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Committee on Governmental Operations

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071(4)(A)2., F.S., A PUBLIC RECORD EXEMPTION FOR SOCIAL SECURITY NUMBERS

Issue Description

Section 119.071(4)(a)1., F.S., exempts from public records requirements the social security number (SSN) of a current or former agency employee in agency employment records. The SSN of an agency's employee, however, may be held by the employing agency, as well as other agencies, for a variety of purposes that are not related to employment. For example, an agency may obtain the SSN of another agency's employee as part of an application for licensure. As an applicant for licensure, the SSN of the agency employee would not be protected at the licensing agency under s. 119.071(4)(a)1., F.S., because it would not be in the licensing agency's employment records. The applicant's SSN, however, still would be protected at the licensing agency under the general exemption for SSNs in s. 119.071(5), F.S.

The general exemption for SSNs contains a limited exception for commercial entities to access SSNs. To obtain access under the exception, a commercial entity must be performing a "commercial activity," which is defined as the provision of a lawful product or service, and which includes verification of the accuracy of personal information; use for insurance purposes; use in identifying and preventing fraud; use in matching, verifying, or retrieving information, and use in research activities. The display or bulk sale of SSNs or their distribution to any customer that is not identifiable by the commercial entity is expressly excluded. Under the exception, the commercial entity must submit a verified, written request for access under penalty of perjury.

The exemption under review, s. 119.071(4)(a)2., F.S., modifies the limited exception to the general exemption for SSNs by authorizing an employee of one agency to notify other agencies in writing that his or her SSN must be given additional protection under the section. Upon provision of this written notice, if an agency receives a request for SSNs under the exception, it may not release the entire SSN of the employee who gave notice, but must instead release the last four digits. If the SSN is in a lien filed with the Department of State, however, then the entire number must be released.

The Open Government Sunset Review Act provides for the review and repeal of public records exemptions in the 5th year after their enactment.¹ By letter dated, May 19, 2008, the Division of Statutory Revision of the Office of Legislative Services certified that s. 119.071(4)(a)2., F.S., was subject to repeal October 2, 2009, unless reenacted during the 2009 legislative session.

Background

Public Records -The Legislature enacted the first public records law in 1892.² 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.³ Article I, s. 24(a) of the State Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

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

² Section 1390, 1391 F.S. (Rev. 1892).

³ Article I, s. 24 of the State Constitution.

The Public Records Act⁴ specifies conditions under which access must be provided to agency⁵ records. Every person who has custody of a public record must permit it to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the records custodian.⁶ 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.⁷

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.⁸ Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.⁹

Only the Legislature is authorized to create exemptions.¹⁰ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.¹¹ A bill enacting an exemption¹² may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.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 exemptions. By June 1, the Division of Statutory Revision of the Office of Legislative Services must 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.

Under the act, 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. 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

⁴ Chapter 119, F.S.

⁵ 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.

⁶ Section 119.071(1)(a), F.S.

⁷ Section 119.011(11), F.S.

⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

¹⁰ Article I, s. 24(c) of the State Constitution.

¹¹ *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).

¹² Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹³ Art. I, s. 24(c) of the State Constitution.

¹⁴ Section 119.15, F.S.

- 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

While the standards in the act may appear to limit the Legislature in the review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit it because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review by constitutional requirements.

Further, s. 119.15(8), 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.

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. 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.

Social Security Numbers – The social security number (SSN) was created for the limited purpose of administering a number of federal programs,¹⁷ but over time it has become the personal identifier of choice for governmental and business entities. One industry, information resellers or data aggregators, collects information about individuals, including SSNs, from public and private sources for resale to private individuals, business entities, and governmental agencies for identity verification.¹⁸ This information is used for insurance purposes, loan processing, background checks, among other business and governmental uses.

