The Florida House of Representatives

Interim Project Report January 2008

Committee on State Affairs Representative Andy Gardiner, Chair

OPEN GOVERNMENT SUNSET REVIEWS

I. SUMMARY

Article I, s. 24 of the State Constitution, establishes a constitutional right for any person to inspect or copy public records. This same provision authorizes the Legislature to create exemptions to this requirement.

The Open Government Sunset Review Act (Act) establishes a process for the review and sunset of exemptions to public record requirements in the fifth year after their enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must 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 Division of Statutory Revision certified for repeal seven public record exemptions pursuant to the Act. The exemptions range from the confidentiality of information contained in the Florida Putative Father Registry to trade secrets filed with the Office of Insurance Regulation.

Based upon a review of the exemptions, this report recommends retaining, with modifications, each of the public record exemptions.

II. PUBLIC RECORDS LAW

Florida's policy of open government can be traced back to 1892 when the Legislature enacted the first public records law.[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]

A. ARTICLE I, SECTION 24 OF THE STATE CONSTITUTION

In November 1992, Florida voters approved a constitutional amendment guaranteeing public access to records of local governments and of the legislative, executive, and judicial branches of state government. It states:

[1] Section 1390, 1391, F.S. (Rev. 1892).
[2] Article I, s. 24, Florida Constitution.

> 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.[3]

B. PUBLIC RECORDS ACT

In addition to the State Constitution, the Public Records Act,[4] which pre-dates the constitutional right of access, specifies conditions under which public access must be provided to records of the executive branch and other agencies.[5] The Public Records Act 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.[6]

Unless specifically exempted, all agency[7] records are available for public inspection. The term "public record" is broadly defined to mean:

> [A]ll 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.[8]

All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[9]

---

[3] Article I, s. 24(a), Florida Constitution.
[4] Chapter 119, F.S.
[5] In 1909, the Legislature enacted the following provision: "That all State, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen." (Chapter 5942, 1909, L.O.F., *see also*, *Public Records Exemptions and Public Meetings Exemptions Staff Guidebook*, House Committee on Governmental Operations, November 1994) Not until 1967 did the Florida Legislature further address access to records. Chapter 67-125, L.O.F., enacted Florida's "public records" law, which was codified in Chapter 119, F.S.
[6] Section 119.07(1)(a), F.S.
[7] Section 119.011(2), F.S., defines "agency" 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."
[8] Section 119.011(11), F.S.
[9] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

C. PUBLIC RECORD EXEMPTIONS

Only the Legislature is authorized to create exemptions to public record requirements.[10] Exemptions must be created by general law and must meet the following requirements:

- The Legislature must state with specificity the public necessity justifying the exemption.
- The exemption can be no broader than necessary to accomplish the stated purpose of the law.[11]
- The general law creating the exemption can contain only exemptions, as well as provisions governing the enforcement of the public record requirements.[12]

D. EXEMPT VERSUS CONFIDENTIAL AND EXEMPT

There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances.[13] If the Legislature designates a record as confidential and exempt from public disclosure, such record may *not* be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption.[14]

III. OPEN GOVERNMENT SUNSET REVIEW ACT

A. BACKGROUND

The Open Government Sunset Review Act (Act)[15] provides for the systematic review, through a five year cycle ending October 2nd of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.[16] By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must 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]

The Act provides 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

---

[10] Article I, s. 24(c), Florida Constitution.
[11] *See also, 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).
[12] Article I, s. 24(c), Florida Constitution.
[13] *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).
[14] *See* Attorney General Opinion 85-62, August 1, 1985.
[15] Section 119.15, F.S.
[16] The Act does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System. Section 119.15(2), F.S.
[17] Section 119.15(5)(a), F.S.

strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria for consideration are 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
- 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.[18]

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?[19]

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are statutory only, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[20] The Legislature is limited in its review process by constitutional requirements.

B. EXEMPTIONS CERTIFIED FOR REPEAL

The Division of Statutory Revision certified for repeal seven public record exemptions pursuant to the Act. The exemptions range from confidentiality of information contained in the Florida Putative Father Registry to trade secrets filed with the Office of Insurance Regulation.[21]

---

[18] Section 119.15(6)(b), F.S.
[19] Section 119.15(6)(a), F.S.
[20] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974).
[21] The following sections were certified for repeal: s. 63.0541, F.S. – information contained in the Florida Putative Father Registry; s. 119.071(2)(h)2., F.S. – photos, videotapes, or images of any part of the body of a victim of a sexual offense; s. 119.0713(2), F.S. – personal identifying information regarding eligibility for paratransit services (Title II of the Americans with Disabilities Act) or the transportation disadvantaged program; s. 409.175(16), F.S. – certain information submitted as part of the foster parent application process; s. 409.821, F.S. – information identifying a Florida Kidcare program applicant or enrollee; s. 500.148, F.S. – information deemed confidential by federal law and that is provided to the Department of Agriculture and Consumer Services during a joint food safety or food illness investigation; and s. 626.97411, F.S. – trade secrets filed with the Office of Insurance Regulation.

