



The Florida Senate

Interim Project Report 2006-225

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Committee on Transportation

Senator Jim Sebesta, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 316.066(3)(C), F.S., CRASH REPORTS

SUMMARY

This public records exemption, codified in s. 316.066(3)(c), F.S., expires on October 2, 2006, unless the Legislature reenacts the exemption following review under the Open Government Sunset Review Act of 1995.¹

Evaluating the public records exemption against the criteria prescribed in the act, this report finds the exemption protects information of a sensitive personal nature concerning an accident victim's information contained in a crash report. Therefore, this report recommends the Legislature reenact the public records exemption.

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 Law² also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term "public records" to include:

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

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. Article I, s. 24(a) of the State Constitution expresses Florida's public policy regarding access to public records by providing 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

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used "to perpetuate, communicate, or formalize knowledge."³ Unless the Legislature makes these materials exempt, they are, open for public inspection, regardless of whether they are in final form.⁴

Under Article I, s. 24(c) 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

¹ Section 119.15, F.S.

² Chapter 119, F.S.

³ *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

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.”⁵

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 not identified and certified is not subject to the legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption it subsequently determines should have been certified, the division is required to include the exemption in the following year’s certification after that determination.

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- (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?

In addition to these considerations, pursuant to SB 1144⁶, which is effective October 1, 2005, consideration must also be given to the following:

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

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 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.”⁷

⁵ Section 119.15(3)(b), F.S. (2004).

⁶ Chapter 2005-251, L.O.F.

⁷ Section 119.15(4)(b), F.S. (2004).

Grand Jury Findings—Insurance Fraud Related to Personal Injury Protection Insurance

In September 2000, the Fifteenth Statewide Grand Jury, in a report on insurance fraud related to personal injury protection (PIP) benefits, found a strong correlation between utilization of crash reports and the commission of PIP fraud. The Grand Jury found individuals called “runners” pick up copies of motor vehicle crash reports filed with law enforcement agencies and use them to solicit people involved in motor vehicle accidents. Other runners print the information in “accident journals” sold to medical providers and attorneys who solicit persons involved in accidents. The Grand Jury noted access to crash reports provided the ability of such runners, who were often employed by unscrupulous attorneys and medical providers, to contact large numbers of potential clients in violation of the prohibition of crash report use for commercial solicitation purposes.

According to the Attorney General’s Second Interim report of the Fifteenth Statewide Grand Jury, “probably the single biggest factor contributing to the high level of illegal solicitations is the ready access to public accident reports in bulk by runners. These reports provide runners, and the lawyers and medical professionals who use them, the ability to contact large numbers of potential clients at little cost and with almost no effort. As a result, virtually anyone involved in a car accident in Florida is fair game to the intrusive and harassing tactics of solicitors. Such conduct can be emotionally, physically, and ultimately, financially destructive.” Chapter 2001-163, Laws of Florida, stated, “motor vehicle insurance fraud is estimated to add as much as \$246 to the average motor vehicle insurance policy premium.”

The Grand Jury found the access to crash reports, which provide individuals with the ability to contact large numbers of potential clients, is a violation of Florida’s prohibition of crash report use for commercial solicitation purposes. Section 119.105, F.S., allows access to anyone who wishes to view or to obtain a copy of police reports; however, the use of such reports for a commercial purpose is prohibited. Specifically, the section states, “a person who comes into possession of exempt or confidential information contained in police reports may not use that information for any commercial solicitation of the victims or relatives of the victims of the reported crimes or accidents and may not knowingly disclose such information to any third party for the purpose of such solicitation during the period of time that information remains exempt or

confidential.” Violation of this statute is punishable as a first degree misdemeanor, with up to one year in jail.

Motor Vehicle Crash Reports

Section 316.066(3)(a), F.S., requires law enforcement officers to file written reports of motor vehicle crashes. Those reports are public records except as otherwise made exempt or confidential.⁸ However, s. 316.066(3)(c), F.S., provides crash reports revealing the identity, the home or employment telephone number, the home or employment address, or other personal information concerning parties involved in a crash, received or prepared by any agency which regularly receives or prepares information concerning the parties to motor vehicle crashes is confidential and exempt from public disclosure. This information is to remain confidential and exempt for 60 days after the date the report is filed.

