

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: PCS/SB 1296 (301656)

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Public Records and Meetings/Medicaid and Public Assistance Fraud

DATE: March 31, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Wilson	GO	Pre-meeting
2.			GA	
3.			WPSC	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill creates an exemption from public-meetings requirements for that portion of a meeting of the Medicaid and Public Assistance Fraud Strike Force at which the strike force will hear or discuss active criminal investigative information or active criminal intelligence information under specific conditions. This bill provides criteria for determining when a portion of the strike force meeting may be closed, how the strike force chair shall declare closing a portion of the meeting, who may attend a closed strike force meeting, and what records must be kept of the proceedings of the strike force during a closed meeting.

The bill also creates an exemption from public-records requirements for audio or video recordings of the closed meeting, and minutes and notes taken during the meeting, until the criminal investigative information or criminal intelligence information ceases to be active.

The bill subjects the exemptions to legislative review and repeal under the Open Government Sunset Review Act. The bill provides a statement of public necessity.

Because this bill creates a new public-meetings exemption and a new public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill creates s. 624.36, F.S.

II. Present Situation:

Public Meetings

The “Sunshine Law” was first enacted in 1967.¹ As codified in s. 286.011, F.S., the provision states:

- (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.
- (2) The minutes of a meeting of any such board or commission or any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

In effect, the Sunshine Law requires:

1. Meetings of public boards or commissions to be open to the public;
2. Reasonable notice for meetings; and
3. Minutes to be taken.

In 1992, the electorate approved an amendment to the State Constitution that raised the statutory requirement of open meetings to a constitutional mandate. Article I, s. 24(b) of the State Constitution provides:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article II, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Collegial bodies within the state, including state and local bodies, are subject to open-meeting requirements, whether the members are appointed or elected.² Further, advisory boards without

¹ Section 1, ch. 67-356, L.O.F.

² *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).

the authority to take action or to bind a decision-making entity, must comply with open-meeting requirements.³ Fact-finding committees that function solely to find facts and to report them, however, have an exception under open meetings requirements.⁴

Given the increasing reliance of government upon legislatively-created corporations, as well as private service-providers, to perform governmental services, the applicability of open meetings requirements to these entities may arise. The judiciary has found that the Sunshine Law is to be construed liberally in order to give the full effect of its purpose.⁵ The Sunshine Law has been held to apply to private entities created by law or a public agency. It also applies to private entities that provide services to governmental agencies on behalf of those agencies in the performance of their public duties. Generally, a private organization is not subject to the Sunshine Law unless it has been delegated the authority to perform a governmental function.⁶

Public Records

Florida also has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record⁷ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under

³ *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Accord, Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988); *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 869 (Fla. 3d DCA 1994); *Lyon v. Lake County*, 765 So.2d 785 (Fla. 5th DCA 2000).

⁴ *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985).

⁵ *Wood v. Marston*, 442 So.2d 934 (Fla. 1983); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

⁶ *See, e.g.*, Inf. Op. to Fasano, June 7, 1996, where the Attorney General opined that the Sunshine Law does not apply to meetings of a homeowners' association board.

⁷ Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

supervision by the custodian of the public record. Unless specifically exempted, all agency⁸ records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “public record” to include 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. 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 “intended to perpetuate, communicate, or formalize knowledge.”⁹ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁰

Only the Legislature is authorized to create exemptions to open government requirements.¹¹ 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.¹² A bill enacting an exemption¹³ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.¹⁴

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁵ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁶

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁷ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁸ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the

⁸ Section 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, 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.”

⁹ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

¹⁰ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

¹¹ Article I, s. 24(c) of the State Constitution.

¹² *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).

¹³ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁴ Section 24(c), art. I of the State Constitution

¹⁵ Attorney General Opinion 85-62, August 1, 1985.

¹⁶ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹⁷ Section 119.15, F.S.

¹⁸ Section 119.15(6)(b), F.S.

Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.¹⁹ An exemption meets the statutory criteria if it:

- 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 the safety of such individuals; 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 which 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.²⁰

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.²¹

Medicaid and Public Assistance Fraud Strike Force

Committee Substitute for Committee Substitute for Senate Bill 8 (2010) would create the Medicaid and Public Assistance Fraud Strike Force (strike force) within the Department of Financial Services (DFS) to develop a statewide strategy and coordinate state and local efforts and resources to prevent, investigate, and prosecute Medicaid and public assistance fraud. The strike force would consist of 11 members²² and would serve to advise and provide recommendations and policy alternatives to the Chief Financial Officer (CFO) regarding Medicaid and public assistance fraud efforts.

The strike force would meet quarterly. The strike force will review information of a highly sensitive nature involving criminal investigations of Medicaid and public assistance fraud and is likely to discuss that information at its meetings.

III. Effect of Proposed Changes:

This bill creates s. 624.36, F.S., to exempt from public-meetings requirements those portions of meetings of the Medicaid and Public Assistance Fraud Strike Force at which active criminal investigative information or active criminal intelligence information is discussed if:

¹⁹ *Id.*

²⁰ *Id.*

²¹ Section 119.15(6)(a), F.S.

²² The members of the strike force would include the Chief Financial Officer (CFO) serving as chair, the Attorney General serving as vice-chair, the Executive Director of the Florida Department of Law Enforcement, Secretaries of the Agency for Health Care Administration and the Department of Children and Family Services, the State Surgeon General, and five members consisting of two sheriffs, two chiefs of police, and one state attorney, who are appointed by the CFO. The members would not be able to designate anyone to serve in their place.

- The chair of the strike force announces at a public meeting that, in connection with the performance of the strike force's duties, it is necessary that active criminal investigative information or active criminal intelligence information be discussed;
- The chair declares the specific reasons that it is necessary to close the meeting, or portion thereof, in a document that is a public record and filed with the official records of that strike force; and
- The entire closed meeting is recorded. The recording must include the times of commencement and termination of the closed meeting, all discussion and proceedings, and the names of the persons present. No portion of the closed meeting is permitted to be off the record. The recordings must be maintained by the strike force.

The bill also creates an exemption from public-records requirements for the audio or video recording of the meeting, and any minutes or notes, until such time as the criminal investigative information or criminal intelligence information ceases to be active. These records must be retained pursuant to s. 119.021, F.S.²³

The bill provides for legislative review and repeal under the Open Government Sunset Review Act. The exemptions will repeal on October 2, 2015, unless reenacted by the Legislature.

The bill provides a public necessity statement.

This bill takes effect on the same date that the related legislation Committee Substitute for Committee Substitute for Senate Bill 8 or similar legislation that creates the Medicaid and Public Assistance Fraud Strike Force takes effect.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly-created or expanded public-records or public-meetings exemption. Because this bill creates a new public-meetings exemption and a new public-records exemption, it requires a two-thirds vote for passage.

Subject Requirement

Section 24(c), art. I of the State Constitution requires the Legislature to create or expand public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

²³ This section of the Public Records Act provides for retention schedules.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly-created or expanded public-records or public-meetings exemption. Because this bill creates a new public-meetings exemption and a new public-records exemption, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Proposed Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)**PCS by Governmental Oversight and Accountability on April 6, 2010:**

The proposed committee substitute:

- Creates an exemption from public-meetings requirements for specified portions of meetings of the Medicaid and Public Assistance Fraud Strike Force;
- Creates an exemption from public-meetings requirements for specified records created as a result of the closed meetings;
- Provides specific guidelines for closure and for maintenance of records of all closed portions of a strike force meeting;
- Subjects the exemptions to review and repeal under the Open Government Sunset Review Act; and
- Provides a statement of public necessity.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
