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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 440.3851, F.S., FLORIDA SELF-INSURERS GUARANTY ASSOCIATION, INCORPORATED

Issue Description

The Florida Legislature created the Florida Self-Insurers Guaranty Association (association) as a nonprofit corporation. Pursuant to s. 440.385, F.S., the purpose of the association is to provide a mechanism to fund covered workers' compensation claims of individual insolvent self-insurers other than public utilities or governmental entities. The association is under the general oversight of the Department of Financial Services, which also regulates individual self-insurers for purposes of workers' compensation coverage. Section 440.3851, F.S., exempts claim files, specified medical records, and certain portions of meetings of the association from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The Open Government Sunset Review Act under s. 119.15, F.S., provides for the review of exemptions to open records and meetings requirements 5 years after enactment. Section 440.3851, F.S., is an exemption for specified records and meetings of the Florida Self-Insurers Guaranty Association, Inc., and provides for release of such records under certain circumstances. The public records and meetings exemption will repeal on October 2, 2010, unless reviewed and saved from repeal.

Senate Banking and Insurance professional staff recommends that the current exemption should be reenacted and saved from repeal.

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 predates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1) (a), F.S., states:

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

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

³ Chapter 119, F.S.

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

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency 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 2nd 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

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.

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

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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:

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

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.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), 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.

Florida Self-Insurers Guaranty Association, Incorporated

In 1982, the Florida Legislature created the Florida Self-Insurers Guaranty Association (association) as a nonprofit corporation. Pursuant to s. 440.385, F.S., the purpose of the association is to provide a mechanism to fund covered workers' compensation claims of individual insolvent self-insurers other than public utilities or governmental entities. The costs of the self-insurance guaranty are allocated among the individual self-insurers. The association is under the general oversight of the Department of Financial Services, which also regulates individual self-insurers for purposes of workers' compensation coverage.

Section 440.3851, F.S., exempts the following records from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

1. Claims files, until termination of all litigation and settlement of all claims arising out of the same accident.
2. Medical records that are part of a claims file and other information relating to the medical condition or medical status of a claimant.
3. Minutes of exempt portions of meetings discussing such claims until termination of all litigation and settlement of all claims with regard to that specific claim.

¹⁵ Section 119.15(4)(b), F.S.

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

Such records and portions of records made confidential and exempt by s. 440.3851, F.S., are authorized to be released to another agency. The receiving agency is required to maintain the confidentiality and exempt status of such records. The association is required to transcribe the portion of meetings that are exempt and confidential.

Findings and/or Conclusions

Banking and Insurance professional staff recommends that the current exemption should be reenacted and saved from repeal. This public records exemption benefits all current and past claimants by preventing disclosure of their personal medical information. The public records exemption also benefits the association by preventing disclosure of information on active claims, such as claim resolution strategy and claim reserving information. The disclosure of such claim information would hinder the association's ability to control claim costs.

The public meetings exemption benefits the association by allowing the board of directors and its committees to participate in the management of the association's claims. Without this exemption, the claims management function would be performed by staff and the expertise of the board members would not be fully utilized. In recent years, the Claims Committee of the association has used this exemption to meet in private session on an annual basis to review the status of selected claims. The meetings are transcribed in accordance with the requirements of the exemption.

Options and/or Recommendations

Senate Banking and Insurance professional staff recommend that the current public record and meeting exemptions should be reenacted and not repealed.