



# The Florida Senate

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Committee on Children, Families, and Elder Affairs

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## OPEN GOVERNMENT SUNSET REVIEW OF SECTION 409.25661, F.S., INSURANCE CLAIMS DATA FOR PUBLIC ASSISTANCE COORDINATION OF BENEFITS

### Issue Description

Section 409.25659, F.S., requires the Department of Revenue (DOR or the department) to develop and operate a data match system in which an insurer may voluntarily provide the department with the name, address, and, if known, date of birth and social security number or other taxpayer identification number for each noncustodial parent who has a claim with the insurer and who owes past due child support.

Section 409.25661, F.S., provides that specified information regarding a noncustodial parent who owes past due child support, collected by DOR pursuant to s. 409.25659, F.S., is confidential and exempt from public records. This exemption was created during the 2004 Legislative Session and was subject to the Open Government Sunset Review Act in 2009. That review was completed,<sup>1</sup> and the Legislature extended the exemption to October 2, 2010.<sup>2</sup> At that time the paragraph will stand repealed unless reviewed and saved from repeal through reenactment by the Legislature.

### 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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,

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<sup>1</sup> See The Florida Senate Interim Report 2009-202, *Open Government Sunset Review Regarding Noncustodial Parents Owing Past-Due Child Support*, September 2008.

<sup>2</sup> Chapter 2009-119, L.O.F.

<sup>3</sup> Sections 1390, 1391 F.S. (Rev. 1892).

<sup>4</sup> Fla. Const. art. I, s. 24(a).

<sup>5</sup> Section 119.07, F.S.

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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency<sup>7</sup> in connection with official business, which are used to “perpetuate, communicate or formalize knowledge.”<sup>8</sup> Unless made exempt, all such materials are open for public inspection as soon as they become records.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.<sup>11</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>12</sup> A bill enacting an exemption or substantially amending an existing exemption<sup>13</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>14</sup>

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.<sup>15</sup> 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.<sup>16</sup> If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information.<sup>17</sup>

### Open Government Sunset Review Act

Section 119.15, F.S., the Open Government Sunset Review Act (the Act), provides for the systematic review of exemptions from the public records law on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.<sup>18</sup> 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.<sup>19</sup>

Pursuant to the 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.<sup>20</sup> An identifiable public purpose is served if the exemption meets one of three specified purposes and 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 statutory criteria if it:

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<sup>6</sup> Section 119.011(12), F.S.

<sup>7</sup> 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.”

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

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

<sup>10</sup> Fla. Const. art. I, s. 24(c).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 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.

<sup>14</sup> Fla. Const. art. I, s. 24(c).

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 54.

<sup>18</sup> Section 119.15(3), F.S.

<sup>19</sup> Section 119.15(5)(a), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

(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 the safety of such individuals; 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 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.<sup>21</sup>

The Act also requires the Legislature to consider six questions that go to the scope, public purpose and necessity for the exemption.<sup>22</sup>

### Insurance Claim Data Exchange

Section 409.25656, F.S., provides the department with the authority to place a levy on any credit or personal property of an obligor for any past due child support. This includes bank accounts, vehicles, and insurance claim payments. Section 409.25659, F.S., was established during the 2004 Legislative Session to provide for the identification of claims on liability insurance<sup>23</sup> which could potentially be applied to child support arrearages in Title IV-D cases.<sup>24</sup> The department reports that as of mid-July 2009, of the total Title IV-D caseload, there were 468,596 noncustodial parents eligible to be matched using the insurance claim data exchange.<sup>25</sup>

The department was directed by statute to develop and operate a data match system which would identify noncustodial parents who owe past-due child support and who also have a claim with an insurer. This process allows insurers to voluntarily provide DOR with the name, address, and if known, date of birth and Social Security number or other taxpayer identification number for each noncustodial parent identified as having a claim.<sup>26</sup> This data can only be used for purposes of child support enforcement.<sup>27</sup>

Within the data match system, an insurer may provide DOR with the needed information in one of three ways:<sup>28</sup>

- An insurer may provide the required data for each claim directly to DOR electronically so that the department can conduct a data match;

<sup>21</sup> *Id.*

<sup>22</sup> Section 119.15(6)(a), F.S. See the Findings and/or Conclusions section of this report for a review of the six questions as they relate to this particular exemption.

