



The Florida Senate

Interim Report 2010-222

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Committee on Higher Education

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 1005.38(6), F.S., COMMISSION FOR INDEPENDENT EDUCATION

Issue Description

The Legislature enacted a public records disclosure exemption for investigatory records held by the Commission for Independent Education (CIE) for investigations of suspected violations of law or rule by postsecondary education institutions operating under ch. 1005, F.S. Additionally, the exemption from public disclosure applies to the portion of probable cause panel meetings in which exempt records are discussed by the panel to determine if there is probable cause that a violation has occurred. The exemption, as provided in s. 1005.38(6)(b), F.S., is limited to a maximum of 10 days after the panel makes a determination regarding probable cause. In accordance with the Open Government Sunset Review Act, the exemption sunsets on October 2, 2010, unless reenacted by the Legislature.

Background

Public Records

Florida has a long history of providing public access to governmental records. The 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:

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.

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term “public record” is broadly defined to mean:

¹ Sections 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 of any public agency.”

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

The Open Government Sunset Review Act of 1995¹² establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

An exemption may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following 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:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption 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
- The exemption 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.¹³

The act also requires consideration of the following:

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

⁵ Section 119.011(11), F.S.

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

⁷ *See 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 Article I, s. 24(c) of the State Constitution.

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

Finally, 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.¹⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁵

The Commission for Independent Education

The Commission for Independent Education in the Department of Education currently licenses more than 820 private postsecondary institutions serving more than 275,000 students. Approximately 38 percent of the licensed institutions are degree-granting institutions. The commission must adopt rules for the establishment and operation of the postsecondary educational institutions it licenses and must submit the rules to the State Board of Education for approval. The commission may conduct disciplinary proceedings through an investigation of any suspected violation of ch. 1005, F.S., or of commission rule. The commission may deny, place on probation, or revoke the license of an institution or may fine an institution an amount not-to-exceed \$5,000, for a violation of the commission's rules.

Findings and/or Conclusions

Each fiscal year, the commission's staff investigate more than 200 possible violations of statute or rule. Most of the investigations are resolved during the staff's investigation. Between 2004 and 2008, 51 investigations were referred to a probable cause panel; none of those investigations resulted in a finding of probable cause. The types of allegations that have led to investigations by a probable cause panel include 1) deficiencies in the school catalog such as failure to clearly note admission standards, failure to indicate that the school is licensed by CIE or to include the commission's phone number and address, failure to include an academic calendar, and failure to bind and print the calendar in a professional manner; 2) deficiencies involving safety standards, such as fire safety violations and failure to submit a facility floor plan; and 3) deficiencies involving student documents such as failure to have both students and administrators sign the enrollment agreements, failure to maintain documentation showing that copies of high school diplomas or G.E.D.'s, are included in the students files, and improperly using the word "scholarships" in enrollment agreements. The results of probable cause panel investigations during the past five years are described in the table below:

Year	Number of Probable Cause Panel Investigations	Outcome of the Investigations ¹⁶
2004	7	No finding (7)
2005	36	No probable cause (36)
2006	8	No probable cause (1) No finding (7)
2007	0	N/A
2008	0	N/A

The records of an investigation become public 10 days after the panel makes a determination regarding probable cause. According to commission staff, the commission has never conducted an investigation in which the records were not made public. The 10-day period is a sufficient amount of time in which to release the records, according to the commission staff.

The types of records the commission collects in investigations include school enrollment agreements, school catalogs, school advertising, and witness testimony. While some of these documents such as school catalogs and school advertising are available to the public, acknowledging that the commission is undertaking an investigation would alert

¹⁴ Attorney General Opinion 85-62.

¹⁵ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹⁶ According to staff of the commission, "No finding" and "No probable cause" both mean that there was a determination of no probable cause. The terminology reflects the wording used in each case.

the school being investigated as to the subject of the investigation and could jeopardize the effectiveness of the investigation. According to the commission, it does not receive information in the course of an investigation that is made confidential or exempt under other Florida laws.

