

March 6, 2019

Senator Lauren Book
202 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Re: Legal Opinion Regarding Privacy Provision of Victims' Rights Amendment

Dear Senator Book:

My client, Marsy Law for Florida, LLC, has requested that I provide you with a legal opinion regarding the the following question:

Does the confidentiality provided for in Article I, Section 16(b)(5) of the Florida Constitution, as amended by the 2018 Constitution Revision Commission Revision 1 (the "victims' privacy provision"), require passage by a vote of 2/3 of each house of the Legislature of a statute creating an exception to Article I, Section 24 of the Florida Constitution?

For the reasons set forth below, my answer to the question is no. Two considerations give rise to my opinion.

The first consideration is that the plain language of Article I, Section 24 of the Florida Constitution ("the open records provision") excludes the victims' privacy provision from its application. The provision states in pertinent part:

(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.* . . .

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a). . .

(emphasis added).

The open records provision thus establishes two exceptions to the requirement that public records be made available for inspection and copying: first for exemptions passed by a 2/3 vote of each house of the Legislature; and, second, for exemptions made confidential by other constitutional provisions. The victims' privacy provision in Article I, Section 16(b)(5) falls into the second exception. The provision states in pertinent part:

(b) To preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents, every victim is entitled to the following rights, beginning at the time of his or her victimization:

(5) The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.

Because the open records provision recognizes an exception for exemptions specifically provided in other sections of the Constitution, which includes the victims' privacy provision, there is no conflict between the two provisions. However, even if the provisions did conflict, the result would be the same by operation of two basic rules of judicial interpretation.

First, it is well established that when two provisions on the same subject conflict, one being general and the other specific, the specific provision prevails. *Department of Revenue v. Daly*, 74 So.3d 165 (Fla. 2011). In this case, the open records provision applies to government-held records in general. The victim rights provision, being limited to particular records, is the more specific and would prevail. Second, when there is a conflict between two provisions on the same subject, the later-passed provision will control in the absence of clear language to the contrary. *Id.*; *McKendry v. State*, 641 So.2d 45 (Fla. 1994). The victims' privacy provision, as the more recently passed of the two provisions, will control to the extent of any conflict.¹

The second consideration underlying my opinion is that the victims' privacy provision is self-executing. It requires no legislative implementation, much less a super-majority vote. The Florida Supreme Court has set forth the following criteria to determine whether a constitutional amendment is self-executing:

The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a

¹ The cited cases involved review of statutory provisions, but the courts have held that rules of judicial interpretation are the same for constitutional provisions and statutes. *Lewis v. Leon County*, 73 So.3d 151 (Fla. 2011).

sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

Gray v. Bryant, 125 So. 2d 846 (Fla. 1960) (internal citations omitted). The right granted in the victims' privacy provision meets the test. It grants to a victim or victim's family the right to prevent the disclosure of information that could be used to locate or harass the victim or the victim's family, or that could disclose confidential or privileged information of the victim. The provision is whole in itself. It requires no additional legislation to be understood or implemented.

The Florida Supreme Court has explained the reason for the presumption that a constitutional provision is self-executing:

On the one hand, constitutional provisions are presumed self-executing to prevent the Legislature from nullifying the rule of the people as expressed in their Constitution. On the other hand, the Legislature may provide additional laws addressing a self-executing constitutional scheme, assuming that such laws supplement, protect or further the availability of the constitutionally conferred right, but the Legislature may not modify the right in such a fashion that it alters or frustrates the intent of the framers and the people.

Browning v. Florida Hometown Democracy, Inc., 29 So. 3d 1053, 1064 (Florida 2010). The Supreme Court's concern articulated in *Browning* is well illustrated by the question addressed in this opinion. If the victims' privacy provision took effect only upon implementation by a 2/3 vote of both houses of the Legislature, the will of the voters could be frustrated by a minority of members of the Legislature. Nothing in the provision suggests the voters intended to burden the right with such a requirement. To the contrary, the provision took effect immediately upon adoption of Revision 1 by the voters and the provision itself provides that every victim is entitled to the rights guaranteed "beginning at the time of his or her victimization." Consistent with the holding in *Browning*, discussed above, the Legislature may enact laws to "supplement, protect, or further" the right of privacy granted by Revision 1, but may not pass any legislation that would frustrate the right.

I have also been asked to address whether the information required by the victims' privacy provision to be kept confidential includes a victim's name. The provision requires the custodian of public records to maintain confidentiality of any information that "could be used" to locate a victim or victim's family. Based upon common usage, the word "could" in the context of the provision refers to possibility. (See *Oxford Dictionary* definition: "used to indicate possibility." <https://en.oxforddictionaries.com/definition/could>). In today's world, it is generally easy to locate a person using the person's name given the abundance of online search resources. In any case, unless circumstances are such that disclosure of a victim's name *could not* assist in locating the victim or victim's family, logic compels the opposite conclusion; that disclosure *could* be used to locate them, thus requiring that the name be kept confidential.

For the foregoing reasons, I reach the following conclusions:

- Article I, Section 16(b)(5) requires no legislative implementation or ratification and is now in effect.
- The provision grants the right to waive confidentiality exclusively to the victim or victim's family.
- Custodians of records made confidential by the victims' privacy provision have a duty to maintain procedures designed to avoid disclosure of such information, including the victim's name in most instances, to unauthorized persons.
- Before information relating to a victim is made public, the victim or victim's family should be provided a reasonable opportunity to object to disclosure or seek judicial assistance.

Sincerely,



Barry Richard

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