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Committee on Regulated Industries

Senator Dennis L. Jones, D.C., Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 569.215, F.S., TOBACCO SETTLEMENT

SUMMARY

Section 569.215, F.S., provides an exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a) of Art. I of the State Constitution for information used to calculate the annual tobacco-settlement payments. The exemption applies to proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement as defined in ss. 215.56005(1)(f), and 569.215, F.S.

Section 569.215, F.S., also exempts from public records requirements proprietary confidential business information of the tobacco industry received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

Staff has reviewed the exemption pursuant to the criteria set forth in the Open Government Sunset Review Act of 1995 and has determined that the exemptions, with some modification, meet the requirements for reenactment. Staff further recommends that the Legislature utilize a definition for the term "trade secret" that is identical to the definition in s. 812.081, F.S.

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 government 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

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with

¹ Chapter 119, F.S.

official business which are “intended to perpetuate, communicate, or formalize knowledge.”²

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 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.”³

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

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

³ Section 119.15(3)(b), F.S.

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.”⁴

Florida’s Tobacco Settlements

In February 1995, the State of Florida sued a number of tobacco manufacturers, and others, asserting various claims for monetary and injunctive relief. The lawsuit included as defendants the American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., Liggett Group, Inc. Brooke Group, Ltd., Lorillard Company, British American Tobacco Co., Ltd. and Dosal Tobacco Corp, Inc., among others.

On March 3, 1996, the State of Florida, as one of five settling states,⁵ settled all of its claims against Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. (collectively herein referred to as Liggett). In August 1997, the “Big Four” tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company) entered into the landmark \$368.5 billion tobacco settlement agreement with Florida for

⁴ Section 119.15(4)(b), F.S.

⁵ The five states that entered into the March 3, 1996, settlement agreement are West Virginia, Florida, Mississippi, Massachusetts, and Louisiana. These states are known as the “initially settling states.”

all past, present and future claims by the state, including reimbursement of Medicaid expenses, fraud, RICO,⁶ and punitive damages. Sections 215.56005(1)(f), and 569.215, F.S., define these settlements to mean the settlement, as amended, in the case of *State v. American Tobacco Co. et al.*, No. 95-1466AH (Fla. 15th Cir. Ct. 1996).

From the date of the settlement, Florida was to receive \$11.3 billion over the next 25 years and an additional \$1.7 billion over the next 5 years as a result of a most favored nation clause in the settlement agreement as amended.⁷ The annual tobacco settlement payments are based on several factors, including the total volume of U.S. cigarette sales, each company's share of the national market, net operating profits, and consumer price indices. Statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.⁸

Task Force on Tobacco-Settlement Revenue Protection

The Florida Legislature established the Task Force on Tobacco-Settlement Revenue Protection (task force) to determine the need for, and to evaluate methods for, protecting the state's settlement revenue from diminution or significant loss.⁹ The task force submitted its findings and recommendations in March 2001. The first recommendation of the Task Force was for the Legislature to “. . . provide a process for verifying that the tobacco settlement payments received are in accordance with the Florida Settlement Agreement.” The report further recommends that the “. . . Legislature should also provide an exemption from the Florida Public Records Act for information considered necessary to verify the accuracy of the payments made by the tobacco companies if such information is considered a trade secret or insider information at the time of its receipt.”

⁶ “Florida Racketeer Influenced and Corrupt Organization Act” in ss. 895.01-895.06, F.S.

⁷ Florida also negotiated a “Most Favored Nations” clause in the settlement, which provides the state with additional monies for a period of time after Minnesota settled with the defendants on terms more favorable than Florida's.

⁸ See s. 569.21, F.S.

⁹ See ch. 2000-128, s. 5, L.O.F.

Public Records Exemption Relating to the Tobacco Settlement Agreement

Section 1, ch. 1, 2001-136, L.O.F., as codified in s. 569.215, F.S., provides an exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a) of Art. I of the State Constitution for information used to calculate the annual tobacco-settlement payments. The exemption applies to proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement.

