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Committee on Judiciary

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071(4)(D) 3. AND 4., F.S., PERSONAL INFORMATION RELATING TO U.S. ATTORNEYS AND FEDERAL JUDGES

Issue Description

In 2004, the Legislature amended s. 119.071, F.S., to create public records exemptions for information relating to current or former U.S. attorneys and assistant attorneys, current or former federal judges and magistrates, and their spouses and children. The information covered by the public records exemptions includes:

- The home addresses, telephone numbers, social security numbers, and photographs of these officials;
- The home addresses, telephone numbers, social security numbers, photographs, and places of employment of their spouses and children; and
- The names and locations of schools and day care facilities attended by their children.¹

In order for an agency to maintain an exempt status for these records, the statute requires that the current or former U.S. attorneys, assistant U.S. attorneys, federal judges, and federal magistrates or their employer submit a request for maintenance of the exemption to the custodial agency.²

These public records exemptions stand repealed on October 2, 2009, unless saved from repeal by the Legislature after review under the Open Government Sunset Review Act in accordance with s. 119.15, F.S. This report reflects the results of the review under the act.

Background

Florida Public Records Law

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 1892.³ 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:

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.⁴

Consistent with this constitutional provision, Florida's Public Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.⁵

¹ Section 119.071(4)(d)3. and 4., F.S.

² Section 119.071(4)(d)8., F.S.

³ Sections 1390, 1391 F.S. (Rev. 1892).

⁴ Fla. Const. art. I, s. 24(a).

⁵ Section 119.07, F.S.

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.⁶

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency⁷ in connection with official business which are used to “perpetuate, communicate or formalize knowledge of some type.”⁸ Unless made exempt, all such materials are open for public inspection as soon as they become records.⁹

Only the Legislature is authorized to create exemptions to open government requirements.¹⁰ Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.¹¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹² A bill enacting an exemption or substantially amending an existing exemption¹³ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁴

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.¹⁵ If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁶ If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.¹⁷

Open Government Sunset Review Act

Section 119.15, F.S., the Open Government Sunset Review Act, provides for the systematic review of exemptions from the Public Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.¹⁸ 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.¹⁹ Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves.²⁰ An identifiable public purpose is served if the exemption meets one of three specified purposes and the Legislature

⁶ Section 119.011(11), F.S.

⁷ 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.”

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

⁹ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

¹⁰ Fla. Const. art. I, s. 24(c).

¹¹ *Id.*

¹² *Id.*

¹³ Pursuant to s. 119.15(4)(b), F.S., an existing exemption is considered substantially amended if the exemption is expanded to cover additional records or information.

¹⁴ Fla. Const. art. I, s. 24(c).

¹⁵ *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

¹⁶ *Id.*

¹⁷ *Id.* at 54.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(5)(a), F.S.

²⁰ Section 119.15(6)(b), F.S.

finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the statutory criteria if it:

- 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 the safety of such individuals; 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 which 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.²¹

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?²²

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.²³ 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 an 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 (1)(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 not exceeding \$1,000.

Federal Justice Officials

Federal Courts

There are 94 U.S. district courts spread throughout the 50 states and U.S. territories.²⁴ Florida is divided into three federal districts with five federal judges, five federal magistrates, and two bankruptcy judges in the Northern

²¹ *Id.*

²² Section 119.15(6)(a), F.S.

²³ *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

²⁴ U.S. Courts, District Courts, <http://www.uscourts.gov/districtcourts.html> (last visited September 25, 2008).

