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Committee on Children, Families, and Elder Affairs

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 741.3165, F.S., DOMESTIC VIOLENCE FATALITY REVIEW TEAMS

Issue Description

Domestic Violence Fatality Review Teams (FRTs) were first formed in Florida in the mid-1990's. The teams, which are not funded by the state, work independently and may be composed of representatives from municipal, county, state, and federal agencies, as well as individuals or organizations that are involved with, or affected by, a domestic violence fatality. The goals of the FRTs are to review fatal and near-fatal incidents of domestic violence, related domestic violence matters, and suicides, and to identify changes in policy or procedure that may prevent future deaths.

When it authorized FRTs, the Legislature also enacted a public records and meetings exemption related to FRTs.¹ This exemption is subject to review under the Open Government Sunset Review Act and stands repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment.²

Background

Florida Public Records and Meetings Laws

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 Act⁵ provides that, unless specifically exempted, all public records must be made available for public inspection and copying.⁶

The term "public record" is broadly defined to mean:

¹ Section 741.3165, F.S.

² Chapter 2005-212, L.O.F.

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

⁴ Fla. Const. art. I, s. 24(a).

⁵ Chapter 119, F.S.

⁶ Section 119.07, F.S.

. . . 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.⁷

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency⁸ in connection with official business, which are used to “perpetuate, communicate or formalize knowledge of some type.”⁹ Unless made exempt, all such materials are open for public inspection as soon as they become records.¹⁰

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.¹¹ 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.¹² 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.¹³

The State Constitution also provides that all meetings of collegial public bodies at which official acts are taken or at which public business is transacted or discussed, must be open and noticed to the public.¹⁴ In accordance with the Constitution, s. 286.011(1), F.S., provides:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Only the Legislature is authorized to create exemptions to open government requirements.¹⁵ Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.¹⁶ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁷ A bill enacting an exemption or substantially amending an existing exemption¹⁸ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁹

⁷ Section 119.011(12), F.S.

⁸ 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.”

⁹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹⁰ *Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984).

¹¹ *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA), *review denied*, 892 So.2d 1015 (Fla. 2004).

¹² *Id.*

¹³ *Id.* at 54.

¹⁴ Fla. Const. art. I, s. 24(b).

¹⁵ Fla. Const. art. I, s. 24(c).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 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.

¹⁹ Fla. Const. art. I, s. 24(c).

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 and public meetings laws on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.²⁰ 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.²¹

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.²² 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**
- (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.²³

The Act also requires the Legislature to consider six questions that go to the scope, public purpose and necessity for the exemption.²⁴

Domestic Violence Fatality Review Teams

In Florida, domestic violence is defined as:

[A]ny assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.²⁵

In 2008, the total number of domestic violence offenses reported across Florida was 113,123. Of the total, 194 offenses were classified as murder or manslaughter.²⁶

Domestic Violence Fatality Review Teams (FRTs) were first formed in Florida in the mid-1990's. These teams began as local initiatives supported with federal grant funds.²⁷ In 2000, the Legislature enacted s. 741.316, F.S., which allows organizations to establish FRTs at the local, regional, or state level. The teams, which are not

²⁰ Section 119.15(3), F.S.

²¹ Section 119.15(5)(a), F.S.

²² Section 119.15(6)(b), F.S.

²³ *Id.*

²⁴ 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.

²⁵ Section 741.28(2), F.S.

²⁶ Florida Department of Law Enforcement (FDLE), Crime in Florida, Uniform Crime Report (2009).

²⁷ FDLE, *Florida Domestic Violence Fatality Review Team 2008 Annual Report, Executive Summary* (2008).

funded by the state, work independently and may be composed of representatives from municipal, county, state and federal agencies, as well as individuals or organizations that are involved with, or affected by, a domestic violence fatality.²⁸ The goals of the FRTs are to review fatal and near-fatal incidents of domestic violence, related domestic violence matters, and suicides, and to identify changes in policy or procedure that may prevent future deaths.²⁹