Section 569.215, F.S., also exempts from public records requirements proprietary confidential business information of the tobacco industry received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

Section 569.215(2), F.S., defines the term “proprietary confidential information” to mean:

information, regardless of form or characteristics, which is owned or controlled by a tobacco company that is a signatory to the settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, No. 95-1466AH, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, is intended to be and is treated by a tobacco company as private in that the disclosure of the information would cause harm to the company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. The term includes, but is not limited to:

- (a) Trade secrets.
- (b) Information in a Form 10-K that is confidential pursuant to an order of the Division of Corporation Finance of the Securities and Exchange Commission.
- (c) Internal auditing control policies and procedures and reports of internal auditors.
- (d) Financial operating and marketing information prepared in the ordinary course of business, the disclosure of which could

impair the competitive business of the provider of information.

(e) Financial statements, which consist of balance sheets, statements of income and cash flows, and notes related thereto, of any subsidiary that is part of a consolidated group and engaged in the production or sale of tobacco products.

(f) Report letters from independent auditors relating to domestic operating company income.

(g) Analyses of specific items of revenue and expense included in operating profit and extraordinary items. As used in this paragraph, the term “extraordinary items” consists of one-time tobacco litigation settlement costs and restructuring charges.

(h) Working papers,¹⁰ schedules,¹¹ analyses, and reconciliations¹² prepared by company personnel for the purpose of clarifying the disclosures of domestic tobacco revenues and operating profit contained in financial statements or other information related to the sale or production of tobacco products.

Section 1, ch. 2001-136, L.O.F., provides the following constitutionally required legislative finding of public necessity. It finds that it is in the public interest that information be obtained for the purpose of negotiating and verifying the calculation of annual tobacco settlement payments. It also finds that if the information provided to the state were disclosed, the tobacco companies could be harmed in the market place, affecting their annual sales, which could cause a reduction in the amounts paid to the state under the agreement. This reduction in payment could harm the financial interests of the state and the people of Florida, and the public and private harm in disclosing the information significantly outweighs any public benefit

¹⁰ According to tobacco company and agency responses to staff questionnaires, working papers are evidentiary materials used by accountants and auditors to document particular entries as debits/credits or income/expense. These documents include invoices, purchase orders, policies, memoranda, etc.

¹¹ According to tobacco company and agency responses to staff questionnaires, a schedule is an attachment to working papers, analysis and reconciliations. A schedule has also been described as a list of accounting entries, such as expense items.

¹² According to tobacco company and agency responses to staff questionnaires, reconciliation is a comparison between two accounting documents, sets of information or conclusions that were derived using different procedures.

derived from its ability to scrutinize and monitor governmental action with regard to the settlement payments.

This public records exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2006, unless reviewed and reenacted by the Legislature.

METHODOLOGY

Committee staff sent written questionnaires to the Office of the Attorney General, the Office of the Chief Financial Officer, and the Office of the Auditor General regarding these agencies’ administration of the public records exemption in s. 569.215, F.S., and the exceptions public necessity of the exemptions under the criteria specified in s. 119.15, F.S. Committee staff also sent questionnaires to the settling tobacco companies, Liggett, Phillip Morris, Inc., R.J. Reynolds Tobacco Company,¹³ and Lorillard Tobacco Company. The First Amendment Foundation was also contacted and provided information for the report. The legislative history of the exemption was reviewed, as well as the relevant statutory provisions.

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.¹⁴

1. What specific records are affected by the exemption?

The exemption in s. 569.215, F.S., is limited to proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, and received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief

¹³ In 2003, R.J. Reynolds Tobacco Company and Brown & Williamson Tobacco Corp. merged to form R.J. Reynolds Tobacco Company as a wholly owned subsidiary of Reynolds American, Inc.

¹⁴ Section 119.15(4)(a), F.S.

Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

As discussed in more detail above, s. 569.215(2), F.S., defines the term “proprietary confidential information” and provides specific examples of the types of information and documents included within the meaning of the term, e.g., financial statements, working papers, schedules, and reconciliations, etc. The definition also lists “trade secrets” within the meaning of the term. However, the exemption does not further define this more general term or describe what types of information would qualify as a trade secret.