IV. METHODOLOGY OF REVIEW

Staff reviewed the public record exemptions pursuant to the requirements of the Open Government Sunset Review Act. As part of the review process, staff examined the exemptions certified for repeal, reviewed applicable Florida Statutes and other state and federal laws, reviewed applicable case law, researched the history relating to the creation of the exemptions, surveyed and held meetings with affected custodians of public records, and collected position statements from entities interested in the exemptions.

V. FLORIDA PUTATIVE FATHER REGISTRY

A. BACKGROUND

The Florida Putative Father Registry (Registry) was created[22] to permit a man who believes he may have fathered a child to assert his claim of paternity.[23] The Registry is maintained by the Office of Vital Statistics (Office) of the Department of Health.[24]

In order to claim parental rights, an unmarried biological father[25] must file with the Registry a notarized claim of paternity form (form) prior to the birth of the child and before a petition is filed for termination of parental rights.[26] By filing the form, the registrant consents to submit to DNA testing upon the request of any party with respect to the child referenced in the paternity claim.[27]

The form includes the registrant's name, address, date of birth, and physical description. The registrant also must provide, if known, the: name, address, date of birth, and physical description of the mother; name, date, and place of birth of the child or estimated date of birth of the expected minor child; and date, place, and location of conception. The registrant is required to sign and notarize the form under oath.[28]

Prior to the birth of the child, a registrant may retract his claim of paternity by filing a notarized written revocation of such claim. Upon receipt of the revocation, the claim of paternity is deemed null and void. Moreover, if a court determines that a registrant is not the father of a child in question, or otherwise has no parental rights over the child, the court must order a registrant's name removed from the Registry.[29]

---

[22] Chapter 2003-58, s. 11, L.O.F.
[23] Since its creation, 515 persons have registered with the Registry. Department of Health, Office of Vital Statistics, questionnaire response, July 2007, at 2 (on file with the Committee on State Affairs).
[24] Section 63.054(1), F.S.
[25] Section 63.032(19), F.S., defines "unmarried biological father" to mean "the child's biological father who is not married to the child's mother at the time of conception or birth of the child and who has not been declared by a court of competent jurisdiction to be the legal father of the child."
[26] Section 63.054(1), F.S.
[27] Section 63.054(2), F.S.
[28] Section 63.054(3), F.S.; *see also*, Form DH 1965 (Florida Putative Father Registry Claim of Paternity) available at www.doh.state.fl.us/planning_eval/vital_statistics/putative.htm (last visited December 11, 2007).
[29] Section 63.054(5), F.S.

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

In order to "provide safeguards to protect and promote the well-being of persons being adopted and their birth and adoptive parents,"[30] the Legislature enacted a public record exemption[31] to keep all information contained in the Registry confidential and exempt from public record requirements.[32] The confidential and exempt information, however, must be disclosed to:

- An adoption entity,[33] upon the filing of a request for a diligent search of the Registry in connection with the planned adoption of a child.
- The registrant unmarried biological father, upon receipt of a notarized request for a copy of his Registry entry only.
- The court, upon issuance of a court order concerning a petitioner acting pro sé in an action under this chapter.[34]

Furthermore, the database comprising the Registry must be kept separate from all other databases and may not be accessed by any other state or federal entity.[35]

When enacting the public record exemption, the Legislature found that preventing the disclosure of Registry information would encourage putative fathers to register; thus, preserving their right to be notified of and consent to an adoption. Furthermore, protecting the information would prevent the unnecessary and unwanted intrusion into personal information, including the existence of intimate relations, and would ensure due process and privacy rights to the individuals involved.[36]

C. FINDINGS

Based upon staff's review, it was determined that the exemption:

- Allows the office to effectively and efficiently administer the Registry, which administration would be significantly impaired without the exemption; and
- 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.

The exemption currently provides limited access to the confidential and exempt information contained in the Registry. One such exception is authorized access to the court upon issuance of a court order concerning a petitioner acting pro sé in an action under chapter 63, F.S. According to the Office, such court access is limited because access is authorized to "[a]ttorneys . . .

[30] Chapter 2003-56, s. 3, L.O.F.
[31] *Id.* at s. 1.
[32] Section 63.0541(1), F.S.
[33] Section 63.032(3), F.S., defines "adoption entity" to mean the Department of Children and Family Services (DCFS), an agency (any child-placing agency licensed by DCFS to place minors for adoption), a child-caring agency registered under s. 409.176, F.S., an intermediary (an attorney who is placing or intends to place a child for adoption), or a child-placing agency licensed in another state which is qualified by DCFS to place children in Florida.
[34] Section 63.0541(1), F.S.
[35] Section 63.0541(2), F.S.
[36] Chapter 2003-56, s. 3, L.O.F.

through representation of a client to receive the information on behalf of their petitioner/clients. Pro se litigants must go through the court to obtain the information to ensure the confidentiality of the information in the registry."[37]

This provision, however, is unclear as to whether the petitioner acting pro sé actually receives access to the confidential and exempt information since access is granted to the court. This provision should be clarified.

Further, the exemption appears to contain duplicative provisions relating to access to and maintenance of the database.

D. RECOMMENDATION

This report recommends that the Legislature retain the public record exemption for the Florida Putative Father Registry, with clarifications. It also recommends removal of the superfluous language.

