



The Florida Senate

Interim Report 2010-202

September 2009

Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 497.172, F.S., THE BOARD OF FUNERAL, CEMETERY, AND CONSUMER SERVICES

Issue Description

In 2005, legislation was enacted that created public records exemptions for the Board of Funeral, Cemetery, and Consumer Services ("Board") in the following circumstances: when holding meetings conducted for the purpose of developing or reviewing licensure examination questions and answers, when holding probable cause panel meetings, when scheduling inspections and special examinations for information held by the Department of Financial Services (DFS) pursuant to a financial examination or inspection, and for trade secrets of a licensee or applicant for licensure.¹ These public records exemptions will repeal on October 2, 2010 unless reviewed and saved from repeal by reenactment by the Legislature.

Senate Professional Staff recommends that the specified exemptions be reenacted with the following changes:

1. Section 497.172(1), F.S., should be amended to require a recording of all closed portions of committee meetings and the recording should be released to the public with specific redactions of any sensitive information pertaining to examination material.
2. Section 497.172(2), F.S., should be amended to provide a permanent exemption for photographs of deceased persons or body parts, taken or obtained by the Board staff in investigation. The photographs should be made available to the public only upon a court order and a showing of good cause and extenuating circumstances.
3. Section 497.172(3), F.S., should be amended to provide a permanent exemption for photographs of deceased persons or body parts, taken or obtained by the Board staff in investigation. The photographs should be made available to the public only upon a court order and a showing of good cause and extenuating circumstances.

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 1892.² 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 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.

¹ Section 497.172, F.S. (Ch. 2005-162 L.O.F.).

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

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

In addition to the State Constitution, the Public Records Act,⁴ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁵ 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 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.⁶

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.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ 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.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹²

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.¹³ If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹⁴

The Open Government Sunset Review Act¹⁵ 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

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 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *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).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ Attorney General Opinion 85-62.

¹⁴ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁵ Section 119.15, F.S.

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 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.¹⁶

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.¹⁷ 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.

Exemptions in s. 497.172, F.S.

In 2005, legislation was enacted that created public records exemptions for the Board of Funeral, Cemetery, and Consumer Services (“Board”) in the following circumstances: when holding meetings conducted for the purpose of developing or reviewing licensure examination questions and answers, when holding probable cause panel meetings, when scheduling inspections and special examinations for information held by the Department of Financial Services (DFS) pursuant to a financial examination or inspection, and for trade secrets of a licensee or applicant for licensure.¹⁸ These public records exemptions will repeal on October 2, 2010, unless reviewed and saved from repeal by reenactment by the Legislature.

¹⁶ Section 119.15(4)(b), F.S.

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

¹⁸ Section 497.172, F.S. (Ch. 2005-162 L.O.F.).

Exemptions Relating to Licensure Examination Meetings

Section 497.172(1), F.S., creates a public records exemption for the Board's licensure meetings where licensure test questions and answers are discussed. The purpose of this exemption is to prevent the dissemination of future examination questions and answers to applicants who have not yet taken the licensure examination.

Exemptions Relating to Probable Cause Panel Meetings

Section 497.172(2), F.S., creates a temporary exemption for probable cause panel meetings held by the Board. These records are only exempt until 10 days after a determination regarding probable cause pursuant to s. 497.153 F.S., at which point the records are subject to public disclosure.

Exemptions Relating to Financial Examinations, Inspections, and Investigations

Section 497.172(3), F.S., creates a temporary exemption for information held by DFS pursuant to financial examinations, inspections, and investigations of violations under ch. 497, F.S. This information is only exempt until the examinations, inspections, and investigations are complete or are no longer active, at which point the information is subject to public disclosure.

Exemptions Relating to Trade Secrets

Section 497.172(4), F.S., creates an exemption for licensees' trade secrets in the possession of DFS or the Board. Staff members of DFS and the Board are frequently exposed to trade secret material of licensees during financial exams, investigations, and inspections. Most commonly, such trade secrets relate to customer lists, but staff are also exposed to other materials that may give a licensee an advantage over its competitors, and such material is protected as trade secret.

Findings and/or Conclusions

Exemptions Relating to Licensure Examination Meetings

Section 497.172(1), F.S., creates a public records exemption for the Board's licensure meetings where licensure examination questions and answers are discussed. This exemption is adequate and serves a public purpose; however, some concern has been expressed over whether this exemption goes too far. In order for the public to be assured that the Board has restricted the exempted conversation to those topics which are covered under the exemption, Senate Professional Staff recommends that s. 497.172(1), F.S., be amended to require a recording of all closed portions of the Board's licensure meetings, and to provide that the recording is subject to public disclosure. Any information pertaining to the examination that the Board determines to be sensitive may be redacted from the record prior to public disclosure.

Exemptions Relating to Probable Cause Panel Meetings

Section 497.172(2), F.S., creates a temporary exemption for probable cause panel meetings held by the Board. These records are only exempt until 10 days after a determination regarding probable cause pursuant to s. 497.153, F.S., at which point the records are subject to public disclosure. Senate Professional Staff recommends that a permanent exemption should be provided for photographs of deceased persons or photographs of body parts taken or obtained by the Board staff in an investigation. Such photographs are taken to document improper treatment or storage of human remains. Allowing these photographs to be obtained and circulated in the media or on the internet could be extraordinarily hurtful and traumatic to family members of the deceased. In addition, the Board has indicated to Senate Professional Staff that there is a segment of the population that has a prurient and unhealthy attraction to such photographs, and releasing the photographs contributes to this inappropriate interest.

Exemptions Relating to Financial Examinations, Inspections, and Investigations

Section 497.172(3), F.S., creates a temporary exemption for information held by DFS pursuant to financial examinations, inspections, and investigations of violations under ch. 497, F.S. Senate Professional Staff recommends that a permanent exemption should be provided for photographs of deceased persons or photographs

of body parts taken or obtained by the Board staff in investigation. Such photographs are taken to document improper treatment or storage of human remains. Allowing these photographs to be obtained and circulated in the media or on the internet could be extraordinarily hurtful and traumatic to family members of the deceased. In addition, the Board has indicated to Senate Professional Staff that there is a segment of the population that has a prurient and unhealthy attraction to such photographs, and releasing the photographs contributes to this inappropriate interest.

Exemptions Relating to Trade Secrets

Section 497.172(4), F.S., creates an exemption for trade secrets in the possession of DFS or the Board. Staff members of DFS and the Board are frequently exposed to trade secret material of licensees during financial examinations, investigations, and inspections. Because this exemption is necessary to protect the confidentiality of licensees' trade secrets, Senate Professional Staff recommends that s. 497.172(4), F.S., should be reenacted as currently written.

Options and/or Recommendations

Based on the staff's review of the exemptions under the Open Government Sunset Review Act's criteria, it is recommended that the specified exemptions be reenacted since these exemptions are necessary for the effective and efficient administration of a government program and the protection of sensitive and confidential information. However, staff also recommends the following changes to the current exemptions:

1. Section 497.172(1), F.S., should be amended to require a recording of all closed portions of committee meetings and the recording should be released to the public with specific redactions of any sensitive information pertaining to examination material.
2. Section 497.172(2), F.S., should be amended to provide a permanent exemption for photographs of deceased persons or body parts, taken or obtained by the Board staff in investigation. The photographs should be made available to the public only upon a court order and a showing of good cause and extenuating circumstances.
3. Section 497.172(3), F.S., should be amended to provide a permanent exemption for photographs of deceased persons or body parts, taken or obtained by the Board staff in investigation. The photographs should be made available to the public only upon a court order and a showing of good cause and extenuating circumstances.