No single law comprehensively regulates SSN collection and use. Regulations have been mostly piecemeal, often applying to specific industries but not to all business entities uniformly.¹⁹ Under the Privacy Act of 1974,²⁰ a state agency may not deny an individual a right, benefit, or privilege provided by law because the individual refuses to disclose his SSN. This prohibition is inapplicable if disclosure: (a) is required by Federal statute, or (b) was required under statute or regulation adopted prior to January 1, 1975. Federal²¹ and state statutes²² contain numerous provisions requiring SSN collection. To comply with the Privacy Act, an agency that requests disclosure of an SSN must inform that individual whether disclosure is mandatory or voluntary, by what statutory or other authority the SSN is solicited, and what uses will be made of it.²³ These requirements are reflected in the general exemption for SSNs in s. 119.071(5), F.S., which prohibits collection of SSNs by an agency unless it has stated in writing the purpose for collection and

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ See also, ch. 650, F.S., related to social security for public employees.

¹⁸ See, e.g., www.verifysocialsecuritynumber.org or www.usatrace.com or www.web-detective.com.

¹⁹ See, e.g., the Fair Credit Reporting Act (FCRA), the Fair and Accurate Credit Transaction Act (FACTA), the Gramm-Leach-Bliley Act (GLBA), the Drivers Privacy Protection Act (DPPA), the Health Insurance Portability and Accountability Act (HIPAA) and the Federal Privacy Act.

²⁰ Section 7 of Pub. L. 93-579

²¹ See, e.g., 7 U.S.C. s. 2025 related to food stamps; 20 U.S.C. s. 1091 regarding financial aid; 42 U.S.C. s 405(c)(2)(C) related to drivers' licenses.

²² See, e.g., s. 382.008, F.S., related to death certificates; s. 921.241, F.S., requiring a written judgment finding a defendant guilty of a felony; s. 61.052, F.S, pleadings for a dissolution of marriage; s. 372.561, F.S., applications for fishing or hunting licenses.

²³ Multiple exceptions are provided in Federal law, e.g., the Tax Reform Act of 1976, 42 U.S.C. s. 405(c)(2)(C)(i),(iv).

unless it is: (a) specifically authorized by law to do so; or (b) imperative for the performance of that agency's duties and responsibilities as prescribed by law.²⁴

While there are numerous state laws authorizing or requiring SSN collection, numerous exemptions exist, as well.²⁵

Exemption Under Review - Section 119.071(4)(a)1., F.S., exempts SSNs of current or former agency employees in agency *employment* records. The term "agency employment records" is not defined by the section. A computer search of the *Florida Statutes* for the phrase "employment record" did not result in identification of a definition for the term in other statutes.

The SSNs of agency employees may be held by the employing agency and other agencies for a variety of purposes that are not related to employment. Those employee SSNs are still protected under the general exemption for SSNs,²⁶ which makes all SSNs confidential and exempt, the highest level of protection. The general exemption also contains a limited exception which grants access to a commercial entity²⁷ that is performing a "commercial activity," which is defined to mean ". . . the provision of a lawful product or service by a commercial entity . . ." ²⁸ Under the exception, a commercial entity must submit a written request for access which must: (1) be verified as provided in s. 92.525, F.S.;²⁹ (2) be legibly signed by an authorized officer, employee, or agent of the commercial entity; (3) contain the commercial entity's name, business mailing and location addresses, and business telephone number; and (4) contain a statement of the specific purposes for which it needs the social security numbers and how the social security numbers will be used in the performance of a commercial activity. Any person who makes a false representation in order to obtain a social security number under the provision or who willingly and knowingly violates it commits a felony of the third degree.

The exemption under review, s.119.071(4)(a)2., F.S., modifies the limited exception to the general exemption by authorizing an employee of one agency to notify another agency in writing that his or her SSN must be protected at the agency being notified. Upon provision of this notice, if that agency receives a request for the SSN from a commercial entity, the commercial entity will not receive that employee's entire SSN but only the last four digits of the SSN.³⁰ If the SSN is in a lien filed with the Department of State, however, then the agency must release the entire number.

Findings and/or Conclusions

Social Security Number Exemptions – The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:³¹ As part of the review process, Senate professional staff surveyed 202 state and local agencies regarding their opinions of the exemption. All agencies responded to the survey.

