

Florida Department of Law Enforcement



Recommendations to the Commission on Open Government Reform

Updated: August 26, 2008

Executive Order 07-107, created the Commission on Open Government Reform to review, evaluate, and issue recommendations regarding Florida's public records and public meetings. As part of the review process, the Florida Department of Law Enforcement (FDLE) Information Program Director Donna Uzzell presented the following four items at the May 20-21, 2008 Commission meeting:

- Create a limited exception to the general prohibitions against publication of photos of sexual assault victims and autopsy photographs;
- Modernize the current exemption for non-Florida information to promote the sharing of information from non-Florida agencies and private entities with Florida public agencies;
- Create an exemption for information submitted to FDLE and DBPR with regard to slot machine operations at the pari-mutuels; and
- Create an exemption for specific personal information submitted to FDLE for purposes of subscribing to email notifications regarding the location of registered sex offenders.

After the presentation, the 2008 Legislature addressed publication of sexual assault victims' information. The "non-Florida information" and pari-mutuel concerns can be addressed in one revised exemption. As a result, FDLE requests the Commission to endorse, in concept, the following three adjustments to Florida's public records law exemptions:

1. Expand the exemption from public records for materials provided by non-Florida agencies. The exemption would apply to materials that are not public in the originator's hands offered to, or proposed to be provided to Florida agencies, but only if the non-public status of the material can be maintained once the materials are received by the Florida agencies. This exemption would apply to domestic security information as well as information provided to those reviewing the backgrounds of persons to be licensed by the state.
2. Create an exemption that would prevent disclosure of information provided by those seeking to be alerted if sexual predators or sexual offenders move into their neighborhood, near their places of worship, near their children's schools, etc. Even revealing the listing of such areas could alert a predator of the presence of potential victims or other people "of interest" at various locations.
3. Adjust the all-encompassing current exemption applied to medical examiner autopsy photos to allow use of those photos for legitimate training purposes without having to seek court approval.

To assist the Commission in determining whether to endorse the concepts proposed by FDLE, preliminary legislative draft language is submitted for each item for review and comment. If the Commission endorses the concepts, its impressions regarding the preliminary draft language will be important as FDLE refines the language for legislative submission.

Recommendation 1: Modernize the current exemption for non-Florida information to promote the sharing of information that is not public in the originator's hands (e.g. non-Florida agencies and private entities) with Florida public agencies. By maintaining the non-public status when shared with Florida agencies, the exemption will promote the sharing of important domestic security information and will greatly facilitate the review of background information in the context of state licensing efforts.

Current Situation. The public records exemption in Section 119.071(2)(b), Florida Statutes, allows Florida criminal justice agencies to receive criminal intelligence or investigative information from non-Florida criminal justice agencies and to maintain that information's confidential or similarly restricted disclosure basis. The policy behind the exemption is that Florida should not exact a public records toll upon a criminal justice agency outside of Florida for sharing this type of information with a Florida agency. What is not public in the hands of the original custodian of information should not become public simply because it is shared with a Florida agency.

If the exemption did not exist, information could become a public record upon a Florida agency receiving the non-Florida information. The intent of the provision is to allow non-public information at its non-Florida source, to remain non-public if it is shared with a Florida criminal justice agency. To the extent the exemption is applied to criminal intelligence or investigative information provided by a non-Florida criminal justice agency, the exemption functions well. However, not all sensitive and non-public information constitutes criminal intelligence or investigative information as those concepts are applied under the existing exemption. Much important information that is not public at its origin is not covered by the current exemption.

In addition, with regard to pari-mutuel licensing background reviews, FDLE is dealing with an inefficient handling of private sector and other state non-public information necessary to perform its review functions. The Department of Business and Professional Regulation (DBPR) encounters similar problems with regard to its slot facility licensing efforts. There is no current public records exemption for private-sector information revealed to FDLE (or DBPR) investigators as part of their background screening responsibilities. Likewise, there is no exemption for non-public files prepared in other states on the same individuals seeking Florida licenses which could be of great value to FDLE and DBPR. Those in the private sector and entities from other states are generally willing to share the information, but do not want non-public information to become public record by reason of FDLE (or DBPR) copying the information and including it in state files.