VI. VICTIM OF A SEXUAL OFFENSE

A. PUBLIC RECORD EXEMPTION UNDER REVIEW

In 2003, the Legislature enacted, with retroactive application,[38] a public record exemption[39] for any criminal intelligence information[40] and criminal investigative information[41] that is a photograph, videotape, or image of any part of the body of the victim of a sexual offense, regardless of whether it identifies the victim.[42] Prior to this act, the law provided a public record exemption for certain information revealing the identity of a victim of a sexual battery, a lewd or lascivious offense, or child abuse.[43]

The possible catalyst for the Legislature's decision to expand the existing protection to such victims was the case of *Weeks v. Golden*.[44] In 1997, James Weeks, an inmate in the Florida correctional system, made three public records requests for documents relating to his sexual battery prosecution. When his requests went unanswered, he filed a petition to compel the state

---

[37] Office of Vital Statistics of the Department of Health, questionnaire response, July 2007, question 5a. (on file with the Committee on State Affairs).
[38] Access to public records is a substantive right; thus, a statute affecting that right is presumptively prospective. It is not applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001).
[39] Chapter 2003-157, s. 1, L.O.F.
[40] Section 119.011(3)(a), F.S., defines "criminal intelligence information" to mean "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."
[41] Section 119.011(3)(b), F. S., defines "criminal investigative information" to mean "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."
[42] Section 119.071(2)(h)2., F.S.
[43] *See* s. 119.071(2)(h)1., F.S.
[44] *See* Staff Analysis of CS/HB 453, Florida House of Representatives (March 27, 2003).

attorney to provide him with the documents requested, which included "close-up shots of the victim's genital area."[45] The First District Court of Appeal eventually determined that because these photographs did not identify the victim, the public was entitled to access these photos, stating "[i]f the legislature had intended to exempt *all* photographs of victims of sexual offenses, it could have easily said so" in statute.[46]

When enacting this exemption, the Legislature declared it a public necessity that such information be made confidential and exempt from public record requirements because:

> [S]uch photographs, videotapes, or images often depict the victim in a graphic and disturbing fashion, frequently nude, bruised, or bloodied. Such highly sensitive photographs, videotapes, or images of a victim of a sexual offense, if viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the victim and the victim's family.[47]

B. OTHER RELEVANT PUBLIC RECORD EXEMPTIONS

Current law provides other public record exemptions and statutes that are relevant to the exemption under review. An assessment of these statutes in relation to the one under review is necessary, as one of the considerations during an open government sunset review is whether a statutory merge would be appropriate when multiple exemptions for the same type of record exist.[48]

Current law provides that all court records, including witness testimonies, revealing the photograph, name, or address of the victim of an alleged offense described in chapters 794 or 800, F.S., or act of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, F.S., are confidential and exempt if the state or the victim demonstrates a need for confidentiality.[49] If the court declares that all court records or other information that reveal the identity of the victim are confidential and exempt, the defendant charged may apply for an order of disclosure for the purpose of preparing a defense. The defendant, however, is prohibited from disclosing the victim's identity to anyone other than his or her defense team.[50]

Current law also provides that information or records that have been made part of a court file and that may reveal the identity of a person who is a victim of a sexual offense is exempt from public record requirements as provided in s. 119.071(2)(h), F.S.[51]

---

[45] *Weeks v. Golden*, 798 So. 2d 848 (Fla 1st DCA 2001).
[46] *Id.*
[47] Chapter 2003-157, s. 3, L.O.F.
[48] Section 119.15(6)(a)6., F.S.
[49] The state or victim must demonstrate to the court that the: identity of the victim is not already known in the community; victim has not voluntarily called public attention to the offense; identity of the victim has not otherwise become a reasonable subject of public concern; disclosure of the victim's identity would be offensive to a reasonable person; and disclosure of the victim's identity would: endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim; endanger the victim because of the likelihood of retaliation, harassment, or intimidation; cause severe emotional or mental harm to the victim; make the victim unwilling to testify as a witness; or be inappropriate for other good cause shown. Section 92.56(1), F.S.
[50] Section 92.56(2), F.S.
[51] Section 119.0714(1)(h), F.S.

The Public Records Act further provides that active[52] criminal intelligence information and active criminal investigative information are exempt from public record requirements.[53]

Finally, current law also prescribes penalties and provides victims legal recourse for the unauthorized disclosure of protected information:

- It is a second degree misdemeanor for a public employee with access to the photographs, names, or addresses of certain sexual offense victims to willfully and knowingly disclose such information to an unauthorized entity.[54]
- Any entity or individual who communicates to others, prior to open judicial proceedings, the name, address, or other specific identifying information concerning the victim of any sexual offense under chapters 794 or 800, F.S., is liable to that victim all damages reasonably necessary to compensate the victim for any injuries suffered as a result of such communication.[55]

C. FINDINGS

Based upon staff's review, it was determined that 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.