In the statement of public necessity accompanying the creation of the public records exemption found in s. 316.066(3)(c), F.S., the 2001 Legislature identified as justification for the public records exemption: (1) to protect the privacy of persons that have been the subject of a motor vehicle crash and (2) to protect the public from unscrupulous individuals who promote the filing of fraudulent insurance claims by obtaining such information immediately after a crash and exploiting the individual at a time of emotional distress.

Motor vehicle crash reports may be made immediately available to the parties involved in the crash, their legal representatives, their licensed insurance agents, their insurers or insurers to which they have applied for coverage, persons under contract with such insurers to provide claims or underwriting information, prosecutorial authorities, radio and television stations licensed by the Federal Communications Commission, newspapers qualified to publish legal notices under ss. 50.011 and 50.031, F.S., and free newspapers of general circulation, published once a week or more often, available and of interest to the public generally for the dissemination of news. The following products or publications are not newspapers as referred to in s. 316.066, F.S.:

- Those intended primarily for members of a particular profession or occupational group.

⁸ Section 119.105, F.S.

- Those with the primary purpose of distributing advertising; and those with the primary purpose of publishing names and other personal identifying information concerning parties to motor vehicle crashes.
- Any local, state, or federal agency, agent, or employee that is authorized to have access to such reports by any provision of law shall be granted such access in the furtherance of the agency's statutory duties notwithstanding the provisions of this paragraph.
- Any local, state, or federal agency, agent, or employee receiving such crash reports shall maintain the confidential and exempt status of those reports and shall not disclose such crash reports to any person or entity.

Additionally, any local, state, or federal agency authorized to have access to crash reports under a separate provision of law is granted access in the furtherance of the agency's duties.

Furthermore, during the 2005 session, CS/SB 1118,⁹ which became effective July 1, 2005, includes victim services programs with those entities currently able to obtain crash reports immediately rather than having to wait 60 days. Victim services programs are defined as "any community-based organization whose primary purpose is to act as an advocate for the victims and survivors of traffic crashes and for their families. The victims services offered by these programs may include grief and crisis counseling, assistance with preparing victim compensation claims excluding third-party legal action, or connecting persons with other service providers, and providing emergency financial assistance."¹⁰

The primary policy reason for closing access to these crash reports for 60 days to persons or entities not specifically listed appears to be protection for crash victims and their families from illegal solicitation by attorneys. In its 2000 report on insurance fraud relating to personal injury protection coverage, the Fifteenth Statewide Grand Jury found a strong correlation between illegal solicitations and the commission of a variety of frauds, including insurance fraud.

As a condition precedent to accessing a crash report within 60 days after the date the report is filed, a person

must present a valid driver's license or other photographic identification, proof of status, or identification that demonstrates his or her qualifications to access that information, and file a written sworn statement with the state or local agency in possession of the information stating information from a crash report made confidential by this section will not be used for any commercial solicitation of accident victims, or knowingly disclosed to any third party for the purpose of such solicitation, during the period of time that the information remains confidential. In lieu of requiring the written sworn statement, an agency may provide crash reports by electronic means to third-party vendors under contract with one or more insurers, but only when such contract states that information from a crash report made confidential by this section will not be used for any commercial solicitation of accident victims by the vendors, or knowingly disclosed by the vendors to any third party for the purpose of such solicitation, during the period of time the information remains confidential, and only when a copy of such contract is furnished to the agency as proof of the vendor's claimed status.

It is a violation, punishable as a third degree felony, for: (1) any employee of a state or local agency in possession of confidential information to knowingly disclose such information to a person not entitled access; (2) any person, knowing he or she is not entitled to such reports, to obtain or attempt to obtain the confidential report, or (3) any person to knowingly use confidential information in violation of a filed written sworn statement or contractual agreement.¹¹

This public records exemption is subject to the Open Government Sunset Review Act of 1995, and will be repealed on October 2, 2006, unless reviewed and reenacted by the Legislature before that date.¹² The purpose of this report is to evaluate, under the Open Government Sunset Review Act, this public records exemption for crash reports which reveal the identity, home or employment address or telephone number or other personal information obtained from parties involved in a crash.

METHODOLOGY

Committee staff reviewed the enactment of the public records exemption as well as the public necessity statement. Also, in conjunction with the House of Representatives, committee staff provided questionnaires to the Department of Highway Safety

⁹ Chapter 2005-177, L.O.F.

