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Interim Project Report 2007-208

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Committee on Military Affairs and Domestic Security

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071 (3)(B), F.S., BUILDING PLANS, BLUEPRINTS, AND SCHEMATIC DRAWINGS OF STRUCTURES OWNED BY GOVERNMENT AGENCIES

SUMMARY

The Open Government Sunset Review Act, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Chapter 2002-67, L.O.F., created a public records exemption for building plans, blueprints, schematic drawings, and diagrams which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency of the state as defined in s. 119.011, F.S.

Section 119.071 (3)(b), F.S., which contains the exemption, shall stand repealed on October 2, 2007, unless reviewed and reenacted by the Legislature.

section or specifically made confidential by this Constitution. . . .

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term "A public record" is broadly defined to mean:

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.⁵

BACKGROUND

Florida Has a Long History of Providing Public Access to Government Records

The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(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

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

⁵ Section 119.011(11), F.S.

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

General policy standards related to computer records are contained in s. 119.01, F.S. Agency use of computers should not restrict access to public records.⁸ Agencies are required to consider whether a computer system is capable of providing data in a common format when designing or acquiring an electronic recordkeeping system.⁹ Further, agencies are prohibited from entering into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency. Agency use of proprietary software must not diminish the right of the public to inspect and copy a public record, subject to copyright and trade secret laws.¹⁰

Only the Legislature is authorized to create exemptions to open government requirements.¹¹ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹² A bill enacting an exemption¹³ may not contain

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Section 119.01(2) (a), F.S., provides that “. . . [a]utomation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.”

⁹ Section 119.01(2) (b), F.S.

¹⁰ Section 119.06(o), F.S., makes exempt data processing software obtained by an agency under a licensing agreement which prohibits its disclosure if that software is a trade secret as defined in s. 812.081, F.S.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹³ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁴

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁵ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁶

The Open Government Sunset Review Act¹⁷ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if 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;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited

¹⁴ Art. I, s. 24(c) of the State Constitution.

¹⁵ Attorney General Opinion 85-62.

¹⁶ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁷ Section 119.15, F.S.

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 would injure the affected entity in the marketplace.¹⁸

The act also requires consideration of the following:

- (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 yes, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁹ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

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

Exempted Plans and Diagrams

Section 119.071 (3)(b), F.S., exempts the following from public disclosure: building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building,

arena, stadium, water treatment facility, or other structure owned or operated by an agency as defined in s. 119.011, F.S.

The section allows disclosure to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is performing work on or related to structures covered by the section; or upon a showing of good cause before a court of competent jurisdiction.

The section shall stand repealed on October 2, 2007 unless reviewed and reenacted by the Legislature.

The Legislature Found It Necessary to Protect Certain Building Plans and Diagrams

In creating s. 119.071 (3)(b), F.S., the Legislature found it was a public necessity to exempt certain building plans and similar documents in order to ensure the safety of government infrastructures and to ensure public safety.²⁰ The finding further states that “[s]uch exempt information is a vital component of public safety and if it were made publicly available, the ability of persons who desire to harm individuals located in or using those structures, the building plans, blueprints, schematic drawings, and diagrams of which are made exempt by this act, would be increased.”

Although some skill would be required to use such information to further an act of terrorism, ample evidence exists of the capabilities of international terrorists to do so. 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 a coordinated response to acts of terrorism and the need for the protection of building plans and similar documents.

Further, 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 2002.

Sensitive Information is Also Protected at the Federal Level

¹⁸ Section 119.15(4) (b), F.S.

¹⁹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

²⁰ Chapter 2002-67, Laws of Florida.

The National Infrastructure Protection Plan (NIPP) is the federal government's outline for protecting the nation's critical infrastructure and key resources (CI/KR). It provides a coordinated approach to establish national priorities, goals and requirements for CI/KR.²¹

The NIPP recognizes the U. S. as an open, technologically sophisticated, highly interconnected, and complex nation with a wide array of infrastructure. This vast and diverse aggregation of highly interconnected assets, systems, and networks may also present an attractive array of targets to terrorists.²²

As a part of the plan to defend targets from acts of terrorism, the NIPP calls for the protection of sensitive information. The NIPP states, "Great care must be taken by the government to ensure that sensitive infrastructure information is protected and used appropriately to enhance the protection of the Nation's CI/KR."²³

From the federal perspective, Sensitive Security Information (SSI) is defined as unclassified information of a sensitive nature, that if publicly disclosed could be expected to have a harmful impact on the security of federal operations or assets, the public health or safety of the citizens of the United States or its residents, or the nation's long-term economic prosperity.²⁴

The Maritime Transportation Security Act, the Aviation Transportation Security Act, and the Homeland Security Act establish protection for SSI. Further, parties accessing SSI must demonstrate a need to know. Holders of SSI must protect such information from unauthorized disclosure and must destroy the information when it is no longer needed. SSI protection pertains to government officials as well as to transportation sector owners and operators.²⁵

Freedom of Information Act - Exemption of Sensitive Security Information

²¹ Department of Homeland Security, *National Infrastructure Protection Plan*, (2006), page i.

²² *Ibid.*, page 10.

²³ *Ibid.*, page 12.

²⁴ U. S. Department of Agriculture, Departmental Regulation 3440-002, (January 30, 2003).

²⁵ Department of Homeland Security, *National Infrastructure Protection Plan*, (2006), pages 67-68.

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.²⁶

Records of federal agencies in Florida generally are not covered by the state's Public Records Law.²⁷ Federal agency records are instead the purview of and covered by federal law.

Cooperative Efforts Protect Critical Infrastructure

The federal Department of Homeland Security (DHS) has designated 97 critical infrastructure sites in Florida. Many of these locations are privately owned. Through the federally funded Buffer Zone Protection Plan (BZPP), DHS agents have been working with the owners as well as state and local law enforcement and response agencies to develop best practices and proper protection. For security reasons, as determined by the federal government, the list of sites is not publicly available.

The work being done for the BZPP is part of a larger national strategy, the National Infrastructure Protection Plan (NIPP). The NIPP was released in 2006 to assure that all designated critical infrastructure is protected from terrorist activity.

The BZPP and the NIPP are illustrative of many cooperative programs between federal, state, and local agencies to prepare for and protect against terrorist attacks.

Efforts to Limit Disclosure

Prior to the events of September 11, 2001, widespread public access existed to information that is now

²⁶ U.S. Department of Justice, *Freedom of Information Act Reference Guide*, (April 2005).

²⁷ Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide*.

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

As a result, building plans, blueprints, schematic drawings, and diagrams exempted by s. 119.071 (3)(b), F.S., are 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 the Department of Law Enforcement, the Department of Environmental Protection, and the Department of Management Services concerning the use and need for the exemption. Committee staff contacted representatives from the Florida Association of Counties and the Florida League of Cities and requested that they poll their membership regarding reenactment. The First Amendment Foundation was also contacted regarding reenactment of the statute.

FINDINGS

1. Section 119.071 (3)(b), F.S., exempts the following from public disclosure: building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency as defined in s. 119.011, F.S.

2. The committee staff could find no evidence that:

- The section uniquely affects some person or entity as opposed to the general public.
- The information contained in the records could be readily obtained by alternative means.
- The records are protected by another exemption.
- There are multiple exemptions for the same type of record.

3. The identifiable public purpose of the exemption is to ensure the safety of government infrastructures and to ensure public safety.

4. The Florida Association of Counties and the Florida League of Cities recommended reenactment of the statute.

5. The First Amendment Foundation did not raise an objection to reenactment of the section in its current form.

6. During committee staff interviews with the Department of Management Services, it was learned that the department had developed a form to notify persons receiving disclosure of exempted information of the need to protect such information. Subsequent discussions between staff members of the Joint Administrative Procedures Committee and the department determined that the department appeared to lack statutory authority to develop and use such a form.

Government agencies lack clear policy and statutory guidance regarding their duty to inform recipients of exempted building plan information of a responsibility to protect such information.

RECOMMENDATIONS

1. Committee staff recommends that the exemption found in s. 119.071 (3)(b), F.S., be reenacted. The exemption provided for building plans, blueprints, and schematics continues to be sufficiently compelling to override the strong public policy of open government.

2. Committee staff recommends that the Committee consider granting appropriate authority to government agencies to instruct recipients of exempted information about their responsibility to protect such information.