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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 627.0628(3)(f), F.S., TRADE SECRETS USED IN HURRICANE MODELS

Issue Description

The Florida Legislature created the Florida Commission on Hurricane Loss Projection Methodology (the commission) for the purpose of generating reliable projections of hurricane losses used for residential property insurance purposes. The commission operates under the requirements of s. 627.0628, F.S., which describes the need for reliable projections of hurricane losses “in order to assure that rates for residential property insurance meet the statutory requirement that rates be neither excessive nor inadequate.” The commission is administratively housed within the State Board of Administration, but independently exercises its powers and duties as specified in the statute.

The Open Government Sunset Review Act provides for the review of an exemption to the open records requirements five years after the exemption is enacted. Section 627.0628(3)(f)1., F.S., is an exemption for trade secrets, as defined in Section 812.081, F.S., that are used in designing and constructing hurricane loss models submitted by private modeling companies to the commission, the Office of Insurance Regulation (OIR), or the consumer advocate. Section 627.0628(3)(f)2., F.S., is an exemption for that portion of a meeting of the commission or that portion of a rate proceeding at which a trade secret is discussed. This exemption will be repealed on October 2, 2010, unless reviewed and saved from repeal by reenactment by the Legislature.

Background

Public Records

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.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. 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.

In addition to the State Constitution, the Public Records Act,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1) (a), F.S., states:

¹ Section 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.” The Florida Constitution also establishes a right of access to any public record made or received in

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 record.

Unless specifically exempted, all agency records are available for public inspection. 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.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, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. 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 exemption meets the three statutory criteria if it:

connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

⁵ Section 119.011(11), 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.

- (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 their safety; 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 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 so, 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?

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.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), 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.

Florida Commission on Hurricane Loss Projection Methodology

In 1995, the Florida Legislature created the Florida Commission on Hurricane Loss Projection Methodology (the commission), under s. 627.0628, F.S., which describes the legislative intent “to encourage the use of the most sophisticated actuarial methods to assure that consumers are charged lawful rates for residential property insurance coverage.” The commission is administratively housed within the State Board of Administration, but independently exercises its powers and duties as specified in the statute. Section 627.0628(3)(a), F.S., specifies that “[t]he commission shall consider any actuarial methods, principles, standards, models, or output ranges that have the potential for improving the accuracy of or reliability of the hurricane loss projections used in residential property insurance rate filings.”

A number of vendors produce highly complex computer models that purport to reflect an average annual expected loss from hurricanes and other perils. Models of this nature are driven by an array of internal assumptions, within a variety of scientific disciplines (e.g., meteorology, structural engineering, actuarial science, statistics, computer science). Although some basic assumptions may be common to more than one model, many of the detailed internal assumptions have been developed only after considerable research by each vendor, which closely guards that information as a trade secret. If all internal information of a model were published, that model could be replicated, and the vendor that produced the model would lose the entirety of its value.

¹⁵ Section 119.15(4)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Initially, s. 627.0628, F.S., did not contain an exemption from public records or public meetings. Accordingly, the commission undertook a process to evaluate the participating computer models, which contained proprietary information, without the ability to exempt either records or meetings from full public disclosure. The commission first established detailed standards that a model was required to meet in order to obtain approval. For the portion of the model that was nonproprietary, the commission members questioned the vendor in open meetings; for the portion that was proprietary, the commission hired a “professional team” of experts which went on-site to determine whether the model met the applicable standards, and reported its findings to the commission in an open hearing.

At the time, a number of officials voiced concern that a portion of the computer model’s internal programming was not subject to the direct scrutiny of the members of the commission, and the process was criticized by some as being a “black box” that the public was unable to view.

In 2005, the legislature enacted s. 627.0628(3)(f)1., F.S., which provided an exemption for trade secrets, as defined in s. 812.081, F.S., that are used in designing and constructing hurricane loss models submitted by private modeling companies to the commission, the Office of Insurance Regulation (OIR), or the consumer advocate. The legislature also enacted 627.0628(3)(f)2., F.S., which provided an exemption for that portion of a commission meeting or that portion of a rate proceeding at which a trade secret is discussed. As a result, commission members, the OIR, and the consumer advocate now have access to specific information that previously had been denied.

Findings and/or Conclusions

Banking and Insurance professional staff recommend that the current exemptions should be reenacted and saved from repeal. The current exemptions allow each commission member, the consumer advocate (who is also a commission member) and the OIR to examine all of the modeling assumptions. As a result, the exemption directly addresses the previously voiced concern that a hurricane model amounted to a “black box,” that escaped in-depth review by the commission members and public officials appointed pursuant to statute.

Representatives of the First Amendment Foundation (the foundation) have recommended two changes to the current exemptions. First, the foundation recommends a change from the current reference to s. 812.081, F.S., for the definition of “trade secret.” Chapter 812, F.S., addresses theft, robbery and other related crimes, and defines “trade secret” as property covered by that chapter. The foundation recommends that the definition of “trade secret” be referenced to s. 688.002, F.S., which is the definition under the Uniform Trade Secrets Act. The staff for the commission objects to making this suggested change because it believes that the current reference provides a more exact definition that is more consistent with the actual trade secrets brought to the commission. Banking and Insurance professional staff believe that either definition would serve the purpose and recommend against the change.

The foundation also recommends that the exemption in s. 627.0628(3)(f)2., F.S., be narrowed by requiring a recording of all the closed portions of commission meetings, and requiring the commission to keep the recording as a confidential document unless and until such time as a competent jurisdiction rules that the recording, or some portion thereof, is a public record. Representatives of the modeling firms oppose this change because it presents a potential jeopardy to the intellectual property from which they derive economic value. The commission staff are concerned that the proposed change would create additional difficulty in obtaining the all of the detailed information necessary to fully validate the hurricane models. Banking and Insurance professional staff believe that the current exemption is necessary to assure that the detailed scientific information is available for the commission to examine.

Options and/or Recommendations

Banking and Insurance professional staff recommend that the current public record and meeting exemptions be reenacted and saved from repeal.