Meetings of a probable cause panel are not open to the public. The public meetings exemption is for that portion of a probable cause panel meeting at which exempt records are discussed. According to commission staff, the only activity at the meeting is discussion of the investigatory records, and therefore the meetings are not public. Probable cause panels do not take minutes or make a recording of the meetings. The panel produces a summary of its findings and presents the summary to the commission at the next regular meeting of the commission.

The commission recommends reenacting the public records exemption because it would hinder the commission's ability to conduct investigations if the party being investigated was able to review the materials associated with the investigation prior to the completion of the investigation. Likewise, the commission recommends reenacting the public meetings exemption because probable cause investigations would be hindered if the schools that were being investigated knew of the commission's plans. The commission does not recommend any change to the public records and public meetings exemptions.

Constitutional Requirements for Public Records and Meetings Exemptions

Under s. 24(c), Art. I, of the State Constitution, a public records or meetings exemption must be no broader than necessary to accomplish the stated purpose of the law. The Open Government Sunset Review Act provides that a public records exemption shall be maintained only if the exempted record is of a sensitive, personal nature concerning individuals; is necessary for the effective and efficient administration of a governmental program; or affects confidential information concerning an entity.¹⁷ The Act requires the legislative review of the exemption to consider which specific records or meetings are affected by the exemption, whom the exemption uniquely affects, the identifiable public purpose of the exemption, whether the protected information could be obtained by alternative means, whether the record or meeting is covered by another exemption, and whether there are multiple exemptions for the same type of record or meeting.

The Specific Records Affected by the Exemptions

The commission's records that are affected by the exemptions in s. 1005.38(6)(b), F.S. include investigatory records of probable cause panels.

Those Uniquely Affected by the Exemptions

The exemption affects the commission and its probable cause panels, the schools being investigated and students.

The Purpose and Public Necessity of the Exemptions

The 2005 law creating the exemptions stated that the exemptions prevent unfounded complaints and investigations from being used to damage the good name of an institution or persons associated with the institution. The exemption also allows the commission to effectively oversee the compliance of licensed institutions with the laws and rules that govern their licensure.

Under s. 119.15(6)(b), F.S., an identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivision to effectively and efficiently administer a government program;
2. Protects information of a sensitive personal nature concerning individuals; or
3. Protects information of a confidential nature concerning entities, including a formula, patent, 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.

¹⁷ Section 119.15(6)(b), F.S.

The public records and public meetings exemptions in s. 1005.38(6)(b), F.S., meet the first and second criterion above in that they allow the state or its political subdivision to effectively and efficiently administer a government program and they protect information of a sensitive personal nature concerning individuals.

The public meetings exemption is for the portion of a probable cause panel meeting in which exempt records are discussed by the panel. According to the commission, the probable cause panels only meet to discuss the exempt records. Thus the entire meeting of the probable cause panel meets the requirement for a public meetings exemption under s. 42(c), Art. 1 of the State Constitution.

The confidential and exempt records relate to investigatory records held by the Commission for Independent Education (CIE) for investigations of suspected violation of law or rule by postsecondary education institutions licensed under ch. 1005, F.S.

Alternative Means for Obtaining the Records

Some of the protected information such as school catalogs and advertising could be obtained by alternative means. However, the knowledge that the collection of records is being compiled as part of an investigation is not readily ascertainable through alternative means.

Other Exemptions Pertaining to the Records

All of the public records exemptions for the commission are contained in s. 1005.38, F.S.

Possibly Combining Multiple Exemptions

The exemption is only in effect for the duration of the investigation plus 10 days beyond the probable cause panel's determination regarding probable cause. It is not likely that an efficiency would be realized by combining this exemption with others.

Options and/or Recommendations

Senate professional staff recommends reenacting the public records exemption for investigatory records held by the Commission for Independent Education and the public meetings exemption for those portions of probable cause panel meetings where exempt records are discussed. The exemptions allow the commission to effectively administer a governmental program—the licensure of private postsecondary institutions—and it protects the good name of persons or institutions while the investigation is being conducted. Because the information made exempt under this act will be available to the public after a determination regarding probable cause is made, public oversight will be maintained.