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Committee on Ethics and Elections

OPEN GOVERNMENT SUNSET REVIEW OF S. 106.0706, F.S., ELECTRONIC FILING OF CAMPAIGN FINANCE REPORTS; CONFIDENTIALITY OF INFORMATION AND DRAFT REPORTS

Issue Description

Section 106.0706, F.S., specifies that user identifications and passwords held by the Department of State for the purpose of electronically filing campaign finance reports pursuant to s. 106.0705, F.S., are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. In addition, all records, reports, and files stored in the electronic filing system in accordance with s. 106.0705, F.S., are also exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until the report is submitted as a filed report. Section 106.0706, F.S., is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and will be repealed on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(6)(b), F.S., provides that an exemption may be maintained only if the exemption: protects information of a sensitive, personal nature concerning individuals; allows the state or its political subdivisions to effectively and efficiently administer a governmental program; or protects confidential information concerning an entity. The purpose of this report is to examine section 106.0706, F.S., in light of these requirements, in order to determine if section 106.0706, F.S., should be reenacted by the Legislature.

Background

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, 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 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.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution, 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

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

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term “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

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

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. 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

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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution.

⁵ Section 119.011(11), F.S.

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

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

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

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria 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;
- 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 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.¹⁵

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?¹⁶

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.¹⁷ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

[N]otwithstanding 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. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act 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 penalty, 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 not exceeding \$1,000.

Electronic Filing of Campaign Finance Reports

Section 106.0705, F.S., requires persons, candidates, committees, and organizations which must file reports in accordance with sections 106.04, 106.07, 106.071, 106.0703, or s. 106.29, F.S., to file those reports electronically with the Division of Elections. Reports filed electronically are considered to be filed under oath. Persons filing reports are subject to administrative fines if the reports are late filed and are subject to criminal penalties if they knowingly include false, incorrect, or incomplete information on the report.¹⁸

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ Section 119.15(6)(a), F.S.

¹⁷ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁸ Section 106.0705(3) , (4), F.S.

Findings

Section 106.0706, F.S., sets forth two specific exemptions to the Public Records Act.¹⁹ First, user identifications and passwords held by the Department of State for the purpose of filing reports in accordance with s. 106.0705, F.S., are confidential and exempt. Second, all records, reports, and files stored in the electronic system remain exempt until such time as the report is submitted as filed. These exemptions benefit candidates, committees, and organizations which must file campaign finance reports electronically. Section 106.0706, F.S., is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and will be repealed on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature.

When s. 106.0706, F.S., was created, the Legislature made five specific public necessity findings. The first two findings related to user identifications and passwords. The Legislature concluded that the exemption was necessary to ensure that persons were held accountable for filing false or inaccurate information. The Legislature found that if electronic reporting passwords and user identifications were not exempt from public record requirements, no accountability would exist for filing false or inaccurate information. Second, the Legislature determined that the exemption was necessary to ensure that no person, other than those expressly authorized by the Division through the use of an assigned user identification and password, could submit information as campaign finance data. The Legislature found that the exemption would protect authorized users against the possibility of an unauthorized person obtaining user names and passwords in order to submit false or erroneous campaign finance data that could be damaging to or result in criminal charges against authorized users.²⁰

With regard to the “records, reports and files” that comprise the second exemption contained in s. 106.0706, F.S., the Legislature specifically stated:

It is anticipated that best practices would encourage periodic and timely updates to the draft report throughout the covered reporting period and this exemption would allow reporting individuals and groups adequate time to enter all the information. Campaign finance reports can contain hundreds or even thousands of individual entries for items such as dates, names, amounts of contributions, and expenditures. It is simply not technologically or practically feasible to require all this information to be manually input on the designated statutory due date. The public-records exemption will allow reporting individuals and groups to update the information in their draft reports throughout the reporting period and subject the reports to internal audits to check for errors prior to submission. The updated reports for the entire reporting period can then be submitted as required by law.²¹

Thus, the Legislature wanted authorized users to make timely updates during the reporting period and check for any errors with confidence knowing that the report would not become public until filed.

Further, the Legislature determined that the exemption protected authorized users from the disclosure of any campaign finance information to someone who could use it to the disadvantage of the authorized user. Specifically, the Legislature gave the following example:

[A] large inflow of contributions to a candidate’s campaign during a reporting period could indicate that the candidate is positioning himself or herself for a large media buy to run political advertisements. An opponent of the candidate could frustrate this intention by purchasing desirable media slots first.²²

Additionally, the Legislature found that the exemption would have the effect of providing the public with quick access to the information provided in the reports compared to access under the former law which required filers to submit paper records by mail by the due date specified in statute. This method of reporting resulted in mailing and data entry

¹⁹ Chapter 119, F.S.

²⁰ Chapter 2004-253, Laws of Florida, pgs. 854-855.

²¹ *Id.* at 855.

²² *Id.*

issues that delayed the public's access to the information. More specifically, crucial campaign finance data due on the 4th day prior to the election was not disclosed to the public, given the delays, until after the election. However, the current electronic filing process, with the exemption, provides this information to the public before the election.²³

The initial concerns regarding the exemptions provided in s. 106.0706, F.S., have not changed. In a recent survey completed by the Division of Elections, the Division recommended reenacting the exemptions for s. 106.0706, F.S., as currently written in statute. The Division essentially reiterated the same concerns that the Legislature had in 2004 to support its position. With regard to user identifications and passwords, the Division opined that the exemption ensured accountability for campaign finance filings and protected these filings from being compromised by unauthorized users.

With regard to the second exemption contained in s. 106.0706, F.S., the Division stated in the survey that the exemption was necessary because “the record, report, and file are not intended to perpetuate, communicate, or formalize knowledge until the candidate or political committee enters the applicable pin number which then posts the report to the Division's website; thereafter, once posted, the record, report, and file are public records.” If this exemption did not exist, reports that have not been verified by the authorized user would be made public. The information contained in the unverified report could not be relied upon as correct information. Furthermore, it could expose candidates and political committees to attacks by opponents based on incorrect information. The exemption also allows candidates and committees the necessary time to enter and update information in their campaign finance reports during the reporting period prior to filing their reports.

Given this information, it is clear that the current exemptions contained in s. 106.0706, F.S., meet at least one of the three criteria for an identifiable public purpose by allowing the Division of Elections “to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”²⁴ Furthermore, the exempted information cannot be obtained by alternative means unless a candidate, committee, or other organization required to file campaign finance reports releases the protected information to the public before filing his or her report with the Division of Elections. It does not appear that any other exemption protects the information exempted in s. 106.0706, F.S., nor does it appear that there are multiple exemptions covering the same type of information.

Language Clarification

The phrase “records, reports, and files” could be modified to the more general word “information” in order to simplify and clarify the language of s. 106.0706, F.S.

Recommendations

Senate professional staff has reviewed the exemptions in s. 106.0706, F.S., pursuant to the Open Government Sunset Review Act of 1995, and finds that the exemptions meet the requirements for reenactment. Section 106.0706, F.S., allows the state to effectively and efficiently administer a governmental program, which would be significantly impaired without the exemptions. The exemptions ensure accountability for campaign finance filings and protect this information from being compromised by unauthorized users. Accordingly, professional staff recommends that the exemptions in s. 106.0706, F.S., be reenacted and thereby saved from repeal. However, in order to simplify the language in s. 106.0706, F.S., professional staff recommends replacing the phrase “records, reports, and files” with the word “information.”

²³ *Id.* at 855-856.

²⁴ Section 119.15(6)(b), F.S.