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Committee on Community Affairs

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 73.0155, F.S., BUSINESS INFORMATION PROVIDED BY A BUSINESS OWNER TO A GOVERNMENTAL CONDEMNING AUTHORITY FOR THE PURPOSE OF MAKING AN OFFER OF BUSINESS DAMAGES

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of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed, unless reenacted by the Legislature.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 73.0155, F.S., provides that business information provided by a business owner to a governmental condemning authority for the purpose of making an offer of business damages under s. 73.015, F.S.,¹ is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I, of the State Constitution, if the business owner requests that such information be kept exempt. This exemption, originally created in chapter 99-224, Laws of Florida, was substantially revised and reenacted in chapter 2004-46, Laws of Florida, which provides that the exemption is subject to the Open Government Sunset Review Act and is repealed on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature. The purpose of this report is to evaluate, under the Open Governmental Sunset Review Act, this public records exemption for eminent domain business records disclosed in business damages claims.

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 s. 73.015, F.S., provides that a condemning authority must attempt to negotiate in good faith with the fee owner of the parcel to be acquired before an eminent domain proceeding is brought under chapters 73 or 74.

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

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 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.
- 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.

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 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.

Eminent Domain Negotiations

Eminent Domain is the power of a condemning authority or governmental entity to take private property for public use. Because the exercise of eminent domain is contrary to the basic right to own property, safeguards for the property owner have been included in both the State of Florida and United States Constitutions.¹³

To encourage presuit settlement and minimized litigation costs in eminent domain proceedings; the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel of property regarding the amount of compensation to be paid for the entire parcel. The process begins with the condemning authority making a written offer of compensation and notifying the property owner of the necessity for the parcel, the nature of the project, the availability of an appraisal report, and the owner's rights and responsibilities under law. The owner must be given at least 30 days to respond to the offer, during which time the condemning authority may not file a condemnation proceeding for the parcel identified (s. 73.015 (1)(a) and (b), F.S.).

Business Damages

Business owners may also be compensated for any probable damages that result from "right of way" takings *where less than the entire property* is sought to be appropriated. Business damages can arise from various sources, including lost parking spaces for customers or alterations to the traffic flow of the customer parking lot. If the business qualifies for business damages and intends to make claim to such damages, the business owner must submit to the condemning authority a good faith written offer to settle any claim. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damages.

The business owner must also submit to the condemning authority copies of "business records" that substantiate the good faith offer to settle business damages. The term "business records" includes, but is not limited to:

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

¹³ Article X, s. 6 of the Florida Constitution; 5th Amendment of the United States Constitution.

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss returns for the 5 years preceding notification on the property to be acquired, and other records relied upon by the business owner that substantiate business damage claim.¹⁴

Section 73.0155, F.S., specifies that business records submitted by a business owner to a governmental authority as part of an offer to settle business damages are confidential and exempt from the open provisions: 1) if disclosure of the records “would be likely to cause substantial harm to the competitive position of the person providing” the business records; and 2) if the person providing the records requests in writing that the information be held exempt. Prior to 2004, upon request these business records were given an “exempt” status only. In such cases, an agency is not prohibited from disclosing information in all circumstances. Due to the statutory revisions of 2004, business records given in business damage claims and given a public records exemption are deemed confidential and exempt. This distinction provides that business information may not be released to anyone other than the persons or entities designated in statute.

Failure to submit a business damage offer within 180 days from receipt of notice, without a good faith justification, requires the court to strike any business damage claim (s. 73.015(2)(c), F.S.). Businesses in existence for less than five years or effected merely by a temporary disruption without any taking of property are not entitled to claims of business damages.

Related Public Records Exemption

Florida law also provides a public records exemption for records held by a state executive branch agency¹⁵ seeking to acquire real property by purchase through the exercise of the power of eminent domain (s. 119.0711(2), F.S.). The exempt records include “all appraisals, other reports relating to value, offers, and counteroffers.” The exemption is operative until execution of a valid option contract or written offer to sell that has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, the exemption expires at the conclusion of the condemnation litigation of the property. The exemption does not apply to a record which was made a part of a court file and which is not specifically closed by order of the court (s. 119.0714(1), F.S.). Professional committee staff found no reported case law on the question of whether the term “other reports relating to value” includes business records provided by a business to a condemning authority to be used to establish value for business damages. Additionally, while this exemption expires at the time of acceptance, the exemption for business records provided in claims of business damages does not expire. Therefore, this exemption is not being reviewed as part of this report as there is no case law or reasonable overlap to justify merging the exemption for business records provided in claims of business damages with this exemption.

Findings

Methodology

Surveys

The professional staff of the Senate Community Affairs Committee, with the assistance of staff from the Legislative Committee on Intergovernmental Relations (LCIR), surveyed Florida counties and municipalities for information on operation of the public records exemption and for opinions on reenactment or repeal of the exemption. Survey questions included:

- 1) How many business owners have submitted an offer of business damages since 1999? Please list the number per year.
- 2) How many of the business owners who made offers of business damages requested that the business information submitted with the offer be held exempt? Please list the number per year.
- 3) Which of the following types of business records have the business owners requested be held exempt?