Challenges. In the days after the terror attacks of September 11, 2001, government entities began sharing important and confidential information in an effort to better anticipate and address potential terror threats. That effort transcends criminal justice agencies. For example, as Florida's chief domestic security coordinating agency, FDLE receives information from health authorities, fire/rescue authorities, private sector information sources, and other non-criminal justice agencies directly related to its mission to protect Florida from terrorism. At the same time, FDLE works directly with many Florida agencies that are not criminal justice agencies. The information contributed by these entities often will not be "criminal intelligence" or "criminal investigative" information, but nevertheless is sensitive and not public in the hands of the originator of the information. The originator has no desire for the information to become public.

For many non-Florida agencies, the information they possess is not a public record in their home jurisdiction. These agencies will not share written materials with FDLE and other Florida agencies for fear that the information will become a public record once a Florida agency receives it. This fear hampers Florida agencies' abilities to obtain this information. There is no public records exemption that operates to exempt such information contributed by non-Florida agencies. The current limitation on the non-Florida exemption has a chilling effect on the sharing of information important to Florida's domestic security efforts.

In addition, when conducting background reviews in the context of state licensing efforts, materials produced in other states and personal financial or other information may not be public but is relevant to licensing decisions to be made in Florida. The information FDLE and DPBR reviews includes financial data, details of licensing and regulatory efforts in others states, and other-state-employer job actions or state regulatory actions related to the individual. In most other states allowing slot machines, such information is not a public record. In the hands of private entities such as the companies running and operating the racinos in Florida, the information is not a public record. An exemption is needed to allow compilation of such information by Florida agencies for licensing review without forcing the non-public information to become public simply because Florida reviewers have "compiled" the information to assist their efforts.

The original non-public information is important to resolving background inquiries. As a result, DBPR and FDLE investigators have to travel and view the information at private offices, without copying it or "compiling" it for subsequent referral or use. Often, it results in numerous return trips to review the information when new issues or questions arise. Other state files may not be accessible for onsite review due to travel distances and expenses. Florida has a vested interest to ensure corruption-free operation of the racinos. Adequately evaluating those persons seeking licensure or employment in top positions at the racino facilities is essential to that effort. Unfortunately, the current process is not efficient and does not allow easy access to information by investigators.

Since both problems relate to the need to maintain the original non-public status of material shared with Florida agencies, a modification of F.S. 119.071(2)(b) could be done to provided the needed solution.

Proposed Solution. Amend Section 119.071(2)(b), FS, as follows:

(b) Whenever criminal intelligence information, or criminal investigative information, information utilized to perform a background check related to the granting of a license by the State of Florida, or information relevant to promoting criminal intelligence, criminal investigative or domestic security efforts is not a public record as originally held by a non-Florida criminal justice agency any person or entity and is made available to a Florida criminal justice agency only on a confidential, non-public, or similarly restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency, person or entity. The restrictions on public disclosure shall continue to apply if the information is shared by the Florida criminal justice agency with any other agency, entity, or person.

Recommendation 2: Create an exemption for specific personal information submitted to FDLE for purposes of subscribing to email notifications regarding the location of registered sex offenders

Current Situation. Last year, Section 943.44353, Florida Statutes, required Florida to provide a sexual predator/offender email subscription service to citizens (consistent with federal Adam Walsh Act). This service allows citizens to receive an email if a sex offender moved within a prescribed radius of a selected address. It also allows subscribers to track an offender's movements, a service that is particularly important to victims, former spouses, complainants, etc. To subscribe to the registered sexual offender/predator service, citizens provide personal information, including email addresses.

Challenges. Currently there are no exemptions regarding this information. The citizens signing up to protect themselves may be unaware their information will become public, or if they are aware that information submitted will be public, they may be fearful it could be made public. For example, a person making a public records request of this information would see an individual's email address, which in many cases, includes information to determine a person's identity such as last name. That person may be able to use that information to determine where someone lives and where the person's go to school. Additionally, a sex offender requesting this information would have personal information of crime victims who signed up to track the offender who perpetrated the crime.

