information, and letters of technical advice are confidential, except when used for official purposes, and is exempt from section 119.07(1), F.S. It incorporated the exceptions found in section 213.053, F.S.

The Department of Revenue receives and shares information with local governments regarding the administration of the communications services tax. The department is charged with administering the local tax, which replaced taxes and fees that had been collected by local governments through the public service tax under s. 166.231, F.S.; the local option sales tax under ch. 212, F.S.; and communications-related franchise fees. Chapter 2001-139, Laws of Florida, provided that information related to the tax imposed under ch. 202, F.S., may be provided by the department to local jurisdictions imposing that tax. Any information or material furnished to a local government, which is exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution, when in the possession of the Department of Revenue is also exempt from disclosure when in the possession of the local government.

Chapter 2001-139, Laws of Florida, provides that it is a public necessity that any information or material contained in returns, reports, accounts, or declarations received by the department pursuant to ch. 202, F.S., be exempt from the public records law. It says that “the disclosure of such information or material would adversely affect the business interests of communications service companies providing the information,” and that “disclosure of such information or material would impair competition in the communications industry.”

METHODOLOGY

Committee staff reviewed the enactment of the public records exemption as well as the public necessity statement. In particular, the public records exemption that applies to records relating to communications services tax returns and related documents received by

the Department of Revenue was compared to the treatment of other tax returns and related documents. Committee staff also surveyed the Department of Revenue for information on the operation of the public records exemption and for opinions on the reenactment, repeal, or modification of the exemption. In addition, committee staff contacted the First Amendment Foundation.⁵

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.⁶

What specific records does the exemption affect?

The public records exemption under review applies to information contained in returns, reports, accounts, or declarations, including investigative reports, information, and letters of technical advice received by the Department of Revenue, under ch. 202, F.S., the Communications Services Tax Simplification Act.

Whom does the exemption uniquely affect?

This exemption affects dealers in communications services, who are required to collect the communications services tax from their customers and remit it to the Department of Revenue. It also affects dealers’ customers and suppliers, since the confidential records include customer names, addresses and sales information, and names, addresses, and purchase information of a dealer’s suppliers.

What is the exemption’s public purpose or goal?

The purpose of the exemption is the protection of the business interests of communications service providers and security of the communications network. The Legislature found that the disclosure of material covered by this public records exemption would adversely affect the business interests of communications service providers and would

⁵ 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>.

⁶ Section 119.15(4)(a), F.S.

compromise the security of the communications network. It also found that disclosure of the information or material would impair competition in the communications industry. The Legislature determined that the public and private harm in disclosing the information protected by the exemption significantly outweighs any public benefit derived from disclosure.

The Department of Revenue adds that an additional benefit of this exemption is that it fosters the trust of those persons required to comply with the tax laws of the state. This is crucial to the effective and efficient administration of a voluntary compliance tax system such as Florida's. Safeguarding the personal and financial information provided to the department by those persons is essential to establishing and maintaining that trust.

Is the information otherwise readily obtainable?

This information is not otherwise obtainable.

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.⁷ A satisfactory public purpose includes: allowing for effective and efficient administration of a governmental program; protecting sensitive personal information about individuals; or protecting confidential information about entities.⁸ Additionally, the Legislature must find the purpose to be sufficiently compelling to take priority over the state's policy tradition of open government.⁹

Public Purpose Analysis

Section 213.053, F.S., provides for confidentiality of taxpayer information received by the Department of Revenue, and also provides exceptions to this confidentiality. In general, information contained in returns, reports, accounts, or declarations, including investigative reports, information, and letters of technical advice received by the Department of Revenue, is confidential and is exempt from the provisions of s. 119.07(1), F.S. The confidentiality of

these records was codified in ch. 80-222, Laws of Florida.

Confidentiality of tax records was affirmed by the Florida Taxpayer's Bill of Rights. The 1992 Florida Legislature passed legislation creating the Taxpayer's Bill of Rights, a single document that explains, in simple and non-technical terms, the rights and obligations of both the taxpayer and the department. Section 213.035 (9), F.S., says that taxpayers have the right to have their tax information kept confidential unless otherwise specified by law.

When the Communications Services Tax Simplification Law was enacted, the Legislature found that the tax imposed under ch. 202, F.S., is a replacement for taxes and fees previously imposed and not a new tax.¹⁰ The state portion of the communications services tax replaced the sales and use tax and gross receipts tax that had been imposed on telecommunications services. Both of the replaced taxes had been exempt from the provisions of s. 119.07(1), F.S.

By providing for the confidentiality of information received by the Department of Revenue regarding the communications services tax, the Legislature continued the policy of treating tax returns and other tax-related information as confidential. This policy allows the Department of Revenue to effectively and efficiently administer the state's tax laws by fostering the trust of those persons required to comply with the laws. The efficient collection of tax revenue depends on the voluntary compliance of the taxpayers.

Coverage of the Exemption

The public records exemption provided in s. 213.053(1)(b), F.S., applies to *all* information contained in returns, reports, accounts, or declarations, including investigative reports, information, and letters of technical advice, received by the Department of Revenue, under ch. 202, F.S., the Communications Services Tax Simplification Act, except for official purposes and as provided under subsections (3) through (17) of that section. This is the same degree of confidentiality that is provided for other taxes administered by the department.

⁷ Section 119.15(4)(b), F.S.

⁸ Id.

⁹ Id.

¹⁰ S. 202.105, F.S.