There are 19 active FRTs in Florida.³⁰ In addition, the Department of Children and Families (DCF), in partnership with the Florida Coalition Against Domestic Violence (FCADV), has recently created a statewide domestic violence fatality review team, funded by a federal grant.³¹ The specified goals of the statewide FRT are to identify gaps in service delivery to domestic violence victims, promote training, and coordinate activities among agencies involved in domestic violence issues.³²

Public Records and Meetings Exemptions for Domestic Violence Fatality Review Teams

In 2000, when the Legislature authorized FRTs, it also granted them immunity from liability for “any act or proceeding undertaken or performed within the scope of the functions of the team” unless the act or proceeding was undertaken in bad faith.³³ Additionally, information gathered by the teams is protected from discovery and introduction into evidence in civil proceedings, and persons attending team meetings are prohibited from testifying in civil or disciplinary actions regarding records or information produced or presented to the team.³⁴

The Legislature also enacted public records and meetings exemptions related to FRTs, providing that:

- Confidential and exempt information obtained by an FRT retains its confidential and exempt status when held by, or included in a report from, the FRT; and
- Meetings and proceedings of an FRT at which identifying information regarding a victim or a victim’s child are discussed are exempt from the public meetings requirements.³⁵

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

[In the absence of public records and public meetings exemptions], sensitive personal information concerning victims and victims’ children and family members would be disclosed and open communication and coordination among parties involved in the domestic violence fatality reviews would be hampered. Accordingly, the Legislature finds that the harm that would result in the release of such information substantially outweighs any minimal public benefit derived therefrom.³⁶

²⁸ *Id.* See also, s. 741.316, F.S.

²⁹ *Id.*

³⁰ As of June 19, 2009, there were active FRTs in the following counties: Alachua, Brevard, Broward, Columbia (Third Judicial Circuit), Duval, Escambia, Hillsborough, Lee, Manatee, Miami-Dade, Orange, Palm Beach, Pasco, Pinellas, Polk/Highlands, Santa Rosa, Sarasota, Seminole and St. John’s. E-mail from Nina Zollo, FCADV, Vice President of Legal and Policy, with attachment (June 22, 2009 5:05 PM) (on file with the Senate Committee on Children, Families and Elder Affairs).

³¹ DCF received an award from the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (the Arrest Program), administered by the United States Department of Justice. The Arrest Program is a discretionary grant program designed to encourage state, local, and tribal governments and courts to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law requiring the coordinated involvement of the entire criminal justice system. See the Arrest Program website at http://www.ovw.usdoj.gov/arrest_grant_desc.htm (last visited August 21, 2009) for more information.

³² FCADV website at <http://www.fcadv.org/projects-fatality.php> (last visited August 21, 2009).

³³ Section 741.316(4)(a), F.S.

³⁴ Section 741.316(5), F.S.

³⁵ Chapter 2000-219, s. 1, L.O.F.

³⁶ Chapter 2000-219, s. 2, L.O.F.

In 2005, when the exemption was reviewed as required by the Open Government Sunset Review Act, it was reenacted and expanded in response to the report's findings. Specifically, the report noted:

Several [fatality review] teams reported that a portion of their duties included interviewing family members and survivors of near-fatal incidents of domestic violence. Since the current statute only maintains confidentiality for information which is confidential when it comes to the team, the personal identifying information in new records created as a result of these interviews does not appear to be protected from disclosure, except for the protection against discovery or introduction into court proceedings found in s. 741.316(6), F.S.³⁷

In addition, the report found that the scope of the public meetings exemption was being interpreted in varying ways by FRTs, and recommended that the Legislature clarify "that the meeting exemption only applies to the portions of the meeting in which identifying information is discussed . . ."³⁸ Section 741.3165, F.S., was amended pursuant to these recommendations, with the Legislature finding public necessity as follows:

In the course of collecting information on domestic violence, the review teams may interview a survivor of domestic violence or the children of the survivor. These individuals may be unlikely to cooperate if they could be identified in records held by a review team because identification could result in potential threats and additional public embarrassment, as well as the exposure of information of a personal, sensitive nature. If these persons were reluctant to participate because they could be identified, this would defeat the purpose of the review teams and limit the collection of potentially valuable information that could be used to make policy and other recommendations that might reduce the frequency of domestic violence in our society.