What specific records or meetings are affected by the exemption? The exemption affects the SSN of a current or former agency employee in any record held by another agency if that employee provides written notice to an agency that

²⁴ Section 119.071(5)(a)2.a.(I) and (II), F.S.

²⁵ A few SSN exemptions include ss. 97.0585, 119.071(4)(a)&(d), 409.175, 717.117, F.S.

²⁶ Section 119.071(5), F.S.

²⁷ Section 119.071(5)(a)7.a.(II), F.S., defines "commercial entity" to mean ". . . any corporation, partnership, limited partnership, proprietorship, sole proprietorship, firm, enterprise, franchise, or association that performs a commercial activity in this state."

²⁸ Commercial activity includes verification of the accuracy of personal information received by a commercial entity in the normal course of its business; use for insurance purposes; use in identifying and preventing fraud; use in matching, verifying, or retrieving information; and use in research activities. It does not include the display or bulk sale of social security numbers to the public or the distribution of such numbers to any customer that is not identifiable by the commercial entity. In addition to the limited commercial exemption, the section permits disclosure of SSNs to another agency or governmental entity if necessary for the receiving entity to perform its duties and responsibilities.

²⁹ Section 92.525, F.S., provides for verification of documents. The penalty for perjury by false written declaration is a felony of the third degree.

³⁰ The SSN is divided into three parts. The area numbers (the first three numbers of a SSN) reflect the state in which the number was issued. The group numbers (the middle two numbers) indicate the order in which the SSN was issued in each area. The serial numbers (the last four numbers) are randomly generated.

³¹ Section 119.15(6)(a), F.S.

is not his or her employer. If such written notice is not provided, the SSN of the agency employee still is protected at other agencies under the general exemption for SSNs. With the written request, however, a commercial entity that makes a request under the authorized exception to the exemption receives only the last four digits of the SSN, instead of the entire number, unless the SSN is in a lien filed with the Department of State.

Whom does the exemption uniquely affect, as opposed to the general public? The exemption affects current or former agency employees at agencies which do not employ them *only if* those employees provide written notice.

Of 202 agency respondents to the staff survey, only 12.1% stated that they had received a written request to protect an SSN under the provision. Twenty-four such requests were identified by the agencies indicating they had received notification under the section. Of those 24 requests, 19 were for particular individuals. Four were broader, covering multiple employees.³² An even smaller number of agency respondents (4.8%) indicated that they had made a request to another agency on behalf of one of their employees.³³

What is the identifiable public purpose or goal of the exemption? The statement of public necessity for the exemption under review notes that the purpose of the exemption is to protect individuals from fraud or other harm from disclosure of their SSNs while still permitting limited commercial access for lawful business purposes. The public necessity statement supporting the general exemption for SSNs found in s. 119.071(5)(a), F.S., notes that the SSN is a unique identifier used in government, business, and health care, and that a complete bar to access is not only impractical, but could affect agency operations, commerce, the insurance industry and health care, among other activities. Protecting SSNs while providing limited access strikes a balance between the need to protect the individual assigned the SSN while still recognizing the need of agencies and businesses to use the SSN for legitimate purposes. The exemption under review appears to meet the identifiable public purpose required by s. 119.15, F.S., of protecting information of a sensitive personal nature, the uncontrolled release of which could jeopardize their safety.³⁴

Nevertheless, the public necessity statement for the exemption under review does not explain why current or former agency employees need greater restrictions on access to their SSNs than the SSNs of other persons held by agencies. The public necessity statement notes that commercial entities can verify a person's identity by using the last four digits of the SSN and by using other information about the individual, such as date of birth or maiden name. While this is correct, it is unclear why the level of protection provided in the general exemption for SSNs is insufficient for current or former agency employees.