Staff received from questionnaire respondents[56] suggested changes to the public record exemption. The clerks of court (clerks) suggested changes to the record redaction[57] process. Those clerks want to require the state attorney or the parties to the case, who are submitting the confidential and exempt information, to be responsible for redacting or notifying the clerk that redaction of such information is necessary. The clerks also suggested narrowing the application

---

[52] Section 119.011(3)(d), F.S., defines "active" to mean:
1. 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.
2. 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.
In addition, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15, F.S., or other statute of limitation.

[53] Section 119.071(2)(c)1., F.S.

[54] Section 794.024, F.S., prohibits the disclosure of protected information to anyone "not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, a person specified in an order entered by the court having jurisdiction of the alleged offense, or organizations authorized to receive such information made exempt by s. 119.071(2)(h), or to a rape crisis center or sexual assault counselor, as defined in s. 90.5035(1)(b), who will be offering services to the victim."

[55] Section 794.026, F.S.

[56] The clerks of court, public defenders, state attorneys, and the Florida Department of Law Enforcement were sent questionnaires regarding the public record exemption under review (s. 119.071(2)(h)2., F.S.)

[57] Section 119.011(12), F.S., defines "redact" to mean "to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information."

of the exemption to criminal cases or criminal actions filed under chapters 794, 800, or 827, F.S. They also suggested expanding the exemption to include sexual violence actions under chapter 784, F.S., and divorce cases in which photos appear to show alleged sexual abuse of a spouse. Finally, it was suggested that the Legislature reconcile sections 92.56, 794.024, and 794.026, F.S., with s. 119.071(2)(h), F.S., to make clear the exceptions to confidential treatment of the information.[58]

The Florida Department of Law Enforcement (FDLE) stated it "has been advised by trainers that the exemption has limited instructors' ability to utilize photos in training sexual crime investigators and other criminal investigators."[59] FDLE suggested that the exemption be amended to allow access to such records for training purposes.[60]

D. RECOMMENDATION

This report recommends that the Legislature retain the public record exemption for photographs, videotapes, or images of victims of a sexual offense, with clarifications and modifications to the exemption and related laws. The exemption and related laws should be collocated, streamlined, and clarified.

VII. PARATRANSIT SERVICES

A. BACKGROUND

The Americans with Disabilities Act of 1990 (ADA) requires public entities operating non-commuter fixed route transportation services to provide paratransit[61] and other special transportation services to individuals who are unable to use the fixed route system. The United States Department of Transportation has issued regulations specifying circumstances under which such services need to be provided, including requirements on state and local entities to administer a process for determining eligibility.

Eligible recipients for such services include:

- Individuals who are unable to get on or off public transit without assistance.
- Individuals who need to use a wheelchair lift on public transportation but such transportation is not available when needed.

---

[58] *See* questionnaire responses from the clerks of court (2007) (on file with the Committee on State Affairs).
[59] Florida Department of Law Enforcement (FDLE), response to Senate questionnaire, June 2007, question 11a. (on file with the Committee on State Affairs).
[60] FDLE, response to House questionnaire, August 2007, question 3. (on file with the Committee on State Affairs); *see also,* FDLE response to Senate questionnaire, June 2007 (on file with the Committee on State Affairs).
[61] Federal law defines "paratransit" to mean "comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems." (49 C.F.R. part 37.3) Section 427.011(9), F.S., defines "paratransit" to mean "those elements of public transit which provide service between specific origins and destinations selected by the individual user with such service being provided at a time that is agreed upon by the user and provider of the service. Paratransit service is provided by taxis, limousines, 'dial-a-ride,' buses, and other demand-responsive operations that are characterized by their nonscheduled, nonfixed route nature."

- Disabled individuals with a specific impairment that prevents travel to a point of departure or travel from a disembarking location.[62]

Federal law also requires that each state plan to provide Medicaid services indicate that the Medicaid agency[63] "will ensure necessary transportation for recipients to and from providers; and describe the methods that the agency will use to meet this requirement."[64] Florida law requires the Agency for Health Care Administration (AHCA) to purchase Medicaid transportation services through the Transportation Disadvantaged program's designated community transportation coordinator (CTC) unless a more cost-effective method is determined by AHCA or if the CTC does not coordinate Medicaid transportation services.[65]

These services are referred to as the Medicaid Non-Emergency Transportation Services (Medicaid NET Services). In June 2004, AHCA transferred the management of such services to the Commission for the Transportation Disadvantaged (CTD).[66] The CTD contracts with a CTC and a planning agency in each county to provide transportation services.

Applicant qualifying criteria are developed by the local coordinating board.[67] The qualifying criteria are used by the CTC to determine eligibility for services. To determine eligibility for paratransit services, applicants must submit an application that requires the disclosure of medical and disability information, among other information.

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

In 2003, the Legislature enacted a public record exemption[68] for all personal identifying information contained in records relating to a person's health for the purpose of determining eligibility for paratransit services under Title II of the ADA or the transportation disadvantaged program. This exemption applies, with retroactive application, to such information contained in records held by local governmental entities.[69]

The confidential and exempt information must be disclosed:

- With the express written consent of the individual or the individual's legally authorized representative;
- In a medical emergency, but only to the extent necessary to protect the health or life of the individual;
- By court order upon a showing of good cause; or

[62] 49 C.F.R. part 37.123.
[63] In Florida, the Medicaid agency is the Agency for Health Care Administration.
[64] 42 C.F.R. part 431.53.
[65] Section 427.0135, F.S.
[66] *Annual Performance Report Commission on the Transportation Disadvantaged*, April 2006, at 20, available at <www.dot.state.fl.us/ctd/docs/APR/2006/2006%20layout%20FINAL.pdf> (last visited Dec. 12, 2007).
[67] The local coordinating board is appointed and staffed by the planning agency and oversees and annually evaluates the CTC.
[68] Chapter 2003-110, s. 1, L.O.F.
[69] Section 119.0713(2), F.S.