<sup>23</sup> Section 409.25659(1)(b), F.S., defines a claim as an open, unresolved bodily injury claim on liability coverage in excess of \$3,000 in an insurance contract payable to an individual, or to a third party for the benefit of the individual, who is a Florida resident or who had an accident or loss that occurred in Florida or who has an outstanding child support obligation in Florida.

<sup>24</sup> Chapter 2004-334, L.O.F. The term "Title IV-D" refers to state-run child support enforcement programs which are funded through grants provided for by the Social Security Act of 1975. Title IV of the Social Security Act covers grants to states for the purpose of providing aid and services to needy families with children and for child welfare services. Part "D" of that law covers child support and the establishment of paternity.

<sup>25</sup> Email from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (August 21, 2008, 11:29 AM EDT) (on file with the committee). According to this email, the total number of cases with orders for support, *i.e.*, Title IV-D and non-Title IV-D cases, is 605,226 as of June 30, 2009.

<sup>26</sup> Section 409.25659(2), F.S.

<sup>27</sup> Section 409.25659(5), F.S.

<sup>28</sup> Section 409.25659(2)(a)-(c), F.S.

- An insurer may receive or access data from DOR and conduct a data match of all noncustodial parents who have a claim with the insurer and who owe past-due child support, and submit the match data regarding each noncustodial parent to DOR; or
- An insurer may authorize an insurance claim data collection organization to complete either of the two options mentioned above.

Due to the variety of data submission methods provided within the system, it would be possible for DOR to receive information on individuals having a claim with an insurer, who do not owe child support.

Section 409.25661, F.S., provides that information obtained by DOR pursuant to s. 409.25659, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution until the department determines whether a match exists. If a match does exist, the matched data is no longer considered to be confidential and exempt, and becomes available for public disclosure unless otherwise exempt.<sup>29</sup> If a match is not made, the nonmatch information must be destroyed.<sup>30</sup>

### Implementation of the Insurance Claim Data Exchange

The department did not immediately begin matching data files with insurance companies pursuant to s. 409.25659, F.S., which went into effect on October 1, 2004. According to DOR, in 2004, immediate steps were taken to implement the statute by making contact with most of the top 25 insurers in the state. During this time, insurers were responding to claims resulting from damage caused during the 2004 hurricane season, and consequently, DOR decided to postpone working on the insurance claim data exchange initiative. The department neither re-initiated contact with the insurers nor attempted to resume implementation activities due to resources being otherwise dedicated to the statewide implementation of Phase I of the Child Support Enforcement Automated Management System (CAMS).<sup>31</sup>

In February 2006, Congress passed the Deficit Reduction Act of 2005 which authorized the Federal Department of Health and Human Services (HHS) to compare information concerning individuals owing past-due child support with information maintained by insurers concerning insurance claims, settlements, awards, and payments. The Act further allows HHS to furnish information resulting from the data matches to state agencies responsible for child support enforcement.<sup>32</sup> A federal workgroup was established in order to implement this provision.

The department initially chose to monitor the activities of the federal workgroup charged with implementing the nationwide insurance data match program and to implement the system changes necessary to receive data from the federal program.<sup>33</sup> On September 8, 2008, the department submitted its participation form for the federal program to the federal office of Child Support Enforcement and began receiving matches on October 10, 2008.<sup>34</sup> The department has received 2,307 data matches from the federal program for the period of November 2008 through June 30, 2009. Of those matches the department reports that:<sup>35</sup>

- 375 matches were ones where the Department had previously received match information from another source;
- 495 matches were not pursued for various reasons, including no jurisdiction, past-due amounts did not meet collection threshold, the parent receives SSI, or DOR involvement in the case has ended; and
- 1,437 matches resulted in lien actions being initiated.

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<sup>29</sup> Section 409.25661(1), F.S.

<sup>30</sup> Section 409.25659(5), F.S.

<sup>31</sup> Letter from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (September 5, 2008) (on file with the committee).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Email from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (December 4, 2008, 8:21 AM) (on file with the committee).