¹⁴ s. 73.015(2)(c), F.S.

¹⁵ ss. 125.355, 166.045, and 1013.14, F.S., provide comparable exemptions for counties, municipalities, and educational boards acquiring property for public purposes.

- 4) In your opinion, does the exemption encourage presuit negotiations?
- 5) In your opinion, would a business be placed at a competitive disadvantage through the release of business records if the exemption were not in place?
- 6) Please describe any other consequences of deleting the exemption.

Meetings

The professional committee staff also met with representatives from the Department of Transportation, the Florida League of Cities, the Florida Association of Counties, the Florida Retail Federation, and the First Amendment Foundation. The Department of Transportation noted that this business record exemption provides invaluable protection for business records which in turn allows for the free flow of information from the business owner to the condemning authority. With such information available, the condemning authority may then make a more accurate counter offer of business damages. The Florida Association of Counties, as well as the Florida League of Cities, noted similar usefulness for this public records exemption but had no official position on the reenactment of this public records exemption. The Florida Retail Federation added that without such a public records exemption, business records that would be useful for condemning authorities to evaluate business damage claims would likely be withheld in presuit negotiations. While the First Amendment Foundation noted the usefulness of such an exemption, further public oversight was suggested. The First Amendment Foundation suggested a possible time frame of five, ten, or fifteen years in which time the business records would be no longer invaluable to the businesses and could become open to the public¹⁶, and suggests modifying s. 73.0155(1)(f), F.S., to provide that “proprietary information” is “information that is related to information the disclosure of which would be likely to cause substantial harm to the competitive position of the person providing such information and which is requested to be held confidential by the person providing such information.”¹⁷

Findings

Survey Responses

The LCIR distributed the public records exemption survey to all Florida’s 67 counties and in coordination with the Florida League of Cities, the survey was distributed to more than 400 of Florida’s municipalities. In addition, the LCIR also sent a copy of the survey to the Department of Transportation. The responses were limited to that of the Department of Transportation and Orange County.

The Department of Transportation is the principal authority engaged in right-of-way acquisition in the state. In 2007, of the 38 business owners who submitted business damage claims resulting from the department’s acquisitions, 14 requested their business information be held exempt from open public records. Thus far in 2008, of the 27 business owners who submitted business damage claims, 16 requested their business information be exempt. The Department of Transportation also noted that this exemption’s ability to protect sensitive information makes it more likely that a business will provide the documents necessary for the condemning authority to fully evaluate a claim for business damages and make an appropriate counter offer. The Department of Transportation also recognized that businesses submit, and condemning authorities may request, a wide variety of records. In addition to the terms specifically identified in statute, businesses may submit, or be asked to submit, items such as: unemployment tax returns, tangible personal property tax returns, customer counts, leases, franchise agreements, appraisal reports or business damage studies, inventories and valuations fixtures, personal property, and similar types of information. Without said exemption, the department adds that it would be at a distinct disadvantage entering into negotiations. This consequently could lead to increased court costs and attorney’s fees to be paid for by the condemning authority. Additionally, Orange County responded to the survey as well but noted no eminent domain proceedings and no requests for business records to be kept exempt.

¹⁶ See the exemption provided in s. 215.44(8)(c)1.f.2., F.S.

¹⁷ The First Amendment Foundation, a non-profit organization that advocates for the public’s constitutional right to oversee its government through Florida’s public record laws, suggested these additions be added to the exemption in its current form. Letter from Adria Harper, Director, First Amendment Foundation (September 9, 2008)(on file with CA Committee)

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 (s. 119.15(6)(a), F.S.).

What specific records are affected by the exemption?

The public records exemption under review applies to “business records” submitted to a governmental authority as part of a business-damage offer made under s. 73.015, F.S. While s.73.015(2)(c), F.S., provides a specific listing of items that qualify as business records, it is prefaced by the words “includes, but is not limited to.” In addition, the statute concludes the list by stating the term business records includes “other records relied upon by the business owner that substantiate the business damage claim,” without defining what “other records” might be. Defined “business records” include:

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim.¹⁸

For the purposes of the negotiation process prescribed in the eminent domain law, the unrestricted listing of business records appears necessary, because what a business relies upon to substantiate its claim, and what a condemning authority needs to evaluate the claim, may be unique to the circumstances of that particular business and that particular eminent domain case. It is these records provided to substantiate the business-damage offer that are given a confidential and exempt status upon request.

Although business records may be confidential and exempt from disclosure, the payments approved by the condemning authority typically are available for the public to evaluate the authority’s decision. For example, if the Department of Transportation made a decision to settle business damage claims for an amount exceeding its initial counter offer, the Department of Transportation would prepare a settlement recommendation explaining the endorsement and terms of settlement.