- For the purpose of determining eligibility for parantransit services if the individual or the individual's legally authorized representative has filed an appeal or petition before an administrative body of a local government or a court.[70]

When enacting the exemption, the Legislature found that it was a necessity "in order to protect health-related information that is of a sensitive personal nature . . . The private and confidential nature of personal health matters pervades both the public and private health care sectors."[71]

C. FINDINGS

Based upon staff's review, it was determined that the exemption:

- Allows local governments to effectively and efficiently administer the program for the transportation disadvantaged, which administration would be significantly impaired without the exemption; and
- 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.

The review also revealed that the information is not provided to local governmental entities only. For example, the CTD also has access to the eligibility information.[72]

D. RECOMMENDATION

This report recommends that the Legislature retain and expand the public records exemption for personal identifying information of an applicant for paratransit services. It is recommended that the exemption be expanded to apply to any agency, whether it is a state or local agency. This expansion would require relocation of the exemption to the section of law containing general exemptions from inspection and copying of public records.[73]

VIII. LICENSED FOSTER PARENTS AND FOSTER PARENT APPLICANTS

A. BACKGROUND

The Department of Children and Family Services (DCFS) administers the state's foster care program. It also adopts and amends licensing rules[74] for family foster homes,[75] residential child-

---

[70] *Id.*
[71] Chapter 2003-110, s. 3, L.O.F.
[72] Meeting with staff of the Florida Commission for the Transportation Disadvantaged on July 17, 2007.
[73] Section 119.071, F.S., provides the general exemptions from inspection and copying of public records.
[74] Section 409.175(5)(a), F.S.
[75] Section 409.175(2)(e), F.S., defines "family foster home" to mean "a private residence in which children who are unattended by a parent or legal guardian are provided 24-hour care. Such homes include emergency shelter family homes and specialized foster homes for children with special needs. A person who cares for a child of a friend for a period not to exceed 90 days, a relative who cares for a child and does not receive reimbursement for such care from the state or federal government, or an adoptive home which has been approved by the department or by a licensed child-placing agency for children placed for adoption is not considered a family foster home."

caring agencies,[76] and child-placing agencies.[77] The requirements for licensure and operation of such homes include the:

- Operation, conduct, and maintenance of the foster home;
- Provision of food, clothing, educational opportunities, services, equipment, and individual supplies to assure the physical, emotional and mental health of the foster children;
- Appropriateness, safety, cleanliness, and general adequacy of the premises;
- Ratio of staff to children required to provide adequate care and supervision, including the maximum number of children in the case of foster homes;
- Good moral character of the personnel based on their screening, education, training, and experience;
- Ability of DCFS to grant exemptions from disqualification from working with children or the developmentally disabled;
- Provision of preservice and inservice training for all foster parents and agency staff;
- Satisfactory evidence of financial ability of the applicant to provide care in compliance with licensing requirements;
- Maintenance of records by the residential child-caring agency or child-placing agency pertaining to admission, progress, health, and discharge of children served, including written case plans and reports to DCFS;
- Provision for parental involvement to encourage preservation and strengthening of a child's relationship with the family;
- Transportation of children served; and
- Provisions to safeguard the legal rights of the children served.[78]

In order to verify compliance, DCFS is further required to compile and review information collected through application forms, background screenings, inspections of the homes or premises, interviews, and financial records.[79] Therefore, as part of the application process, foster parent applicants are required to provide personal information so DCFS may determine fitness of such applicants to be foster parents.

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

[76] Section 409.175(2)(j), F.S., defines "residential child-caring agency" to mean "any person, corporation, or agency, public or private, other than the child's parent or legal guardian, that provides staffed 24-hour care for children in facilities maintained for that purpose, regardless of whether operated for profit or whether a fee is charged. Such residential child-caring agencies include, but are not limited to, maternity homes, runaway shelters, group homes that are administered by an agency, emergency shelters that are not in private residences, and wilderness camps. Residential child-caring agencies do not include hospitals, boarding schools, summer or recreation camps, nursing homes, or facilities operated by a governmental agency for the training, treatment, or secure care of delinquent youth, or facilities licensed under s. 393.067 or s. 394.875 or chapter 397."

[77] Section 409.175(2)(d), F.S., defines "child-placing agency" to mean "a person, corporation, or agency, public or private, other than the parent or legal guardian of the child or an intermediary acting pursuant to chapter 63, that receives a child for placement and places or arranges for the placement of a child in a family foster home, residential child-caring agency, or adoptive home."

[78] Section 409.175(5)(a), F.S.

[79] Section 409.175(6), F.S.