The Office of the Attorney General (Attorney General) advises that they use the definition for the term “trade secrets” as that term is defined in the Florida Statutes, e.g., s. 812.081, F.S.,¹⁵ and relevant case law. However, two of the surveyed tobacco companies advised that they use the definition of the term in s. 688.002(4), F.S.,¹⁶ and the interpretation of that term

¹⁵ Section 812.081, F.S., prohibits the theft of trade secrets and defines that term as follows:

(c) “Trade secret” means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. “Trade secret” includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

¹⁶ Section 688.002(4), F.S., defines the term “trade secret” to mean:

information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from

by the Florida courts. The Attorney General’s response to this issue, indicates that they also reference the definition in s. 688.002(4), F.S. Although the definitions in ss. 688.002(4) and 812.081(1)(c), F.S., may be read as not inconsistent, the definition of the term “trade secrets” in s. 812.081, F.S., is more detailed and descriptive. This may lead to confusion regarding whether a public records exemption has been properly claimed. For example, s. 812.081(1)(c), F.S., requires that the trade secret must provide “the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.” Section 688.002(4), F.S., does not require such a condition. Further defining this term by use of the more narrow, and also more detailed and descriptive, definition in s. 812.081(1)(c), F.S., may avoid confusion or conflict.

According to the Department of Financial Services (DFS), which conducts the settlement payment verification process, it does not believe that specific “trade secrets” are implicated in connection with the information received by the department. The information that the department receives is confidential financial information relating to the tobacco companies’ operating income and profits, if any.

However, trade secrets may be implicated in settlement negotiations. Although the substantive case was settled in 1996, there are currently unresolved issues related to the calculation of the settlement payments that are the subject of ongoing negotiations.¹⁷

2. Whom does the exemption uniquely affect, as opposed to the general public?

This exemption uniquely affects the settling tobacco companies. As discussed in more detail below, the public purpose behind the exemption is to protect proprietary confidential business information of the settling tobacco companies from being acquired by their competitors. According to the legislative finding

its disclosure or use; and

- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

¹⁷ See *Florida’s Tobacco Settlement Agreement, An Accountability Update*, Report No. 02-052, Office of the Auditor General, Florida Legislature, October 2001; *Florida Tobacco Settlement and Nonsettling Manufacturers*, Interim Report No 2005-157, Florida Senate Committee on Regulated Industries, November 2004.

of public necessity for this exemption,¹⁸ the tobacco companies could be harmed in the market place if the exempted information were disclosed.

3. What is the identifiable public goal of the exemption?

Section 119.15, F.S., also provides that an exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the purposes discussed below and 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.

As determined by the Legislature in 2001, the constitutionally required legislative finding of public necessity found that it was in the public interest to exempt the settling manufacturer's proprietary confidential information for the following reasons:

- The information is necessary to ensure that the tobacco settlement payments are accurate; and
- If the tobacco companies disclose this information, they would be at a competitive disadvantage in the marketplace, which may in turn adversely affect their business interests.

The Legislature also found that "if the participating tobacco companies are harmed in the marketplace, their annual sales of tobacco products will be reduced, which will diminish the annual amounts that they pay to the State of Florida, and will thereby harm the financial interests of the state and the people of Florida." As noted earlier in this report, tobacco settlement payments are based, in part, on each company's market share. This exemption is based on the assumption that the settling tobacco companies may be placed at a competitive disadvantage in the marketplace in relative to the nonsettling manufacturers if the exempted information were disclosed. Consequently, such a competitive disadvantage may translate to a reduced market share for the settling tobacco companies, and a reduction in tobacco settlement payments.¹⁹

According to the DFS, in the absence of the exemption, the tobacco companies would remain obligated to make

payments to the state but would likely refuse to present any documentation of the basis on which the payment was calculated in order to avoid public disclosure of the underlying financial information.

Based on the above discussion, the exemption serves an identifiable public purpose.