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

The public records exemption under review has the potential to uniquely affect a business that operates on property acquired by a governmental condemning authority for a right-of-way and that is eligible to claim damages to the business directly caused by the partial acquisition. Such a business must submit a good-faith written offer to settle any claims of business damages in order to preserve its right to a determination of such damages in court. In addition, the business must submit business records to substantiate the offer. These records submitted, if requested, would be deemed confidential and exempt. The public records exemption also has the potential to uniquely affect governmental condemning authorities, which would utilize business records to evaluate the merits of a business’s damage offer.

What is the identifiable public purpose or goal of the exemption?

In the statement of public necessity accompanying creation of the public records exemption, the Legislature articulated two justifications for exempting eminent domain business records from disclosure: 1) to encourage presuit settlement of business damages, and 2) to prevent a business from being placed at a competitive disadvantage through the release of sensitive business records to the public.¹⁹

Based upon discussion with the Department of Transportation, it appears that, as a practical matter, the ability of the public records exemption to encourage presuit settlement is somewhat limited. The eminent domain statute authorizes the condemning authority to initiate its condemnation lawsuit 30 days after it has fulfilled the requirement to notify an affected business of its right to pursue business damages (s. 73.015(2), F.S.). Since the business has 180 days from receipt of notification to submit its offer to settle business-damage claims, the department has often already filed the

¹⁸ s. 73.015(2)(c)2., F.S.

¹⁹ Section 2. Ch. 99-224, L.O.F.

lawsuit, naming the business as the defendant, before the business submits the offer and the supportive business records. Although the vast majority of business-damage claims involving the department are settled without arguing the case before jury, they are nonetheless settled within the ambit of filed litigation and, therefore, are not technically presuit settlements.

Thus, it may be more accurate to conclude that one purpose of the public records exemption is to encourage settlement of business damage claims before the litigation advances fully to trial, potentially reducing overall litigation costs. The exemption, as a component of the more fundamental requirement for the business to make the first offer, helps facilitate settlement of business damages by removing the potential barrier to the exchange of information used by the parties to evaluate the merits of the business-damage claims.

Proponents of the public records exemption maintain that the exemption is necessary to counterbalance the 1999 statutory change that requires the business to take the first step of submitting a good-faith offer to the condemning authority or risk losing its right to maintain a business-damage claim in court. Prior to the 1999 revisions, details related to business damages were not as likely to be explored until the parties were further engaged in eminent domain litigation. A business typically sought a protective order from the circuit court to exempt business records from disclosure. Without the public records exemption a business would be in the position of having to submit sensitive business information to a governmental agency which could then be obtained and used by competitor businesses to their advantage in the marketplace.

Beyond the two primary justifications cited by the Legislature in creating the public records exemption, research for this report indicates a complimentary purpose. To the extent the exemption removes any reluctance on the part of a business to share sensitive information early in the condemnation process, it enables the condemning authority to obtain factual data to evaluate the merits of a business-damages offer and thereby make a more prudent decision regarding acceptance of that offer and the expenditure of public dollars to pay business damages.

Can the information contained in the records be readily obtained by alternative means? If so, how?

The items that are listed in the statutory provision requiring the submission of business records to substantiate a claim for business damages - and which arguably are the same business records intended to be protected from disclosure under the public records exemption - do not appear to be readily accessible to the general public. Much of the information delineated in the statute, and which is typically used by the Department of Transportation or other condemning authorities to evaluate an offer of business damages, relates to federal or state tax filings. In general, federal tax returns and return information are confidential under 26 USC s. 6103(a). Similarly, under Florida law, information in returns and reports received by the Department of Revenue are confidential and exempt from the state's open government requirements, with specific exceptions (s. 213.053, F.S.). Additionally, balance sheets and profit-and-loss statements, which are among the delineated items that may be submitted to substantiate business-damage offers, cannot be readily obtained by the public.

Is the record protected by another exemption?

No.

Are there multiple exemptions for the same type of record that it would be appropriate to merge?

No.

Recommendation

Based upon the insights shared by governmental condemning authorities and organizations representing the interests of businesses in eminent domain matters, the exemption for business records submitted to substantiate a business-damage offer serves the public purpose of protecting information of a confidential nature about entities. The tax filings, profit-and loss statements, balance sheets, customer counts, franchise and lease agreements, sales records, and similar information often used by a condemning authority in evaluating a business' offer are not typically accessible to the public and may be used by a business to protect or further an advantage over those who do not have access to that information. Disclosing the information would provide competitor businesses with previously inaccessible insights into

the financial status and operations of the business and thereby potentially injure the business in the marketplace – exacerbating those injuries already caused by the government’s condemnation of property on which the business operates.

Therefore, professional staff of the Senate Community Affairs Committee recommends that the Legislature retain the public records exemption in s. 73.0155, F.S., for business records submitted to a governmental authority as part of an offer to settle a claim of business damages under the eminent domain law. In retaining the exemption, the Legislature may wish to consider standardizing the terminology used in the exemption so that it is consistent with similar exemptions protecting “proprietary confidential business information.”²⁰

²⁰ See s. 215.44(8)(c), F.S.