Current law provides, with retroactive application, a public record exemption for certain personal information of foster parents and foster parent applicants, and their spouses, minor children, and other adult household members. This information includes their home, business, work, child care, or school addresses and telephone numbers; social security numbers; birth dates; medical records; home floor plans; and photographs of such persons.[80]

The information remains exempt for five years after the application date for foster parent applicants[81] and for five years after the license expiration date for licensed foster parents,[82] with the exception of social security numbers and medical information, which remain protected. Exempt information regarding a licensed foster parent who becomes an adoptive parent remains protected.[83]

Additionally, information pertaining to the names, addresses, and telephone numbers of persons providing character or neighbor references regarding foster parent applicants or licensed foster parents is exempt.[84]

Originally enacted in 1998,[85] this exemption applied only to licensed foster parents, their spouses and children, and other household members. The Legislature expanded this exemption, in 2003, to include the personal information of foster parent applicants and their spouses and children and other household members.[86] In doing so, the Legislature found that it was a public necessity to avoid public disclosure of records that could "cause harm or embarrassment to an individual," and "lessen the willingness of prospective caregivers to reveal medical information, thus hindering the department's ability to assess foster parent applicants and licensed foster parents and hindering the department's attempts to make appropriate placements for foster children."[87] The Legislature further found that it is a public necessity to provide foster parent applicants with the same protections as licensed foster parents in order to "encourage persons to apply to become licensed foster parents. The public availability of such information regarding foster parent applicants could have a negative, chilling effect on the recruitment of such persons."[88]

C. FINDINGS

Based upon staff's review, it was determined that the exemption:

- Allows DCFS to effectively and efficiently administer the foster care program, which administration would be significantly impaired without the exemption; and
- 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.

[80] Section 409.175(16)(a) and (b), F.S.
[81] Section 409.175(16)(a), F.S.
[82] Section 409.175(16)(b), F.S.
[83] *Id.*
[84] Section 409.175(16)(c), F.S.
[85] Chapter 98-29, s. 1, L.O.F.
[86] Chapter 2003-83, s. 1, L.O.F.
[87] *Id.* at s. 3.
[88] *Id.*

Further, current law provides a general public record exemption for social security numbers.[89] As such, the exemption for social security numbers provided in s. 409.175(16)(a) and (b), F.S., is duplicative.

D. RECOMMENDATION

This report recommends that the Legislature retain the public record exemption for certain personal information regarding licensed foster parents and foster parent applicants. In addition, it recommends the repeal of the duplicative exemption for social security numbers provided in s. 409.175(16)(a) and (b), F.S.

IX. FLORIDA KIDCARE PROGRAM

A. BACKGROUND

In 1998, the Legislature created the Florida Kidcare (Kidcare) program[90] in response to the passage of the State Children's Health Insurance Program[91] by the United States Congress. Family income level, age of the child, and whether the child has a serious health condition are the criteria used to determine which services a child is eligible to receive.

Kidcare is an umbrella program composed of four components that are jointly administered by the Agency for Health Care Administration (AHCA), Department of Children and Family Services (DCFS), Department of Health (DOH), and Florida Healthy Kids Corporation (FHKC). Those components include MediKids, Florida Healthy Kids program, Children's Medical Services Network, and Medicaid for children.[92]

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

Current law provides, with retroactive application, a public record exemption for information identifying a Kidcare program applicant[93] or enrollee,[94] held by AHCA, DCFS, DOH, or FHKC.[95] Such information may be disclosed to another governmental entity only if disclosure is necessary for the entity to perform its duties and responsibilities under the Kidcare program, and to the Department of Revenue for purposes of administering the state Title IV-D program. In addition, the confidential and exempt information may not be released to any person without the written consent of the Kidcare program applicant.

---

[89] *See* s. 119.071(5)(a), F.S.
[90] Chapter 98-288, L.O.F.
[91] Title XXI of the Social Security Act.
[92] *See* ss. 409.814 and 624.91, F.S.
[93] Section 409.811(3), F.S., defines "applicant" to mean "a parent or guardian of a child or a child whose disability of nonage has been removed under chapter 743, who applies for determination of eligibility for health benefits coverage under ss. 409.810-409.820."
[94] Section 409.811(10), F.S., defines "enrollee" to mean "a child who has been determined eligible for and is receiving coverage under ss. 409.810-409.820."
[95] Section 409.821, F.S.

A violation of the section is a misdemeanor of the second degree.[96]

Originally enacted in 1998,[97] this exemption applied only to information contained in an application for determination of eligibility for the Kidcare program. In 2003, the Legislature expanded the exemption,[98] clarifying that it applied to all identifying information of an applicant or enrollee, irrespective of whether such information was located in an application or other record. The Legislature found that without the expansion, the purpose of the exemption would be defeated. The Legislature further found that if such information were not granted protection, "applicants would be less inclined to apply to the program due to the fact that such identifying information would be made available to the public, which would cause an unwarranted invasion into the life and privacy of program applicants and enrollees, thereby significantly decreasing the number of program enrollees."[99] Finally, the Legislature found that the exemption was necessary to comply with Federal requirements.[100]

C. FINDINGS

Based upon staff's review, it was determined that the exemption:

- Allows AHCA, DCFS, DOH, and FHKC to effectively and efficiently administer the Kidcare program, which administration would be significantly impaired without the exemption; and
- Protects information of a sensitive personal nature concerning applicants and enrollees, 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.

