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Committee on Military Affairs and Domestic Security

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 943.0314, F.S., DOMESTIC SECURITY OVERSIGHT COUNCIL

Issue Description

Pursuant to s. 943.0314, Florida Statutes (F.S.), portions of public meetings of the Domestic Security Oversight Council that pertain to active criminal investigative or active criminal intelligence information as defined in s. 119.01, F.S., are exempt from certain public meeting provisions of s. 286.011, F.S., and Article I, s. 24(b), of the State Constitution.

An audio or video recording of, and any minutes and notes generated during a closed meeting or closed portion of a meeting of the council are exempt from Florida public records requirements s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution until such time as the criminal investigative information or criminal intelligence information heard or discussed therein ceases to be active.

Section 119.15, F.S., the Open Government Sunset Review Act, requires a review of the exemption five years after passage of the original law.

Section 943.0314, F.S., will repeal on October 2, 2010, unless reviewed and reenacted by the Legislature.

Background

Florida Has a Long History of Providing Public Access to Government Records

The Legislature enacted the first public records law in 1892.¹ In 1992, 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:

(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...

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 examined 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 "A 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,

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

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ provides for the systematic review of an exemption five years after its enactment. 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 identifiable public purpose is served if 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;
- 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

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.”

⁵ Section 119.011(12), F.S.

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

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

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

- 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.¹⁵

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 yes, 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?¹⁶

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(8) 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.

The Domestic Security Oversight Council

The Domestic Security Oversight Council was established by s. 943.0313, F.S., to serve as an advisory council to the Governor, the Legislature, and the Chief of Domestic Security. Its principal duties include:

- Review the development, maintenance, and operation of a comprehensive multidisciplinary domestic security strategy. This strategy guides the state's prevention, preparedness, protection, response, and recovery efforts against terrorist attacks;
- Review the development of integrated funding plans to support specific projects, goals, and objectives necessary to the state's domestic security strategy and make appropriate recommendations to implement those plans;
- Review and recommend approval of funding recommendations received from the regional domestic security task forces and state working groups to ensure the best use of such funds in support of domestic security strategies. The council forwards an annual prioritized funding recommendation to the Governor and the Legislature that supports the state's domestic security strategy. This prioritized recommendation is based on allocations made available through federal and state funding sources;
- Review and recommend the approval of statewide policies and operational protocols that support the domestic security efforts of the regional domestic security task forces and state agencies;
- Review the overall statewide effectiveness of domestic security and counter-terrorism efforts; and
- Conduct any additional review or inquiry or make recommendations to the Governor and the Legislature to fulfill the function of general oversight of the state's domestic security and counter-terrorism efforts and to promote increased security.¹⁸

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ Section 119.15(6)(a), F.S.

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

¹⁸ Section 943.0313(5), F.S.

The council, initially established as the Domestic Security Advisory Panel, was created by Executive Order #2001-300 to advise the governor and provide and evaluate recommendations for combating terrorism in Florida.¹⁹ The council has now evolved into an integral part of the domestic security operational management process, providing guidance for the regional domestic security task forces and domestic security working groups.²⁰

The council's membership is prescribed in Florida Statutes and consists of representation from top level state government leadership as well as representatives from a variety of stakeholder communities including law enforcement, the regional domestic security task forces, fire fighters, emergency medical, prosecuting attorneys, healthcare, emergency preparedness, domestic security intelligence, and seaports.²¹

The council is directed by statute to establish an Executive Board that consists of the following members. The:

- Executive Director of the Department of Law Enforcement;
- Director of the Division of Emergency Management;
- Attorney General;
- Commissioner of Agriculture;
- State Surgeon General;
- Commissioner of Education; and
- State Fire Marshall.²²

Exempted Active Criminal Investigative and Active Criminal Intelligence Information

Section 119.011, F.S., defines active criminal investigative information as information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information shall be considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.²³

Active criminal intelligence information is defined in s. 119.011, F.S., as information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information shall be considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.²⁴

In addition, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The term "active" does not apply to cases that are barred from prosecution under a statute of limitations.²⁵

Criminal intelligence information and criminal investigative information does not include:²⁶

- The time, date, location, and nature of a reported crime;
- The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.071(2)(h);²⁷
- The time, date, and location of the incident and of the arrest;

¹⁹ Florida Governor's Executive Order #2001-300 signed October 11, 2001.

²⁰ Florida Department of Law Enforcement website at <http://www.fdle.state.fl.us>.

²¹ Section 943.0313(1), F.S.

²² Section 943.0313(4), F.S.