District; 21 federal judges, 14 federal magistrates, and nine bankruptcy judges in the Middle District; and 24 federal judges, 18 magistrates, and six bankruptcy judges in the Southern District.²⁵

The U.S. Constitution provides that Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate, and each has a lifetime appointment. Recommendations for appointments may come from the Senate and sometimes from members of the House of Representatives who are members of the President's political party.²⁶

The U.S. magistrates are appointed by majority vote of the active district judges of the court and may serve eight years if they have full-time appointment. They are considered judicial officers exercising jurisdiction over matters assigned by statute as well as those delegated by the district judges.²⁷ Under the supervision of district judges, a magistrate may be assigned civil cases for jury or non-jury trials upon consent of the parties and for pre-trial matters. Except for felony cases, and upon consent of the parties, criminal cases may also be assigned to a magistrate.²⁸

A U.S. bankruptcy judge is a judicial officer of the U.S. district court who is appointed by the majority of judges of the U.S. court of appeals to exercise jurisdiction over bankruptcy matters. The number of bankruptcy judges is determined by Congress. The Judicial Conference of the United States is required to submit recommendations from time to time regarding the number of bankruptcy judges needed. Bankruptcy judges are appointed for 14-year terms.²⁹

United States Attorneys

The mission statement of the United States Attorneys provides that:

United States Attorneys serve as the nation's principal litigators under the direction of the Attorney General. There are 93 United States Attorneys stationed throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. United States Attorneys are appointed by, and serve at the discretion of, the President of the United States, with advice and consent of the United States Senate. One United States Attorney is assigned to each of the judicial districts, with the exception of Guam and the Northern Mariana Islands where a single United States Attorney serves in both districts. Each United States Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction. United States Attorneys conduct most of the trial work in which the United States is a party.³⁰

The United States Attorneys have three statutory responsibilities under Title 28, Section 507 of the United States Code:

- the prosecution of criminal cases brought by the Federal government;
- the prosecution and defense of civil cases in which the United States is a party; and
- the collection of debts owed the Federal government which are administratively uncollectible.³¹

There are three U.S. Attorneys and 350 assistant U.S. Attorneys in Florida's three districts.³²

²⁵ The Florida Bar Journal, Directory, Issue 2007.

²⁶ U.S. Courts, Frequently Asked Questions, <http://www.uscourts.gov/faq.html> (last visited September 25, 2008).

²⁷ *Id.*

²⁸ Federal Magistrate Judges Association, <http://www.fedjudge.org/index.asp> (last visited October 22, 2008).

²⁹ *Id.*

³⁰ U.S. Department of Justice, United States Attorneys, Mission Statement, <http://www.usdoj.gov/usao/index.html> (last visited September 17, 2008).

³¹ *Id.*

³² Information obtained from the National Association of Assistant United States Attorneys (NAAUSA).

Public Records Exemptions

There is precedent in the Florida Statutes for affording protection to addresses, telephone numbers, social security numbers, and other personal information relating to public agency personnel. Section 119.071(4)(d), F.S., provides this kind of public records protection, for example, for law enforcement officers, state judges, child-welfare investigators, and others. The Legislature has amended the statute repeatedly. In 2008, for example, the public records exemption relating to state judges was expanded to include state general and special magistrates, judges of compensation claims, administrative law judges, child support enforcement hearing officers, and certain family members.³³

In 2004 the Legislature added subparagraphs 3. and 4. to s. 119.071(4)(d), F.S., which is the statute governing public records exemptions for agency personnel information. In doing so, the Legislature exempted home addresses, telephone numbers, social security numbers, and photographs of current and former U.S. attorneys, assistant U.S. attorneys, federal judges, and federal magistrates. It also exempted the home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of these officials, as well as the names and locations of schools and day care facilities attend by their children.

In order for an agency to maintain an exempt status for these records, the statute requires that the current or former U.S. attorneys, assistant U.S. attorneys, federal judges, and federal magistrates or their employer submit a request for maintenance of the exemption to the custodial agency.