4. Can the information contained in the records be readily obtained by alternate means?

No, the information obtained in the records could not be readily obtained by alternate means. However, if the information regarding which a public records exemption is claimed pursuant to s. 569.215, F.S., were readily available by alternate means, then such information would not qualify for the public records exemption. Section 569.215(2), F.S., requires that to qualify for the exemption the information must not have been previously disclosed, "unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public."

5. Is there a continued necessity for the exemption?

Settling tobacco companies are required to make settlement payments to Florida in perpetuity. The DFS has an ongoing verification process for assuring that the settling tobacco companies have made the appropriate annual payments.²⁰ To assist in the process of verification, the Legislature exempted from public records requirements proprietary confidential business information of the tobacco industry received by the state for the purpose of negotiating or verifying annual settlement payments.²¹

6. Can the exemption be narrowed?

The First Amendment Foundation (FAF) advises that the exemption provides a too broad definition of what constitutes "proprietary confidential business information" because it is the tobacco companies and not the state agencies that are required to determine whether the information is confidential and exempt. Section 569.215, F.S., applies the exemption to

²⁰ This process is based on the Auditor General's recommendations regarding the administration of the tobacco settlement. *See An Accountability Review, Florida's Tobacco Settlement Agreement*, Report No. 13686, Office of the Auditor General, Florida Legislature, June 2000; *An Accountability Update*, *supra* at n. 16.

²¹ *See* ch. 2001-136, L.O.F., codified at s. 569.215, F.S.

¹⁸ *See* s. 1, ch. 2001-136, L.O.F.

¹⁹ *See* s. 2, ch. 2001-136, L.O.F.

information that the tobacco companies determine to be “proprietary confidential business information” within the intent of the exemption. The governmental recipients are not required to determine whether the information submitted by the companies is, in fact, “proprietary confidential business information.”

According to the FAF, the affected state agencies may deny public access to the information without any means or process to verify whether the information qualifies for confidential and exempt status. The FAF recommends that the exemption be narrowed to require that the governmental recipients determine whether the information submitted by the companies is “proprietary confidential business information upon receipt of the information,” and that the tobacco companies must first be required to request that the submitted information be treated as confidential.

According to the DFS, all documentation related to calculating the settlement payments is confidential proprietary information because of the nature of the settlement terms. DFS also believes that there is little question, however, that the information received in conjunction with settlement payments is non-public in nature.

Verification of an exemption that has been claimed by tobacco companies is performed by the DFS when the DFS refers the information to the department’s verification consultant for a review. The DFS’s consultant compares for “reasonableness” the information received with the published industry data from Securities and Exchange Commission filings.

According to the Attorney General, it has received only two public records requests for materials protected by the exemption since its enactment in 2001. Both requests were subsequently withdrawn by the requestors. Therefore, the Attorney General has not been required to assess the validity of the information that the companies’ have identified as “proprietary confidential business information” as defined in s. 569.215, F.S. Nor has the Attorney General been required to research whether this information has been made public. According to the Attorney General, in the event of a dispute between a public records requestor and a company over claimed confidentiality, the agency would assess the company’s claims in accordance with the principle that exemptions to the public records laws are strictly construed and in accordance with existing statutory definitions of the relevant terms as well as applicable case law.

The information subject to the exemption may also be protected as “attorney work product” pursuant to s. 119.07 (5)(1), F.S.²² According to the DFS, it has been informed by the Attorney General that all information received by the DFS from the tobacco companies also constitutes “work product” within the meaning of s. 119.07(5)(1), F.S.

Other than narrowing the definition of the term “trade secret,” the exemption should not be further narrowed at this time. Information supplied to the state agencies involved would be proprietary business information in the possession of the tobacco companies. Any narrowing of the exemption at this time may trigger additional litigation and delay the ability of the state to ascertain the correctness of the funds being paid to the state by the tobacco companies.

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption for proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments. Staff also recommends that the Legislature utilize a definition for the term “trade secret” that is identical to the definition in s. 812.081, F.S.

²² Section 119.07 (5)(1)1., F.S., provides:

A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings.