



The Florida Senate

Interim Report 2009-205

October 2008

Committee on Community Affairs

OPEN GOVERNMENT SUNSET REVIEW OF S. 119.071(5)(C), F.S., PUBLIC RECORDS EXEMPTION FOR INFORMATION THAT WOULD IDENTIFY OR HELP LOCATE A CHILD, OR THE PARENTS OR GUARDIAN OF A CHILD WHO IS PARTICIPATING IN A GOVERNMENT-SPONSORED RECREATION PROGRAM OR CAMP

Issue Description

The Open Government Sunset Review Act (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of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed unless reenacted by the Legislature.

Section 119.071(5)(c), F.S., provides that any information that identifies or helps to locate a child participating in a government-sponsored recreation program or camp, or information that identifies the parents or guardians of such child is exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I, of the State Constitution. Identifying information includes but is not limited to, the name, home address, telephone number, social security number, or photograph of the child; the names and locations of schools attended by such child; and the names, home addresses, and social security numbers of the parents or guardians of such child. This exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature.¹

Background

Florida's Public Records Laws

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 1892. In 1992, Florida voters approved an amendment to the State Constitution which 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 records 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 Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any

¹ The exemption was placed in s. 119.07(6)(jj), F.S., by the Division of Statutory Revision, Office of Legislative Services. The exemption was transferred to s. 119.071(5)(c), F.S., when the Legislature enacted ch. 2005-251, Laws of Florida.

² s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of

reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. 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 “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴ Unless specifically exempted, all agency⁵ records are to be available for public inspection.

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act – s. 119.15, F.S.

The Open Government Sunset Review Act (act) establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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, expanded, or maintained only if: (1) it serves an identifiable public purpose; and (2) if it is not broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three statutory purposes 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. The three statutory purposes are:

- 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.

transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

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

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

⁵ s. 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, 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.”

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *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).

⁸ s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Article 1, s. 24(c) of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

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

- If 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.
- If 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.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.¹² The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., expressly provides 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.

Under s. 119.01(1)(a), F.S., any public officer who violates any provision of the Public Records Act chapter is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine of \$1,000. Any person who willfully and knowingly violates the provisions of s. 119.105, F.S., relating to the release of exempt and confidential information contained in police reports, commits a third degree felony, punishable by potential imprisonment not to exceed five years, or a fine of not more than \$5,000 or both.

Public Records Exemption

The 2004 Legislature enacted chapter 2004-32, Laws of Florida,¹³ to create a public records exemption for information that would identify or help locate a child participating in a government sponsored recreation program or camp. The exemption was enacted in response to a parental custodial issue in Palm Beach County when the non-custodial parent submitted a public records request using the child's name. Identifying information was released to the non-custodial parent who then attempted to abduct the child.

The exemption covers the participating child's name, home address, photograph, telephone and social security numbers, and the name and location of the school attended by the child. To provide further protection, the name, home address, telephone number, and social security number of the participating child's parent or guardian is also exempt. The exemption was created to reduce the opportunity for stalking, harassment, abduction or abuse of children participating in these programs.

Findings

Methodology

Surveys

The professional staff of the Senate Community Affairs Committee worked with the professional staff of the Legislative Committee on Intergovernmental Relations (LCIR) to prepare and conduct a survey of state agencies and local governments to determine the number that sponsor recreational programs or camps and to determine the continued need for the exemption.

¹² *Straughn v. Camp*, So.2d 689,694 (Fla. 1974)

¹³ s. 119.071(5)(c), F.S.

The following were among the questions included in the survey:

- Was your agency aware of this public records exemption prior to receiving notice of this survey research project?
- Does your agency recommend repealing or reenacting the public records exemption?
- What is the total number of public records requests received by your agency for information protected by this exemption?

The LCIR distributed the public records exemption survey to all of Florida's 67 counties and coordinated with the Florida League of Cities¹⁴ to distribute the survey to more than 400 of Florida's municipalities. In addition, the LCIR sent a fax to all 92 of Florida's special district public housing authorities directing them to the LCIR website where they could either link to the survey online or download the survey in word format. The responses were tabulated and the tabulated data was submitted to the professional staff of the Senate Community Affairs Committee.

The professional staff of the Senate Community Affairs Committee surveyed the Division of Recreation and Parks in the Department of Environmental Protection which has the responsibility of managing the state park system, and the Florida Fish and Wildlife Conservation Commission which is responsible for managing the state's fish and wildlife resources. Both agencies sponsor outdoor recreational programs for children during the school year and in the summer months.

The professional staff also surveyed the Florida Sports Foundation, Inc., which is the state's official sports promotion and development organization. The Foundation is a private, not-for-profit corporation operating under a contract with the Office of Tourism, Trade and Economic Development in the Executive Office of the Governor. The premier sports program organized by the Foundation is the Sunshine State Games which include competitions in sports that are sanctioned or recognized by the Olympic Governing Body for that sport. Amateur athletes of all ages and all skill levels can participate in the Sunshine State Games which serve as a qualifier for the State Games of America held in odd-numbered years and the Southeast Sports Festival held in even-numbered years.¹⁵ For fiscal year 2008-2009, the Legislature appropriated \$2.75 million to the Florida Sports Foundation and \$200,000 in general revenue to the Sunshine State Games.¹⁶

Meetings

The professional staff of the Senate Community Affairs Committee met with the staff of the Florida Recreation and Parks Association (association), a non-profit organization whose members include professional staff for federal, state, and local parks, recreation and leisure service agencies; and local recreation and park advisory board members serving in local communities.¹⁷ The professional staff of the Senate Community Affairs Committee also met with staff of the First Amendment Foundation, a non-profit organization, with a mission of protecting the public's right to open government.

¹⁴ Membership in the Florida League of Cities consists of municipalities and other units of local governments that provide municipal services. See http://www.flcities.com/what_we_do.asp for information relating to the League.

¹⁵ Information on the Florida Sports Foundation, Inc. and the Sunshine State Games may be obtained at <http://www.flasports.com>.

¹⁶ See ch. 2008-152, Laws of Florida, General Appropriations Act.

¹⁷ See <http://web.frpa.org/> for general information about the Florida Recreation and Parks Association.

Findings

Survey Responses – Local Governments

<i>Local Governments Survey Results – Tabulated Data</i>						
Responding Entity	Number of Responses Received	Number Aware of exemption	Number recommending reenactment of exemption	Number recommending repeal of exemption	Number making no recommendation	Number of public records requests received 1/08 -6/30/08
Counties	14 ¹⁸	4	7	0	7	Less than 20
Municipalities/ Towns/ Villages	46	15	20	3	23	13
Police Departments	1	1	1	-0-	-0-	-0-
Public Housing Authorities	-0-	Unknown due to lack of response.	-0-	-0-	-0-	Unknown due to lack of response.

Three counties and six cities reported that they sponsor no recreational programs or camps for children. Five counties and eleven cities reported that they were unaware of the exemption, and one county reported that it was unaware of exemption but only provided funding for recreational programs or camps and therefore did not collect information subject to the exemption.

Survey Responses – State Agencies and the Florida Sports Foundation, Inc.

DEP Division of Recreation and Parks – Florida Park Service

The Florida Park Service (Service) reported that recreational programs and camps for children are held in 30 of Florida’s state parks. Programs and camps include the Junior Ranger Program, Kid’s Fishing Clinic, Exploration Point Summer Program, Eco Adventure Days, the Little Turtles and Marine Biology Summer Day Camps, Kid’s Ecology Corps, and the Swamp ‘n’ Sea Summer Day Camp. The Service was unaware of the public records exemption prior to the survey and has received no public records requests from January 1 thru June 30 of this year. While the Service reports that different programs within the park system may set specific age limits, generally individuals under the age of 18 years are considered “children” for purposes of participating in state park programs. The agency remained neutral on reenactment or repeal of the public records exemption.

FWCC

The FWCC reported the following recreational programs and camps for children: the Joe Budd Aquatic Education Center, the Ocala Outdoor Adventure Camp, the Kids’ Fishing Clinic, and the Hunter Safety Education Course for Juveniles. The FWCC was aware of the public records exemption prior to the survey and has received no public records requests from January 1 thru June 30 of this year. The FWCC does set age ranges or limits for different programs and considers participants 16 years of age and younger to be “children” for purposes of the exemption. The FWCC does recommend reenactment of the exemption to ensure protection of children.

¹⁸ Several cities and counties submitted more than one response. For purposes of this report, duplicate responses have been eliminated.

Florida Sports Foundation, Inc.

The Foundation indicated on its survey that for purposes of the exemption, it considers the Sunshine State Games to be an athletic program not a “recreational program.” However, personal identifying information on athletes participating in the Sunshine State Games is not available to the public.

Meetings

The professional staff of the Senate Community Affairs Committee met with the executive director of the Florida Recreation and Parks Association (Association), which was instrumental in the passage of legislation creating the exemption in 2004. The Association supports the reenactment of the exemption this year and suggested that the Legislature consider applying a stricter standard of protection by providing that the protected information is “confidential and exempt” thereby limiting access to the information to circumstances prescribed in statute. In the publication “*Suggested Minimum Standards for Youth Sports in Florida*”, the Association notes that with respect to information identifying children participating in recreational programs, “regardless of who is the “keeper of records” the Parks and Recreation Department and the youth sports organization should work jointly to ensure that the strictest guidelines are implemented to prevent the release of this information. There should be no exception to this policy.”¹⁹

The professional staff also met with the executive director of the First Amendment Foundation (FAF). The FAF worked on the language of the exemption when it was originally enacted in 2004. In a letter dated September 9, 2008, the FAF noted that the exemption “is sufficiently narrow, and meets the constitutional standard as articulated in Art. I, s. 24, Fla. Con. We do not object to reenactment of the exemption in its current form.”

Issues relating to the Public Records Exemption

Section 119.15(6)(a), F.S., requires that as part of the review process, the Legislature must consider the following:

- What specific records or meetings are affected by the exemption?
 - Records containing information that identifies a child participating in a government-sponsored recreation program or camp, or the parent or guardian of such child, including but not limited to, the name, home address, telephone number, social security number, or photograph of the child; the name and locations of schools attended by the child; and the names, home addresses, and social security numbers of the parents or guardians of such child.
 - Section 119.071(5)(a), F.S., already contains specific restrictions on the collection of social security numbers, and provides that an agency must state in writing the purpose for collecting a social security number.
 - Section 119.071(5)(c), F.S., is silent as to the definition of “government-sponsored recreational programs or camps.” The survey results reveal confusion among local governments and state agencies as to what constitutes a “government-sponsored recreational program or camp.” Some local governments provide funding to or agree to lease space for recreational programs or camps but the programs and camps are run by other public or private entities. Some local governments fund and operate a recreational program or camp. Some state agencies and local governments operate a recreational program or camp but rely (in part or in whole) on participant enrollment fees for operating expenses.
- Whom does the exemption uniquely affect, as opposed to the general public?
 - The exemption uniquely affects any child participating in a government-sponsored recreational program or camp, and the parent or guardian of such a child.
 - Section 119.071(5)(c), F.S., is silent as to the definition of “child” for purposes of the exemption. When asked if the exemption extends to children over the age of 16, the survey results reveal a discrepancy among the various local governments and state agencies. Some local governments limit the protection to children under the age of 18 years; some limit the protection to children under the age of 17 years, and some limit the protection to children between the ages of 4 to 14.

¹⁹ Publication entitled “*Suggested Minimum Standards for Youth Sports in Florida*”, published by the Florida Recreation and Parks Association, can be found at <http://web.frpa.org/pdfs/articles/MinimumStandards.pdf>.

- What is the identifiable public purpose or goal of the exemption?
 - Public availability of the protected information could create the opportunity for stalking, harassment, abduction, or abuse of children participating in government-sponsored recreational programs or camps. Information that identifies a parent or guardian of such a child could be used indirectly to lead to the location of the child.
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
 - Section 119.071(5)(c), F.S., provides that exempt information may be disclosed by a court order upon a showing of good cause.
 - Section 119.071(5)(c), F.S., appears to contain a conflict because it does not provide that the protected information is “confidential and exempt” yet it does provide that the information made exempt may be disclosed by court order upon a showing of good cause. This appears to create a limitation on the disclosure of protected information.
 - Some applications for children enrolling in recreational programs or camps contain a waiver to be signed by the parent or guardian providing the “sponsor and co-sponsors the unconditional right to use the name, voice, and photographic likeness of the above mentioned participants, in connection with any articles, press releases, and audio/video productions.”²⁰
- Is the record or meeting protected by another exemption?
 - When survey respondents were asked if they enrolled participants separately even if the program or camp was part of a school-related activity, more than one dozen respondents reported “yes”.
 - Some records which may be kept for after-school programs or school-related field trips and activities are already protected under the “right of privacy” exemption contained in s. 1002.22(3)(d), F.S., which covers enrollment in the school and activities conducted under the school’s authority.
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?
 - No.

Recommendations

Based upon the Open Government Sunset Review of s. 119.071(5)(c), F.S., it is recommended that the exemption for information that identifies or helps to locate a child participating in a government-sponsored recreational program or camp or that identifies the parent or guardian of such a child be retained but modified. The Legislature should consider modifying the exemption to provide a definition for “government-sponsored recreational programs or camps” to help clarify which recreational programs and camps are affected by the exemption. The Legislature should further consider revising the exemption from “information that identifies or helps to locate a child” to “information that identifies or helps to locate a minor” and citing the general definition for minor contained in the Florida Statutes.²¹ This clarification will ensure that state and local governments will apply the same level of protection to all children participating in the government-sponsored recreational programs or camps.

With regard to the exemption itself, the Legislature may wish to consider modifying that exemption so that the protected information is “confidential and exempt” rather than the less strict standard of “exempt.” This expansion may be justified by the requirement in the current exemption that “information made exempt pursuant to this paragraph may be disclosed by court order upon a showing of good cause.” However, should the Legislature decide that that less strict standard is the correct standard, the exemption should be modified to remove the provision authorizing release by court order. This will eliminate conflict between the requirement of the exemption providing for protection of identifying information, including photographs, and application of the exemption among state agencies and local governments which often use photographs of children participating in the sponsored program or camp for marketing purposes.

²⁰ See the “KIDS’ FISHING CLINIC” Registration Form used by the Fish and Wildlife Conservation Commission to register children in the clinic.

²¹ s. 1.01, F.S., provides that the word “minor” includes any person who has not attained the age of 18 years.