Findings and/or Conclusions

The Legislature made a finding of public necessity when it created subparagraphs 3. and 4. of s. 119.071(4)(d), F.S. It provided, in part, that U.S. attorneys, federal judges, and federal magistrates:

interact with accused and convicted criminals every day of their careers. The capacity in which they deal with the accused and the convicted does not create good will among the accused, the convicted, their associates, or their families....Further, their duties make their spouses and children potential targets for acts of revenge....Accordingly, it is a public necessity that identifying and personal information be made exempt.³⁴

The exemptions at issue here exempt from public disclosure specified personal information relating to current or former U.S. attorneys and assistant attorneys and current or former federal judges and magistrates which includes:

- Their home addresses, telephone numbers, social security numbers, and photographs;
- The home addresses, telephone numbers, social security numbers, photographs, and places of employment of their spouses and children; and
- The names and locations of schools and day care facilities attended by their children.

In order to obtain an exemption of this information, the U.S. attorneys, judges and magistrates must make a request for maintenance of the exemptions to the custodial agency. Some state agencies have forms on-line or available upon request that allow authorized government employees listed under s. 119.071, F.S., to request the exemption. The forms generally request personal data, the record the person wishes to be exempt, and an attestation of identity or notarized signature of the government employee making the request. The Department of Highway Safety and Motor Vehicles (DHSMV) requires a form or a request on letterhead (which can include requests on behalf of spouses and children) asking that driver's license information not be released under the list of exceptions found in s. 119.0712(2), F.S. This request also automatically blocks driver registration information from being released.³⁵

Current trends show an increase in threats by prisoners and disgruntled litigants against federal judges and U.S. attorneys. One of the more high-profile cases occurred in February 2005, when the husband and mother of

³³ Chapter 2008-41, L.O.F.

³⁴ Chapter 2004-95, L.O.F.

³⁵ Interview with staff from the Department of Highway Safety and Motor Vehicles, August 5, 2008.

Chicago U.S. District Judge Joan Humphry Lefkow were murdered by a litigant whose case Judge Lefkow had dismissed. In a July 2006 article in the Boston Globe, the U.S. Marshals Service (the agency assigned to protect federal judges and U.S. attorneys, the Clerks of Courts Office, the U.S. Probation Offices, as well as jurors and witnesses³⁶) reported a record-setting pace of threats against federal judges after this murder. The Marshals office stated that the threats came from mentally deranged inmates, disgruntled litigants in civil lawsuits, especially those without representation, and people who file multiple lawsuits (this represented the largest percentage of threats).³⁷ A March 2008 USA Today article reported that the U.S. Marshals Service, tracked a 69-percent increase “in inappropriate communications with federal officials from fiscal years 2003 to 2007.” These communications included outright threats or a pattern of suspicious mailings. According to the U.S. Marshals Service, threats in 2008 are expected to exceed those in 2007, with 1184 threats logged by August 28, 2008.³⁸

The responses from Florida federal district judges, magistrates, and assistant U.S. attorneys to a questionnaire sent by professional staff of the Committee on Judiciary also affirmed the necessity for these exemptions. Out of the 51 surveys received, every participant answered “yes” when asked whether they thought the public records exemption was necessary.³⁹ The answers to the question of how they thought the exemption protected them were similar in the sense that the exemption, though not full-proof, made it more difficult for their personal information to be found.

Eighteen of the participants answered “yes” when asked if they ever received threats on their lives. Many of the descriptions of the threats were brief but referred generally to threats of murder by litigants and criminal defendants. Others elaborated on the particular facts involved in the threats. One assistant U.S. attorney described three threats upon his life. The first threat was made by a defendant’s family member in an elevator in the courthouse. The second and third threats, as relayed to him by jailhouse informants, were from people he had prosecuted. Another U.S. attorney described a two-year period when he was deputized as a Special Deputy U.S. Marshal so that he could carry a firearm on his person for the protection of himself and his family against a former inmate who was no longer in custody.

Most of the respondents had requested that their information be exempt from various governmental agencies. The agencies cited most often included the supervisor of elections, the county property appraiser, and the Department of Highway Safety and Motor Vehicles.