<sup>35</sup> Letter from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (July 16, 2009) (on file with the committee).

Of those lien actions:<sup>36</sup>

- 1,138 lien actions are pending final resolution, and
- 299 have been completed.

The department reports that they have collected approximately \$47,000 for non-custodial parents as of July 16, 2009.<sup>37</sup>

### **Status of the Federal Program**

According to the department, the federal program is still building its partnerships with personal liability insurance companies. Of the 207 companies currently participating in the federal program, none are Florida based. The department again reports, as it did when this exemption had its initial review, that it cannot determine whether or not the federal program will provide the needed match information for companies based or doing business in Florida until more companies begin actively matching with the federal program.<sup>38</sup>

The department reports that in July 2009, it mailed letters inviting Florida insurers to enter into a data matching partnership with DOR. According to the department, this partnership was to benefit the state program described in s. 409.25659, F.S.<sup>39</sup>

## **Findings and/or Conclusions**

The Act requires the Legislature to consider six questions when deciding whether to save a public records exemption from scheduled repeal.

### **What specific records are affected by the exemption?**

The confidential and exempt information includes the following information regarding an individual who has a claim with an insurer:

- Name;
- Address;
- Date of birth (if known);
- Social Security number (if known) or other taxpayer identification number (if known); and
- Claim number.

### **Whom does the exemption uniquely affect, as opposed to the general public?**

The exemption applies to specific information obtained by DOR regarding an individual who has a claim against an insurance company. The individual may or may not be a noncustodial parent who owes past-due child support.

### **What is the identifiable public purpose or goal of the exemption?**

In 2004, the Legislature found that it is a public necessity that insurance claims information obtained by DOR pursuant to s. 409.25659, F.S., be made confidential and exempt until such time as the department determines whether a match is made with regards to a person who owes child support. Such information regarding those persons who do not receive a match is personal and of a private nature. Gathering and maintaining personal information on persons for purposes of child support enforcement, when such persons do not owe child support,

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* These collections are from lump sum settlements and wage withholdings.

<sup>38</sup> Letter from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (July 16, 2009) (on file with the committee).

<sup>39</sup> Email from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (July 22, 2009, 2:28 P.M.) (on file with the committee).

could be considered an intrusion into the right of one's privacy, especially since those persons are unaware that a government agency has collected such information.<sup>40</sup>

If such information is not made confidential and exempt until the time specified, the effective and efficient administration of the insurance claim data exchange program could be jeopardized.<sup>41</sup>

Insurers might be less likely to provide the department with information regarding insurance claims if the insurer has concerns that such information will be made available for public disclosure.<sup>42</sup>

Finally, public oversight of such a program is not hindered in that the public has access to all information regarding persons receiving a match.<sup>43</sup>

**Can the information contained in the records be readily obtained by alternative means? If so, how?**

The department reports that the information that is held confidential and exempt pursuant to s. 409.25661, F.S., cannot be readily obtained by alternative means and recommends that the exemption be reenacted.<sup>44</sup>

**Is the record protected by another exemption?**

The confidential and exempt information may include the Social Security number of an individual who has a claim and who may or may not be a noncustodial parent who owes past-due child support. This exemption is duplicative of the Social Security number exemption found in s. 119.071(5)(a)3, F.S.

**Are there multiple exemptions for the same type of record that it would be appropriate to merge?**

Under the provisions of s. 119.071(5)(a)5, F.S., all Social Security numbers held by an agency are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Therefore, the inclusion of Social Security numbers within the confidential and exempt information provided for in s. 409.25661, F.S., is duplicative.

## Recommendation

Senate professional staff recommends that the Legislature retain the exemption specified in s. 409.25661, F.S. If the exemption is not re-enacted, certain information of a sensitive and personal nature concerning individuals, the release of which may be defamatory or cause unwarranted damage to the good name or reputation of that individual, may become available to the public. The exemption therefore meets the criteria for the reenactment.

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<sup>40</sup> Chapter 2004-339, L.O.F.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Letter from the Department of Revenue to the Senate Committee on Children, Families, and Elder Affairs (July 16, 2009) (on file with the committee).