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:	CS/CS/CS/SB 1598
INTRODUCER:	Governmental Oversight and Accountability Committee, Judiciary Committee, Community Affairs Committee, and Senator Dockery
SUBJECT:	Public Records and Public Meetings/Sunshine in Government Act
DATE:	April 7, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Howes	Yeatman	CA	**Fav/CS**
2.	Maclure	Maclure	JU	**Fav/CS**
3.	Naf	Wilson	GO	**Fav/CS**
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill revises Florida's open meetings and public records laws to implement, in part, recommendations of the Commission on Open Government Reform, which issued its final report in January 2009. Among other provisions, the bill:

- Transfers provisions governing open meetings from chapter 286, F.S., to chapter 119, F.S., which currently governs solely public records, and names the consolidated provisions and expanded chapter 119, F.S., as the "Sunshine in Government Act";
- Requires all elected and appointed public officials to undergo education and training on the requirements of the Sunshine in Government Act;
- Authorizes an agency to charge an additional fee if the nature or volume of a public records request necessitates more than 30 minutes of agency resources to fulfill, with the fee being charged for that portion of the request requiring more than 30 minutes;
- Prohibits an agency from charging for redaction of personal information that is not considered a public record;
- Adds definitions to chapter 119, F.S., for the terms "agency resources," "any electronic medium stored, maintained, or used by an agency," and "trade secret";

- Requires an agency to consider whether an electronic recordkeeping system is capable of redacting information that is exempt or confidential and exempt;
- Allows agencies to reduce or waive fees for public records;
- Provides for the repeal of a reenacted public records or open meetings exemption in the 10th year after reenactment, unless the Legislature reenacts the exemption; and
- Revises some of the noncriminal and criminal penalties for violations of the public records and open meeting laws.

This bill substantially amends the following sections of the Florida Statutes: 119.01, 119.07, 119.071, and 119.15. The bill creates the following sections of the Florida Statutes: 119.001, 119.002, 119.003, 119.13, 119.20, 119.201, 119.202, 119.30, 119.31, and 119.32. The bill repeals the following sections of the Florida Statutes: 119.011, 119.10, 119.12, 286.011, 286.0113, and 286.012. The bill reenacts and amends multiple provisions of the Florida Statutes in order to incorporate amendments made by the bill to statutory sections referenced in those provisions and to conform cross-references.

II. Present Situation:

Public Records and Open Meetings

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The Florida Legislature enacted the first public records law in 1892.[1] In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to open meetings and public records to a constitutional level. Article I, section 24(a) of the Florida Constitution, and the Public Records Act,[2] specify the conditions under which public access must be provided to governmental records and meetings.

The Public Records Act 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 record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Section 119.011(12), F.S., defines the term "public records" 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."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

[1] Section 1390, 1391, F.S. (Rev. 1892).
[2] Chapter 119, F.S.
[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[4] *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

Article I, section 24(b) of the Florida Constitution and s. 286.011, F.S., the Sunshine Law, specify the requirements for open meetings. Open meetings are defined as any meeting 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, at which official acts are to be taken. No resolution, rule, or formal action shall be considered binding unless it is taken or made at an open meeting.[5]

Although the Florida Constitution provides that records and meetings are to be open to the public, it also provides the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Currently, there are approximately 90 exemptions to the open meetings law and more than 970 exemptions to the public records law.[6] Article I, section 24(c) of the Florida Constitution governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of public necessity justifying the exemption. Further, the constitution provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

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.[7] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[8] The terms are not defined in the law, however, and the distinction may not be clearly understood or consistently applied.[9]

An exemption from disclosure requirements for confidential information does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[10] For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.[11] The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records.[12] One federal court has also ordered that records may be subject to discovery in a civil

[5] Section 286.011, F.S.
[6] Florida Commission on Open Government Reform, *Reforming Florida's Open Government Laws in the 21st Century*, 3 and 5 (Final Report, January 2009), *available at* http://www.flgov.com/og_commission_home (last visited Mar. 29, 2010).
[7] Op. Att'y Gen. Fla. 85-62 (August 1, 1985).
[8] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So. 2d. 289 (Fla. 1991).
[9] Florida Commission on Open Government Reform, *supra* note 6, at 6.
[10] *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985).
[11] *B.B. v. Department of Children and Family Services*, 731 So. 2d 30 (Fla. 4th DCA 1999).
[12] *Department of Highway Safety and Motor Vehicles v. Krejci Company, Inc.*, 570 So. 2d 1322 (Fla. 2d DCA 1990).

action upon a showing of exceptional circumstances where the information was needed to complete service of process.[13]

Article I, section 24 of the Florida Constitution, chapter 119, F.S., and chapter 286, F.S., all provide different definitions as to who is subject to the open meeting and public records laws. Under article I, Section 24(a) of the Florida Constitution, "any public body, officer, or employee of the state, or persons acting on their behalf" is subject to the public records law. Under article I, Section 24(b), 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, is subject to the open meetings law. Under chapter 119, F.S., any agency[14] is subject to the public records laws. Under s. 286.011, F.S., 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 are subject to the open meeting laws.