²³ Section 119.011, F.S.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Section 119.071(2) (h), F.S., relates to the victims of the crime of child abuse and to victims of any sexual offense.

- The crime charged;
- Documents given or required by law or agency rule to be given to the person arrested except for certain information in a criminal case that a court orders to be maintained in a confidential manner if release is found to be defamatory to the good name of a victim or witness, would jeopardize the safety of such victim or witness, or impair the ability of a state attorney to locate or prosecute a codefendant; and
- Informations and indictments except as provided in s. 905.26, F.S., relating to grand jury felony indictments of persons not in custody or under recognizance.

The Legislature Found It Necessary to Protect Certain Information Relating to the Activities of the Domestic Security Oversight Council

In creating s. 943.0314 F.S., the Legislature found it was a public necessity to exempt certain active criminal investigative and active criminal intelligence information heard or discussed by the Domestic Security Oversight Council.²⁸ The finding further states that the council reviews information of a highly sensitive nature involving terrorism activity, counterterrorism methodologies, and planning, training, and operational activities of a coordinated intergovernmental prevention, protection, and response strategy that requires specific discussion of these activities. Public discussion of these activities would result in the sharing of data, methods, and operational techniques that could be used by persons intent on doing harm which could result in the successful execution of an attack against the residents of this state or nation. The finding concludes that the ability to fully understand and discuss the details of criminal investigative information and criminal intelligence information related to terrorist activities and counterterrorism measures being considered as part of an overall discussion of strategic planning and funding recommendations for the purchase of specialized equipment, training, or services is critical to the ability of the state to defend against terrorist attacks.

Subsequent attempted and successful terrorist attacks since 2001 illustrate that international terrorists are as capable and motivated today as they were at the time the Legislature found the exemption necessary in 2005.

Freedom of Information Act - Exemption of Sensitive Security Information

In 1966, Congress passed the Freedom of Information Act (FOIA) to increase public access to federal government documents. All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the FOIA.

The FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records.²⁹ Similarly, records of federal agencies in Florida generally are not covered by the state's Public Records Law.³⁰

Under the provisions of FOIA, certain federal records or information compiled for law enforcement purposes are not subject to public disclosure. This includes law enforcement records or information that:

- Could reasonably be expected to interfere with enforcement proceedings;
- Could reasonably be expected to disclose a confidential source including information compiled during the conduct of a criminal investigation or a lawful national security intelligence investigation; or
- Would disclose techniques and procedures for law enforcement investigations or prosecutions or guidelines for such investigations or prosecutions the disclosure of which could reasonably be expected to risk circumvention of the law.³¹

²⁸ Chapter 2005-211, L.O.F.

²⁹ U.S. Department of Justice, *Freedom of Information Act Reference Guide*, (April 2005).

³⁰ Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide*.

³¹ 5 U.S.C. s.552(b).

Sensitive Security Information (SSI) is information relating to aviation or maritime transportation safety or security as determined by the U. S. Departments of Transportation or Homeland Security. For example, SSI includes aviation or maritime transportation security programs or contingency plans, vulnerability assessments, and security inspection or investigative information. Persons possessing SSI must take reasonable steps to protect the information from unauthorized disclosure.³²

Findings and/or Conclusions

1. Section 943.0314, F.S., exempts those portions of Domestic Security Oversight Council meetings that hear or discuss active criminal investigative or active criminal intelligence information as defined in s. 119.01, F.S., from public disclosure under Florida's public meetings provisions s. 286.011, F.S., and Article I, s. 24(b), of the State Constitution. An audio or video recording of, and any minutes and notes generated during a closed meeting or closed portion of a meeting of the council must be kept but are exempt from public disclosure under Florida's public records provisions s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution. The exemption remains in effect until such time as the criminal investigative information or criminal intelligence information heard or discussed therein ceases to be active.
2. Sensitive information relating to terrorist activities intelligence gathering and counter-terrorism strategies and methods will be affected if s. 943.0314, F.S., is repealed.
3. Senate professional staff could find no evidence that:
 - The information contained in the records could be readily obtained by alternative means.
 - The records are protected by another exemption.
 - There are multiple exemptions for the same type of record.
4. The identifiable public purpose of the exemption is to protect sensitive criminal investigative and criminal intelligence information from public disclosure in order to prevent the adverse consequences of terrorist acts and to ensure public safety.

Options and/or Recommendations

Senate professional staff recommends that the exemption found in s. 943.0314, F.S., be reenacted. The exemption provided for active criminal investigative and active criminal intelligence information heard or discussed by the Domestic Security Oversight Council continues to be sufficiently compelling to override the strong public policy of open government.

³² 49 CFR Part 15.