The exemption provides for the release of confidential and exempt information to another governmental entity only if disclosure is necessary for the entity to perform its duties and responsibilities under the Kidcare program. The receiving entity must maintain the confidential and exempt status of such information and may not release the information to any person.

In *Ragsdale v. State*,[101] the Supreme Court held that:

> [T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of 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.[102]

[96] A misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days (s. 775.082, F.S.), and a fine of $500 (s. 775.083, F.S.)
[97] Chapter 98-119, s. 1, L.O.F.
[98] Chapter 2003-104, s. 1, L.O.F.
[99] *Id.* at s. 3.
[100] *Id.*
[101] 720 So.2d 203 (Fla. 1998).
[102] *Id.* at 206, 207.

In *City of Riviera Beach v. Barfield*,[103] the court stated "[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute."[104] As such, the provision is unnecessary because had the Legislature intended for the confidential and exempt status of such applicant and enrollee information to evaporate then the Legislature would have stated as much.

D. RECOMMENDATION

This report recommends that the Legislature retain the public record exemption for Kidcare program applicant and enrollee identifying information. In addition, it recommends removal of the unnecessary provision requiring an entity, with authorized access to the confidential and exempt information, to maintain the confidentiality of that information received.

X. FOOD SAFETY AND FOOD ILLNESS INVESTIGATIONS

A. BACKGROUND

Investigations of food borne illnesses require close collaboration and cooperation among multiple state and federal agencies. In addition to the basic obligation to maintain a safe and wholesome food supply, the Department of Agriculture and Consumer Services' (DACS) responsibilities include assisting state and federal governments with food borne illness outbreaks that involve Florida firms or farms.[105] The information gathered by federal agencies is confidential under federal law.

When collaborating in such investigations, DACS and participating federal agencies may share information that is protected by federal law. Federal law protects information falling under the definition of a trade secret or confidential commercial or financial information. Such information may include a "commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort," or "valuable data or information which is used in one's business and is of a type customarily held in strict confidence or regarded as privileged and not disclosed to any member of the public by the person to whom it belongs."[106]

---

[103] 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined "once a record is transferred from one public agency to another, the record loses its exempt status." The court declined to accept the Attorney General's view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

[104] *Id.* at 1137.

[105] Department of Agriculture and Consumer Services, Division of Food Safety, website <www.doacs.state.fl.us/fs/safety.html> (last visited Dec. 14, 2007).

[106] 21 C.F.R. part 20.61.

Written communications within the executive branch of the federal government are protected,[107] as are certain communications between the Food and Drug Administration (FDA) and state and local government entities, provided that any confidential information the FDA shares with state entities as part of a cooperative law enforcement or regulatory effort also is kept confidential by such entities.[108]

Other information protected at the federal level includes: information established by an executive order to be kept secret in the interest of national defense or foreign policy, internal agency personnel rules and practices, statutorily exempted information, certain intra-agency or inter-agency memoranda, personnel and medical files, certain law enforcement information, certain financial regulatory information, and geological and geophysical information concerning wells.[109]

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

In 2003, the Legislature enacted a public record exemption[110] for information deemed confidential under federal law[111] and that is provided to DACS: during a joint food safety or food illness investigation, as a requirement for conducting a federal-state contract or partnership activity, or for regulatory review. The confidential and exempt information may be disclosed only if a final determination has been made by the appropriate federal agencies that such information is no longer entitled to protection, or pursuant to a court order.[112]

When enacting the public record exemption, the Legislature found that it was a public necessity that information concerning investigations of food safety or food illness that is otherwise confidential under federal law should likewise remain confidential and exempt when shared with DACS. The exemption affords DACS with the ability to access confidential information provided by federal agencies for purposes of conducting investigations and carrying out contracts and partnership agreements. The Legislature further found that federal agencies would be less inclined to seek the department's review on important regulatory matters if their confidential information was subject to public disclosure when provided to DACS.[113]

C. FINDINGS

Based upon staff's review, it was determined that the exemption allows DACS to effectively and efficiently conduct food safety and food illness investigations, which would be significantly impaired without the exemption.

D. RECOMMENDATION

---

[107] All communications within the Executive Branch of the federal government that are in written form or that are subsequently reduced to writing may be withheld from public disclosure; however, factual information that is reasonably segregable is available for public disclosure. *See* 21 C.F.R. part 20.62.
[108] 21 C.F.R. part 20.88.
[109] 5 U.S.C. s. 552(b).
[110] Chapter 2003-172, s. 1, L.O.F.
[111] The information must be deemed confidential under 21 C.F.R. parts 20.61, 20.62, or 20.88, or 5 U.S.C. s. 552(b).
[112] Section 500.148(3), F.S.
[113] Chapter 2003-172, s. 2., L.O.F.

This report recommends that the Legislature retain the public records exemption with changes to reorganize the structure of the section. It is recommended that the exemption be relocated to the beginning of s. 500.148, F.S., and that the reporting requirements found therein be collocated.