...
In the course of collecting information on domestic violence, the review teams obtain confidential or exempt information from other agencies and this information is discussed during meetings of the review teams. If the portions of those meetings at which this confidential or exempt information is discussed are not closed, confidential or exempt information could be disclosed, which would defeat the purpose of those exemptions.³⁹

Because the exemption was substantially amended in 2005, it is now subject to another sunset review.⁴⁰

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 does the exemption affect?

The specific records affected by the exemption pertain to persons who are killed, or in some instances, narrowly escape being killed, as the result of domestic violence. Since the fatality review teams in Florida typically review only records of closed cases, much of the information reviewed is public record. However, the teams also review confidential records in order to carry out their duties, and the exemption insures that these records will remain confidential or exempt when held by the FRT.⁴¹ These confidential records include:

³⁷ Florida Senate, Committee on Children and Families, Open Government Sunset Review of s. 741.3165, Records Held by a Domestic Violence Fatality Review Team (Interim Project Report 2005-202) (November 2004).

³⁸ *Id.*

³⁹ Chapter 2005-212, s. 2, L.O.F.

⁴⁰ Chapter 2005-212, s. 1, L.O.F.

⁴¹ Public records do not necessarily lose their exempt status once they are disclosed. In *Ragsdale v. State*, the Supreme Court held that: "[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of

- Reports to the child abuse hotline and all records generated as a result of such reports;⁴²
- Criminal intelligence or investigative information which reveals the identity of a victim of sexual offenses;⁴³
- Information relating to persons with sexually transmitted diseases when this information is held by the Department of Health;⁴⁴
- Mental health clinical records;⁴⁵
- Reports of adult abuse made to the central abuse hotline and all records generated as a result of such reports;⁴⁶
- Patient medical records;⁴⁷
- Records of juvenile offenders;⁴⁸
- Medical records and pre-sentence investigative reports of adult offenders;⁴⁹ and
- Educational records.⁵⁰

Some records are not available to the teams as a result of federal restrictions on information sharing. These include:

- Information relating to substance abuse treatment;⁵¹
- Information relating to clients of domestic violence centers;⁵²
- Military records;⁵³ and
- Sources of information gathered by news reporters.⁵⁴

In addition to protecting the records *reviewed* by an FRT, s. 741.3165, F.S., protects information that identifies a victim or a victim's children when that information is included in records *created* by an FRT or discussed at an FRT meeting.

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

The exemption uniquely affects surviving family members of victims of domestic violence. Since some teams also review near-fatalities, the victims and families of such near-fatalities are also affected.

the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.” 720 So.2d 203, 206 (Fla. 1998). *See also, City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995) in which the court held, “[T]he primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests. Had the legislature intended the exemption . . . to evaporate upon the sharing of that information . . . , it would have expressly provided so in the statute.”

⁴² Section 39.202, F.S.

⁴³ Section 119.071(2)(h), F.S.

⁴⁴ Section 384.29, F.S.

⁴⁵ Section 394.4615, F.S.

⁴⁶ Section 415.107, F.S.

⁴⁷ Section 456.057, F.S.

⁴⁸ Section 985.04, F.S.

⁴⁹ Section 945.10, F.S. (regarding pre-sentence records)

⁵⁰ Section 1002.22(2)(d), F.S.

⁵¹ 42 U.S.C.A. s. 290dd-2 (2009).

⁵² 42 U.S.C.A. s. 10402(a)(2)(E) (2009).

⁵³ 5 U.S.C.A. s. 552(a) and (b)(6) (2009).

⁵⁴ U.S. Constitution, Amendment 1.

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

The goal of the exemption is to enable the teams to protect the privacy of information relating to family members of victims of domestic violence fatalities and survivors of near-fatal episodes of domestic violence.

For this report, staff surveyed local fatality review teams, select members of the statewide fatality review team, and the Florida Coalition Against Domestic Violence.⁵⁵ The responders to the surveys uniformly supported reenactment, noting that, without the exemption,

- Agencies would be unwilling to share information;
- Family members would be hesitant to participate in the process; and
- Team members would be reluctant to speak openly at their meetings.