¹⁰ Section 316.003(85), F.S.

¹¹ Sections 316.066(3)(d),(e), and (f), F.S.

¹² Section 316.066(3)(c), F.S.

and Motor Vehicles as well as each county Sheriff's Department and local municipalities for information on the operation of the public records exemption and for opinions on the reenactment, repeal, or modification of the exemption. Additionally, staff requested and received input from the First Amendment Foundation¹³ and the Department of Financial Services' Division of Insurance Fraud.

FINDINGS

Of the approximately 470 questionnaires sent out, only 66 responses were received. A majority (45 responses) of parties who responded to questionnaires agree the confidential and exempt record is of a sensitive, personal nature concerning an accident victim's information contained in a crash report and the exemption should be reenacted. However, 19 responses indicated the Legislature should reduce the current criminal penalty in s. 316.066(d), F.S., to a misdemeanor or less for violations by records custodians. In addition, 9 responses recommended the exemption should be repealed suggesting the exemption is unnecessary and places a "burden" on records custodians.

The First Amendment Foundation provided a written opinion, which indicated "the exemption is simply unworkable" based on numerous complaints over the past five years from the public, reporters and records custodians. Specifically, the Foundation expressed concerns as a result of its experience that occasionally legitimate requests were denied "due to the excessive penalty provision" for records custodians. Section 316.066(d), F.S., clearly provides a state or local agency employee who *knowingly* discloses such information is guilty of a third degree felony. The Foundation assumption is records custodians would rather deny access to the crash reports and commit a first degree misdemeanor, punishable by a fine not to exceed \$1,000 or imprisonment not to exceed one year¹⁴ rather "than risk being penalized with a third degree felony" for mistakenly furnishing a crash report to persons or entities not covered by the exemption. Based on the above, it is the recommendation of the Foundation to allow the exemption to sunset.

¹³ The First Amendment Foundation is a non-profit foundation 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 www.floridafaf.org

¹⁴ Section 119.10(1)(b), F.S.

The Department of Financial Services' Division of Insurance Fraud supports the reenactment of this exemption. As indicated during discussions, it is the opinion of the division that PIP fraud begins with solicitation. In a recent study by the Department of Financial Services, "the original purpose of the prohibition on solicitation was to combat the practice of some providers who paid runners to obtain information about accident victims and invite them to be serviced by those providers, who in turn charge high prices and/or over treat the victim to exhaust the PIP coverage and promote filing of a motor vehicle tort claim. While there has been some deterrent value, many cases of apparent runner activity have continued to take place...."¹⁵ According to the division, there were 3,942 PIP fraud referrals and 676 arrests have been made from such referrals during fiscal years 2002-2005.¹⁶ However, the restriction on the availability of crash reports continues to aid in deterring illegal commercial solicitation of accident victims. The division recommends further strengthening of the exemption. Specifically, it recommends amending s. 316.066, F.S., to change the "free newspaper" loophole in the crash reports law that has resulted in massive abuses by runners in its present form.¹⁷

RECOMMENDATIONS

The Open Government Sunset Review Act prescribes 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 the exemption contained in s. 316.066(3)(c), F.S., meets the specified criteria set forth in s. 119.15(4)(b)2, F.S., as it protects

¹⁵ Study of PIP Insurance Changes, *Effect of Changes Pursuant to the Florida Motor Vehicle Insurance Affordability Reform Act of 2003*, January 2005, by the Florida Department of Financial Services.

¹⁶ The Senate Committee on Banking and Insurance is conducting an interim project, *Florida's Motor Vehicle No-Fault Law, 2006-102*, to assess how well the Motor Vehicle No-Fault Law is working in Florida, compared to automobile insurance systems in other states. The Motor Vehicle No-Fault Law is set for repeal effective October 1, 2007, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006.

¹⁷ Study of PIP Insurance Changes, *Effect of Changes Pursuant to the Florida Motor Vehicle Insurance Affordability Reform Act of 2003*, January 2005, by the Florida Department of Financial Services.

information of a sensitive personal nature concerning individuals involved in a crash.

The exemption provided for crash reports continues to be sufficiently compelling to override the strong public policy of open government; therefore, the exemption found in s. 316.066(3)(c), F.S., should be reenacted.