In addition, a simple "Google" or similar Internet search inquiry of an address can also sometimes lead to a name and other identifying information which can be easily tracked to an individual. Many emails utilize an individual's last name (e.g., JDoe@yahoo.com). Even a phonebook search could potentially reveal J. Doe's residential address to a sexual predator intent on indentifying who is accessing information related to him. The exposure of personal information to the public as a cost of doing business with the state could have a chilling effect on the program and could deter folks from signing up for the very service that was intended to help them protect Florida citizens.

Proposed Solution. Add Subsection 943.33453(3), FS, as follows:

(3) Any information provided to the department by persons, other than sexual predators or offenders as defined under F.S 775.21, 943.0435, 944.607, 944.606, 985.4815, 985.481, when requesting access to this notification system is exempt from the provisions of s. 119.07(1) and s. 24(a), Art.1 of the State Constitution.

Recommendation 3: Create a limited exception to the general prohibitions against the use of autopsy photographs

Current Situation. Florida law prohibits publishing photographs or other information related to subjects of autopsies. There are no exceptions for investigative or training purposes.

After the crash death of Dale Earnhardt, a prolonged legal battle occurred regarding access under the public records law to the autopsy photos. The 2001 Legislature passed a bill prohibiting publication of autopsy photos without the express permission from next-of-kin (Earnhardt Family Protection Act). Violation of the protections imposed by the Act is a third degree felony.

Challenges. In practice, in training venues, instructors cannot use autopsy photos to train crime scene investigators and show them "what to look for" on bodies. Florida medical examiners cannot use "John or Jane Doe" photos at meetings with other examiners to enhance overall skills or to otherwise assist them in their duties. The statutory restrictions, though well intended, are having unintended negative consequences.

Many unidentified bodies are located and are subjected to autopsies. Next-of-kin is not always available to approve publication of autopsy information. Seeking court approval for each proposed use of photos is onerous. The ultimate result is that trainers cannot use autopsy photos that could help trainees learn what to look for at a crime scene. Even medical examiners cannot share photos with other medical examiners in an effort to hone their skills or seek consultation as to cause of death. The broad exemption has severe unintended consequences.

Proposed Solution. Relax the current exemption to allow for the appropriate and professional use of autopsy information for case consultation, training, and related duties. This can be done by adding Subsection 406.135(9), F.S., as follows:

Section 406.135(9) is amended to add:

(9)(a) A medical examiner having custody of a photograph, a video recording, or an audio recording of an autopsy may use or allow the use of the photograph, video recording, or audio recording for case consultation with a pathologist, forensic scientist, or other specialist or expert, or for release to a health department to carry out its lawful duties.

(b) A medical examiner may also use or allow the use of any photograph, video recording or audio recording in the examiner's custody for:

1. Medical or scientific teaching or training purposes;
2. Instruction or training of law enforcement personnel;
3. Instruction or training of state prosecutors or others with a bona fide professional need to use or understand forensic science related to autopsies; or
4. Conferring with medical or scientific experts on matters not related to the investigation or review of a particular case or incident

provided that any information that would identify the individual upon whom the autopsy was performed is masked, removed, or modified from the photograph, video recording, or audio recording.

(c) For purposes of this subsection, information that identifies an individual consists of:

1. The individual's name;
2. The individual's address;
3. Personally identifiable information related to the individual including the individual's Social Security Number;
4. A full, unmasked or otherwise unmodified view of the individual's face; or
5. Identifying marks on the body of the individual that are unrelated to the deceased's medical condition or medical status or are otherwise not pertinent to the underlying use of photograph, video recording, or audio recording.

(d) A medical examiner who allows the use of autopsy information under this subsection has a duty to disclose to each person to whom the information is revealed or released that the information is restricted and may not be used for a purpose other than as it has been limitedly disclosed. A medical examiner who fails to disclose the restricted status of any information disclosed as allowed by this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082, or s. 775.083.

(e) Any person who receives, views, hears or otherwise accesses information revealed by a medical examiner as authorized under this subsection, and who has been advised of the restricted status of the information as provided in subsection (d), who then utilizes such information in a manner outside the stated restrictions and purposes for which the information was disclosed commits a misdemeanor of the second degree, punishable as provided in s. 775.082, or s. 775.083.