The Florida Senate

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Committee on Children, Families, and Elder Affairs

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 39.0132(4)(A)2., F.S., GUARDIANS AD LITEM

Issue Description

Section 39.0132(4)(a)2., F.S., provides that any information related to the best interest of a child and held by a Guardian ad Litem is confidential and exempt from the requirements of public records law. This information includes medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records, and any other information that is otherwise confidential pursuant to Chapter 39, F.S. The subparagraph stands repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.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.[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:

> 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. [2]

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.[3]

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.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business, which are used to "perpetuate, communicate or formalize

[1] Sections 1390, 1391 F.S. (Rev. 1892).
[2] Fla. Const. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), 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,

knowledge."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] 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 makes exempt from public inspection and those that it makes exempt and confidential.[13] 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.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information.[15]

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 Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[16] 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.[17]

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. [18] 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:

> (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

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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."

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

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

[8] Fla. Const. art. I, s. 24(c).

[9] *Id.*

[10] *Id.*

[11] 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.

[12] Fla. Const. art. I, s. 24(c).

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

[14] *Id.*

[15] *Id.* at 54.

[16] Section 119.15(3), F.S.

[17] Section 119.15(5)(a), F.S.

[18] Section 119.15(6)(b), F.S.

> (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.[19]

The Act also requires the Legislature to consider six questions that go to the scope, public purpose and necessity for the exemption.[20]

Guardian Ad Litem

The Florida Guardian ad Litem Program is a partnership of community advocates and professional staff acting on behalf of Florida's abused and neglected children.[21] A guardian ad litem (GAL) is "a volunteer appointed by the court to protect the rights and advocate the best interests of a child involved in a court proceeding."[22] As of July 8, 2009, there were approximately 27,000 children represented by close to 7,000 volunteers in the Guardian ad Litem Program.[23]

According to the Statewide Guardian ad Litem Program, a GAL's responsibilities include but are not limited to the following:[24]

- Visiting the child and keeping the child informed about the court proceedings;
- Gathering and assessing independent information on a consistent basis about the child in order to recommend a resolution that is in the child's best interest;
- Reviewing records;
- Interviewing appropriate parties involved in the case, including the child;
- Determining whether a permanent plan has been created for the child in accordance with federal and state law and whether appropriate services are being provided to the child and family;
- Submitting a signed written report with recommendations to the court on what placement, visitation plan, services, and permanent plan are in the best interest of the child;
- Attending and participating in court hearings and other related meetings to advocate for a permanent plan, which serves the child's best interest; and
- Maintaining complete records about the case, including appointments scheduled, interviews held, and information gathered about the child and the child's life circumstances.

The Guardian ad Litem Program receives information of a sensitive nature from third party sources, such as medical providers, mental health providers, schools, and law enforcement. These records are maintained by a GAL and relate exclusively to children who allegedly have been abused, neglected, or abandoned and are in the dependency court system through no fault of their own. These records contain sensitive information that could harm the child should they be released.

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.

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[19] *Id.*
[20] Section 119.15(6)(a), F.S. See the Findings section of this report for a review of the six questions as they relate to this particular exemption.
[21] Florida Guardian ad Litem Program, http://www.guardianadlitem.org/ (last visited July 1, 2009).
[22] *Id*. at http://www.guardianadlitem.org/vol_faq.asp (last visited July 1, 2009).
[23] Statewide Guardian ad Litem Office Press Release, July 8, 2009 available at: http://www.guardianadlitem.org/documents/PressRelease07.08.09.pdf, (last visited July 21, 2009).
[24] Statewide Guardian ad Litem Office website, available at: http://www.guardianadlitem.org/vol_faq.asp (last visited July 21, 2009).

What specific records are affected by the exemption?

The exemption holds any information held by a GAL and considered by the GAL to relate to the best interests of a child to be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This information may include *but is not limited to* the following:

- Medical records,
- Mental health records,
- Substance abuse records,
- Child care records,
- Education records,
- Law enforcement records,
- Court records,
- Social services records,
- Financial records, and
- Any other information maintained by a GAL which is identified as confidential information under Chapter 39, F.S.[25]

For this report, staff surveyed the offices of Guardian ad Litem across the state.[26] Without exception, the GALs responded that the records should remain exempt. One responder reported:

> … Release of the kinds of sensitive, personal information for a youth involved in the dependency system --- making it available to their peers, friends, neighbors, family members --- would potentially subject them to ridicule, embarrassment, possible threats from family members, and a general debasement of their self worth (these are children, remember). There is also the potential for certain unscrupulous people to use this sensitive, private information to prey on these highly susceptible victims, which would be an unconscionable act in its own right, but add enormous weight, guilt and potential physical or psychological danger to the child.

Others argue that the exemption for "all information" obtained by a GAL is overbroad under the standard enunciated in Article I, s. 24(c) of the State Constitution. That provision states that ". . . the law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."[27] However, the Statewide Guardian ad Litem Program has explained that the Legislature recognizes that each child's circumstances and case investigation are unique by adding to the enumerated list of records the modifier, "but not limited to."

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

The exemption uniquely affects a child whose best interests are represented by a GAL, by protecting sensitive information held by the GAL relating to the child.

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

The public necessity for the exemption was described by the Legislature as follows:

> [I]nformation obtained by a GAL in discharging duties with respect to proceedings relating to children should be made confidential and exempt from public-records requirements. . . . [I]nformation obtained by a GAL in ensuring the care, safety, and protection of children is sensitive and personal to the child and his or her family and . . . release of that information could

[25] Section 39.0132(4)(a)2., F.S.
[26] Responses on file with the Senate Committee on Children, Families, and Elder Affairs.
[27] Senate Bill Analysis of CS/SB 1098 relating to Public Records Exemptions, April 13, 2005, available at: http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s1098.go.pdf.

> expose the child to harm or injure the reputation of the child or the child's family. Providing confidential and exempt status [to this information] will facilitate the ability of the GAL to represent the best interests of the child in legal proceedings and thereby fulfill the purpose and administration of the guardian ad litem program.[28]

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

Much of the information acquired by a GAL is collected from other entities, *e.g.*, schools, medical providers, law enforcement, or courts. However, as each case is unique, it is impossible to know with specificity from whom records might be obtained.

Is the record protected by another exemption?

Much of the information that is collected from other entities may be held exempt from public disclosure while held by that entity. Also, s. 39.822(3)(a), F.S., provides that:

> An agency, as defined in chapter 119, shall allow the guardian ad litem to inspect and copy records related to the best interests of the child who is the subject of the appointment, including, but not limited to, records made confidential or exempt from s. 119.07(1) or s. 24(a), Art. I of the State Constitution. The guardian ad litem shall maintain the confidential or exempt status of any records shared by an agency under this paragraph.

Finally, to the extent the information may include Social Security numbers of children or their parents, pursuant to s. 119.071(5)(a)5, F.S., all Social Security numbers held by an agency are confidential and exempt.

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

Although much of the information collected and held by a GAL may be covered by another exemption, it is not impossible that some records may not have a separate exemption. Therefore, it does not appear that it would be appropriate to merge the exemption with any other statutory exemption.

Recommendation

Based upon the Open Government Sunset Review of s. 39.0132(4)(a)2., F.S., Senate professional staff recommends that the Legislature retain the public records exemption established in s. 39.0132(4)(a)2., F.S. The exemption protects information of a sensitive personal nature concerning children served by the Guardian ad Litem Program and which, if released, could cause unwarranted damage to the good name or reputation of the children or their families. The exemption therefore meets the criteria for reenactment.

[28] Chapter 2005-213, s. 3, L.O.F.