Compelling Public Interest

In ch. 2001-139, Laws of Florida, the Legislature declared that it is a public necessity that any information or material contained in returns, reports, accounts, or declarations received by the department pursuant to ch. 202, F.S., be exempt from the public records law. It says that “the disclosure of such information or material would adversely affect the business interests of communications service companies providing the information,” and that “disclosure of such information or material would impair competition in the communications industry.”

The Florida First Amendment Foundation has commented that the exemption under review is impermissibly broad, and that it is redundant, since taxpayer confidentiality is protected in other statutes. However, since this exemption provides the same protection to communications services tax records as other tax records, it would be more appropriate to review the confidentiality of all tax records, rather than creating different standards for records relating to this particular tax.

Sharing of Protected Information

Section 213.053, F.S., allows sharing of otherwise-confidential information under the following conditions:

Subsection (3) allows a taxpayer or his or her representative to inspect the taxpayer’s return, and to authorize the department to divulge specific information concerning the taxpayer’s account. It also allows the department, while providing unemployment tax collection services under contract with the Agency for Workforce Innovation, to release unemployment tax rate information to the agent of an employer if the agent provides payroll services for more than 500 employers, pursuant to the terms of a memorandum of understanding that requires the agent to retain the confidentiality of the information.

Subsection (4) allows the department to publish statistics, if they do not allow the identification of particular accounts; it also allows the department to provide to the Chief Financial Officer the names and addresses of taxpayers who have claimed an exemption pursuant to s. 199.185(1)(i), F.S. (all intangible personal property issued in or arising out of any international banking transaction and owned by a banking organization) or a deduction pursuant to s. 220.63(5), F.S. (eligible net income of an international banking facility).

Subsection (5) allows the department to make available information to comply with any formal agreement for the mutual exchange of information with the U.S. Internal Revenue Service or the U.S. Department of The Interior.

Subsection (6) authorizes the department to share information with the Auditor General, the director of the Office of Program Policy Analysis and Government Accountability, the chief Financial Officer, the Director of the Office of Insurance Regulation of the Financial Services Commission, or his or her authorized agent. Information may also be supplied to a property appraiser or tax collector or his or her agent, pursuant to s. 195.084, F.S., or to designated employees of the Department of Education solely for determination of each school district’s price level index. No information may be disclosed to any of these entities if such disclosure is prohibited by federal law, and anyone who receives this information is subject to the same confidentiality requirements as the department.

Subsection (7) authorizes the department to provide specific information to various state and local government agencies and to eligible participants and certified public accountants for participants in the Registration Information Sharing and Exchange Program. Anyone who receives this information is subject to the same confidentiality requirements as the Department of Revenue.

Subsection (8) requires the department to provide information pursuant to an order of a judge of a court of competent jurisdiction, or pursuant to a subpoena, under certain circumstances.

Subsection (9) authorizes the department to disclose certain information to the governing body of a municipality, a county, or a subcounty district levying a local option tax, or a state tax which is distributed to units of local government based on place of collection. Such information in the hands of the local government is subject to the same confidentiality requirements as when it is held by the department.

Subsection (10) allows the department to verify a certificate of registration issued pursuant to ss. 212.18 (sales tax dealers), 538.09 (secondhand dealers), or 538.25 (secondary metals recyclers), F.S.

Subsection (11) allows the department to provide information relating to payment or nonpayment of taxes to a United States Trustee, or his or her designee,

for any United States Bankruptcy Court, exclusively for official purposes.

Subsection (12) allows the disclosure of certain state sales tax information relating to cancellation or revocation of sales and use tax certificates of registration for the failure to collect and remit sales tax. This information is limited to the sales tax certificate number, trade name, owner's name, business location address, and the reason for the cancellation or revocation.

Subsection (13) allows the department to provide access to information for federal, state, and local law enforcement officials, and the Office of Financial Regulation, for the enforcement of s. 896.102, F.S., concerning currency transactions greater than \$10,000.

Section (14) directs the department to disclose to the Division of Corporations the name, address, federal employer identification number, and duration of tax filings with this state of all corporate or partnership entities that are not on file or have a dissolved status with the Division of Corporations and that have filed tax returns pursuant to chs. 199 or 220, F.S.

Section (15) allows the department to disclose confidential taxpayer information filed with the department by persons subject to any state or local tax to the child support enforcement program to assist in the location of parents who owe or potentially owe child support, and to the Department of Children and Family Services for the purpose of search activities pursuant to ch. 39, F.S., which deals with proceedings relating to children. Employees of the child support enforcement program and the Department of Children and Family Services are bound by the same confidentiality requirements as the Department of Revenue.

Section (16) allows the department to provide to the person against whom transferee liability is being asserted, pursuant to s. 212.10, F.S., information relating to the basis of the claim.

Section (17) allows for the disclosure of information to a person entitled to compensation pursuant to s. 213.30, F.S., (compensation for information relating to a violation of the tax laws) the amount of any tax, penalty, or interest collected as a result of information furnished by that person.

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.¹¹ 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.¹² The public records exemption under review applies a confidential and exempt status.

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption in s. 213.053(1)(b), F.S., for all information contained in returns, reports, accounts, or declarations received by the Department of Revenue pursuant to ch. 202, F.S., including investigative reports and information and letters of technical advice.

¹¹ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA) *rev. denied*, 589 So. 289 (Fla. 1991).

¹² See Inf. Op. to Chiaro, January 24, 1997.