XI. TRADE SECRETS FILED WITH THE OFFICE OF INSURANCE REGULATION

A. BACKGROUND

Many insurers use credit scores and related credit history information as an underwriting tool. According to a 2007 report by the Federal Trade Commission, "[c]redit-based insurance scores are effective predictors of risk under automobile insurance policies. They are predictive of the number of claims consumers file and the total cost of those claims."[114]

In 2003, the Legislature enacted legislation that regulated and limited the use of credit information by insurers.[115] The law applies to personal lines motor vehicle insurers and residential property insurers that make an adverse decision[116] based on credit information of the policyholder or applicant.[117] The law also authorizes the Financial Services Commission to adopt rules to administer the section; however, the rulemaking has remained tied up in litigation.[118]

B. PUBLIC RECORD EXEMPTION UNDER REVIEW

In 2003, the Legislature enacted a public record exemption[119] for credit scoring methodologies and related data and information that are trade secrets[120] and that are filed with the Office of Insurance Regulation (OIR) pursuant to a rate filing or other filing required by law.[121] The Legislature found that it was a public necessity that credit scoring methodologies and related data and information that are trade secrets be made confidential and exempt from public record requirements, as the release of such information could harm the business of an insurance company if revealed to its competitors or the public. The Legislature further found that the

---

[114] *Credit-Based insurance Scores: Impacts on Consumers of Automobile Insurance*, July 2007, at 13, available at <www.ftc.gov.> (last visited Jan. 9, 2008).
[115] Chapter 2003-407, s. 3, L.O.F.
[116] Section 626.9741(2)(a), F.S., defines "adverse decision" to mean "a decision to refuse to issue or renew a policy of insurance; to issue a policy with exclusions or restrictions; to increase the rates or premium charged for a policy of insurance; to place an insured or applicant in a rating tier that does not have the lowest available rates for which that insured or applicant is otherwise eligible; or to place an applicant or insured with a company operating under common management, control, or ownership which does not offer the lowest rates available, within the affiliate group of insurance companies, for which that insured or applicant is otherwise eligible."
[117] *See* s. 626.9741, F.S.
[118] Office of Insurance Regulation, questionnaire response, July 2007, question 3. (on file with the Committee on State Affairs).
[119] Chapter 2003-408, s. 1, L.O.F.
[120] Section 688.002(4), F.S., defines "trade secret" to mean "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."
[121] Section 626.97411, F.S.

exemption was necessary to prevent an insurer from being less inclined to provide OIR with adequate information on which to base a determination as to whether a filing meets the requirements of law, which would result in increased administrative and legal disputes with regard to the filing.[122]

C. FINDINGS

Based upon staff's review, it was determined that the exemption:

- Allows OIR to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; and
- 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.

OIR, however, recommends repeal of the public record exemption because it "believes that this information should be made transparent and accessible to the public."[123] It should be noted that a general public record exemption for trade secrets, as interpreted by the First District Court of Appeal, is provided by s. 815.045, F.S. The court determined, in *Sepro Corp. v. Florida Department of Environmental Protection*,[124] that the section provides a public record exemption for all trade secrets.[125] The court noted that the section reads like a statement of legislative intent rather than a conventionally phrased provision of positive law, but that its intended effect is clear.

OIR reports that it does not have a process to determine whether an insurer's credit scoring data or other related data or information filed with the Office meets the definition of a trade secret. According to OIR:

---

[122] Chapter 2003-408, s. 3, L.O.F.

[123] Office of Insurance Regulation, questionnaire response, July 2007, question 3. (on file with the Committee on State Affairs).

[124] 911 So.2d 792 (Fla. 1st DCA, 2003); rev. denied sub nom. *Crist v. Florida Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005).

[125] This section of law applies to a trade secret as defined in s. 812.081, F.S. That section defines "trade secret" to mean "the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."

Insurance companies submit all documents related to a rate or form filing to the Office through an electronic file transfer program on the internet. This program allows those documents to be viewed online to the general public via the Office's online I-File system. If a company wants to categorize information as trade secret, it must submit the information under a special link and must submit a cover page explaining why it should remain trade secret.

If a public records request is made for the specific information claimed as trade secret, the Office notifies the company that, unless a judge issues an injunction against the release of the information, the information will be released to the requestor. If the company wishes that the information be kept trade secret, the case must be presented to a judge to determine whether the information meets the definition of trade secret.[126]

D. RECOMMENDATION

This report recommends that the Legislature retain the public record exemption, with modifications. The exemption protects credit scoring methodologies and related data and information that is meets the definition of "trade secret." It is recommended that the superfluous language regarding "credit scoring methodologies and related data and information" be removed as it is superfluous because a reference to trade secrets only encompasses all three terms as it is the modifier.

In addition, the report recommends that when a public record request is made for such confidential and exemption information that OIR determine whether the requested information is a trade secret. After all, OIR's current practice of disclosing requested information identified by the insurer as a trade secret, unless the insurer obtains a court injunction, is inconsistent with its duty as a custodian of public records.

[126]OIR, questionnaire response, July 2007, question 1e. (on file with the Committee on State Affairs).