The survey responses revealed a particular concern that the kinds of cases that come before the FRTs are ones that are vulnerable to media exploitation and community ostracization. The purpose of the FRTs is to study domestic violence fatalities in the aggregate and make policy decisions based on the data, not to solve or find blame in individual cases. Making information about individual cases subject to public disclosure does not advance the goal of the FRTs. In fact, according to survey respondents, without the exemption, many teams would be hampered in their ability to perform their work, and some would simply cease to exist.

Others argue that the identity of the victim and his or her children, exempted in the records created by the teams, is information otherwise subject to public disclosure in law enforcement and court records, and thus this exemption should be amended or narrowed.⁵⁶ Similarly the public meetings exemption, which allows for the closure of an FRT meeting during which confidential or exempt information is discussed, does not allow an opportunity for public oversight and should also be amended.⁵⁷

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

While much of the information reviewed by the teams is public record and thus readily available to the teams by alternative means, the information in records identified above as confidential could not be obtained by alternative means, nor could the personal identifying information of the victims and their families.

Is the record protected by another exemption?

As discussed above, much of the information reviewed by the teams is made confidential by other state and federal statutory provisions. However, no other exemption explicitly protects the confidential records when they are held by the FRTs or the personal identifying information included in documents created by the FRTs or discussed at team meetings.

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

It does not appear that it would be appropriate to merge the exemption with any other statutory exemption.

Related Issue

Under current law, fatality review team members are precluded from testifying in civil and disciplinary matters as to documents produced or matters discussed within the scope of their work on the FRT.⁵⁸ Team members are not, however, similarly shielded from criminal subpoena. Consequently, most FRTs do not begin their reviews of a case until after the final disposition of the related criminal case, because of the possibility that the FRT members could be subpoenaed to testify at the criminal trial. According to some survey responses, this often results in

⁵⁵ Survey responses on file with the Senate Committee on Children, Families, and Elder Affairs.

⁵⁶ See Letter from Barbara A. Peterson, President, First Amendment Foundation, to Senate Committee on Governmental Oversight and Accountability and House Governmental Affairs Policy Committee, 31 July 2009

⁵⁷ *Id.*

⁵⁸ Section 741.316(5), F.S.

fatality reviews that are not conducted until “years after the homicide, resulting in the loss of key information, and key people because of the passage of time.”⁵⁹

Child abuse death review team members are protected from subpoenas in criminal cases, as well as in civil matters pursuant to s. 383.402(14), F.S.⁶⁰ If fatality review team members were afforded similar protection, teams could begin their reviews sooner, resulting in more timely and meaningful reviews.

Recommendations

Based upon the Open Government Sunset Review of s. 741.3165, F.S., Senate professional staff recommends that the Legislature:

- Retain the public records exemption established in s. 741.3165, F.S., which protects information held by domestic violence fatality review teams. The exemption meets the stated and compelling public necessity of protecting information, the disclosure of which might cause unwarranted damage to the good name or reputation of the individuals identified. The exemption therefore meets the criteria for reenactment.
- Amend the domestic violence fatality review statute to protect fatality review team members from being subpoenaed in a related criminal trial. Such protection would allow FRTs to begin their reviews earlier, resulting in more thorough, meaningful reviews.

⁵⁹ Survey response from the Florida Coalition Against Domestic Violence, on file with the Senate Committee on Children, Families, and Elder Affairs.

⁶⁰Section 383.402(14), F.S., provides that “[a] person who has attended a meeting of the state committee or a local committee or who has otherwise participated in activities authorized by this section may not be permitted or required to testify in any civil, criminal, or administrative proceeding as to any records or information produced or presented to a committee during meetings or other activities authorized by this section. However, this subsection does not prevent any person who testifies before the committee or who is a member of the committee from testifying as to matters otherwise within his or her knowledge. An organization, institution, committee member, or other person who furnishes information, data, reports, or records to the state committee or a local committee is not liable for damages to any person and is not subject to any other civil, criminal, or administrative recourse. This subsection does not apply to any person who admits to committing a crime.”