Availability of the Personal Information

The Internet and other information technologies have revolutionized the gathering and sharing of vast amounts of personal information. The public records exemptions under review require a federal attorney, judge, or magistrate to request that an agency keep his or her home address, telephone number, and other covered information exempt from public disclosure. However, it is quite possible that, even if the agency keeps it exempt, the same information may be available through other non-governmental sources readily accessible to members of the general public. Comparable exemptions for state judicial officers and for guardians ad litem require, as a condition to an agency granting a request to maintain information as exempt, that the judicial officer or guardian ad litem submit a written statement that reasonable efforts have been made to protect the information from being accessible through other means available to the public. The Legislature may wish to add similar language to the public records exemptions under review for federal attorneys, judges, and magistrates.

³⁶ E-mail communication from the U.S. Marshals Service, September 11, 2008.

³⁷ Mark Sherman, *An angry trend: Threats against federal judges set record pace Changes in court cases may be fueling increase*, The Boston Globe, http://www.boston.com/news/nation/washington/articles/2006/07/28/an_angry_trend_threats_.

³⁸ Kevin Johnson, *Threats up against federal judges, lawyers*, USA Today, www.usatoday.com/news/nation/2008-03-05-threats_N.htm. E-mail communication from the U.S. Marshals Service, September 11, 2008.

³⁹ Surveys were sent directly to the 102 federal judges, federal magistrates, and bankruptcy judges in Florida. With the help of the main office in Tampa, Florida, for the U.S. Attorneys’ Office and the National Association of United States Attorneys (NAAUSA), surveys were sent via e-mail to the U.S. attorneys and assistant U.S. attorneys in Florida. The exact number of surveys sent is unknown, but presently there are three U.S. attorneys and 350 assistant U.S. attorneys in Florida.

Records Protected by Another Exemption

Social security numbers held by an agency are confidential and exempt from public records disclosure under s. 119.071(5)(a)5., F.S. An agency may not collect a person's social security number unless the agency states its purpose in writing and unless it is specifically authorized by law to do so or it is imperative for the performance of that agency's duties and responsibilities. The agency may only use the social security numbers for the purpose provided in the written statement.⁴⁰

The one exception to this exemption is when a commercial entity makes a verified written request to the agency for social security numbers. The commercial entity is permitted to only use the information in the performance of a commercial activity.⁴¹ Commercial activity is defined as the provision of a lawful product or service by a commercial entity. It includes:

- accuracy verification of personal information received in the normal course of business;
- use for insurance purposes;
- use in identifying and preventing fraud;
- use in matching, verifying, or retrieving information; and
- use in research activities.⁴²

This exception does not supersede any other applicable public records exemptions existing prior to May 13, 2002, or created thereafter, and therefore the social security number exemptions in s. 119.071(4)(d), F.S., for federal judges, federal magistrates, and U.S. attorneys are not affected.⁴³

Options and/or Recommendations

Senate professional staff recommends that the Legislature retain the public records exemptions established in subparagraphs 3. and 4. of s. 119.071(4)(d), F.S., which make specified personal information relating to current or former U.S. attorneys, assistant U.S. attorneys, and current or former federal judges and magistrates exempt from disclosure. This recommendation is made in light of the information gathered for this report that indicates that there is a public necessity to continue to protect these officials from potential threats from the accused, the convicted, and the mentally unstable. Senate professional staff recommends that the Legislature consider amending this section to delete the comparable exemption for social security numbers if the existing general exemption for such numbers in s. 119.071(5), F.S., and its exception for commercial entities are deemed sufficient safeguards for these attorneys and judges. Senate professional staff also recommends that the Legislature consider adding a provision that requires a written statement that the attorneys and judges have taken steps to protect their addresses from access through other sources available to the public.

⁴⁰ Section 119.071(5)(a)2., F.S.

⁴¹ Section 119.071(5)(a)7.b., F.S.

⁴² Section 119.071(5)(a)7.a.(l), F.S.

⁴³ Section 119.071(5)(a)11., F.S.