Another exemption, s. 119.071(4)(d), F.S., provides a greater limitation on access than the general exemption for specified agency employees. Those employees, however, perform work that puts them at potentially higher levels of risk, such as law enforcement officers, child abuse investigators and judges. These persons also are permitted to provide notice to other agencies besides their employer of the higher level of protection afforded to them but the section protects the entire SSN, not just the first five digits. Further, the exemption protects not only SSNs but home addresses, telephone numbers, and photographs of the specified employees and their family members. Arguably, this additional protection could be warranted given the nature of the work performed by these employees. No comparable explanation is provided in the public necessity statement for the exemption under review.

Further, if an additional limitation on access to SSNs is necessary for current or former agency employees, the public necessity statement of the exemption under review does not explain why this additional limitation should not apply to the SSNs of non-agency employees held by agencies.

Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? Since the SSN is commonly used in business and government as a personal identifier, the person who has been assigned the SSN often either must provide the SSN to obtain specified government services or to obtain certain business services, such as a personal loan or mortgage. While such information is not readily available to everyone, the

³² School district employees appear to be the largest group of agency employees affected by the exemption and the request is made for these employees by their employees, usually to the Department of Education.

³³ The exemption permits either the agency employee or the employing agency to make such a request.

³⁴ Section 119.15(6)(b), F.S.

SSN of an agency employee is often available to other governmental agencies and businesses for a variety of purposes. Further, under the terms of the exemption, the entire SSN may be available under the exception at any other agency that has not received a written request, as well as in a lien filed with the Department of State.

Is the record or meeting protected by another exemption? Yes. The SSN is protected by the general exemption for SSNs found in s.119.071(5)(a), F.S. As noted *supra*, that section contains a limited exception to the exemption for commercial entities that file a verified written request for access. The exemption under review limits access by commercial entities under this exception to the last four digits of the SSN unless the SSN was in a lien filed with the Department of State. Additionally, under s. 119.071(4)(d), F.S., the SSNs of specified types of employees are protected. Such specified employees include active or former law enforcement personnel, including correctional and correctional probation officers, personnel of the Department of Children and Family Services whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, or other criminal activities, may be protected at other agencies if a written request is made to that agency. Under this provision, the entire SSN, not just the last four digits, may be protected at the non-employing agency upon written notification. Finally, there may be other specific exemptions which provide additional protection for SSNs.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge? There are multiple exemptions for SSNs in the *Florida Statutes* that, depending on the circumstances, could apply to protect SSNs under a variety of circumstances. Greater uniformity in the application of SSN exemptions would reduce the administrative burden on agencies, as well as ensure greater consistency of application.

Options and/or Recommendations

It is recommended that social security numbers of current or former agency employees continue to be protected. Protection of the SSNs of agency employees will continue whether or not s. 119.071(4)(a)2., F.S., remains in law. The entire SSN of current or former agency employees will still be protected under s. 119.071(4)(a)1., F.S., at their place of employment if the exemption under review repeals. The only difference for current or former employees is that commercial entities which comply with the requirements of s. 119.071(5)(a), F.S., will be able to obtain the entire SSN of that current or former employee, instead of only the last 4 digits.. Specified employees covered by s. 119.071(4)(d), F.S., will not be affected in either case.

There are a number of options available for legislative consideration. If the Legislature finds that the additional limitation on access to SSNs provided by the exemption under review is appropriate, the exemption under review should remain in place; however, the Legislature may wish to modify s. 119.071(4)(a)1., F.S., to include the additional limitation on access at the employee's place of employment, as well. Further, if the Legislature wishes to continue the additional limitation on access to the full SSN by commercial interests, it may wish to consider extending this additional limitation to all persons. Alternatively, the Legislature may wish to let the exemption under review repeal. Under this option, the SSN of agency employees would remain protected under the general exemption, but commercial entities performing a commercial activity could obtain the entire SSN upon submission of a verified, written request. The Legislature may also wish to consider the option of increasing protection SSNs of all persons under the general exemption by amending the statutory definition of "commercial activity" so that it is clearly limited to identity verification. Refinement of the definition may help to alleviate concerns regarding access under the general exemption.

Whatever option the Legislature chooses, it is recommended that greater uniformity and consistency of SSN exemptions be pursued.