Open Government Sunset Review Act

The Open Government Sunset Review Act[15] provides for the review and repeal of any public records or meetings exemptions that is created or substantially amended in 1996 and subsequently. The act defines the term "substantial amendment" for purposes of triggering a review and repeal of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings, as well as records. The law clarifies an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.[16] The law was amended by chapter 2005-251, Laws of Florida, to modify the criteria under the Open Government Sunset Review Act so consideration will be given to reducing the number of exemptions by creating a uniform exemption during the review process.

Under the Open Government Sunset Review Act, an exemption may be created, revised, or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to

[13] Court Order on Plaintiff's Motion for Substituted Service, *Allen v. City of Miami*, 2003 U.S. Dist. LEXIS 21778 (S.D. Fla. Nov. 14, 2003).
[14] "Agency" is defined 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." Section 119.011(2), F.S.
[15] Section 119.15, F.S.
[16] Section 119.15(4)(b), F.S.

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 information would injure the affected entity in the marketplace.

The exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[17]

Under 119.15, F.S., any exemption to the open meetings law or public records law is automatically repealed five years after it is enacted or substantially amended, unless it is reenacted by the Legislature after the review. If an exemption is reenacted during the five-year review, it is no longer required to be subject to the Open Government Sunset Review Act.

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

Florida Commission on Open Government Reform

Although both the open meetings law and the public records law have been amended since first enacted and some reforms made, never in Florida's long history of open government have both laws been reviewed in their entirety.[18] As a result, there are inconsistencies and redundancies in the law, and some argue that the state's open government laws have failed to keep pace with today's technology, resulting in an erosion of the public's constitutional right of access to government meetings and records.[19] In June 2007, Governor Charlie Crist created the Commission on Open Government Reform for the express purpose of reviewing, evaluating, and issuing recommendations regarding Florida's public records and open meetings laws.[20]

The commission held four public hearings throughout the state to receive testimony from invited speakers and the public. The commission conducted extensive legal research, including a thorough review of the history of Florida's open government laws, a search of current statutory law and applicable case law, and a study of laws enacted in other states. Testimony from the

[17] Section 119.15(6)(b), F.S.
[18] Florida Commission on Open Government Reform, *supra* note 6, at 1.
[19] *Id.*
[20] Florida Exec. Order No. 07-107 (June 19, 2007), *available at* http://www.flgov.com/pdfs/orders/07-107-ogreformcomm.pdf (last visited Mar. 29, 2010).

public also was solicited, as was written testimony. [21] The commission adopted a series of proposals that have become the basis for the changes proposed in this bill.[22]

III. Effect of Proposed Changes:

This bill revises Florida's open meetings and public records laws to implement, in part, recommendations of the Commission on Open Government Reform, which issued its final report in January 2009. Among other things, the bill transfers provisions governing open meetings from chapter 286, F.S., to chapter 119, F.S., which currently governs solely public records, and names the expanded chapter 119, F.S., as the "Sunshine in Government Act." Following is a section-by-section explanation of the bill.

Section 1 creates s. 119.001, F.S., to cite chapter 119, F.S., as the "Sunshine in Government Act."

Section 2 creates s. 119.002, F.S., to require all elected and appointed public officials to undergo education and training on the requirements of the Sunshine in Government Act. However, the bill specifies that a violation of the training requirement is not subject to the bill's proposed penalty provisions in newly created s. 119.30, F.S.

Section 3 creates s. 119.003, F.S., which will serve as the definitions section for the chapter. This new section carries forward and consolidates the definitions currently prescribed in ss. 119.011 and 119.071, F.S.

The bill also defines the following new terms:

- "Agency resources" means the cost of clerical or supervisory assistance or agency information technology resources actually incurred by the agency in complying with a public records request.
- "Any electronic medium stored, maintained, or used by an agency" means any electronic format that the agency can reasonably provide as part of the standard operation of its electronic recordkeeping system.
- Trade secret" is defined as it is in s. 688.002, F.S. [23]

Section 4 amends s. 119.01, F.S., to require an agency to consider whether an electronic recordkeeping system is capable of redacting information that is exempt or confidential and exempt contained in the public records that are online or stored in the system. The bill provides that the agency must take this capacity into consideration when upgrading the system, as well as designing or acquiring the system. As a result of the bill's revision, an agency, when upgrading a system, must also consider whether the system is capable of providing data in a common format.

[21] Florida Commission on Open Government Reform, *supra* note 6, at 1.
[22] *See id*. at 18-34.
[23] Section 688.002, F.S., defines trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that 1) 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 2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 5 amends s. 119.07(4) F.S., to authorize an agency to charge an additional fee if the nature of the records request requires more than 30 minutes of agency resources. The fee may be charged for the additional resources incurred and may be charged for the portion of a request requiring more than 30 minutes. In the case of a record in an electronic medium, the agency may charge the actual cost of duplication. However, the agency may similarly charge an additional fee if the nature of the records request requires more than 30 minutes of agency resources.

If a document is requested to be converted into an electronic format and the agency has the necessary software and hardware to meet the request, the agency must oblige.

This section also provides that the cost of clerical or supervisory assistance may be no greater than the base hourly rate of the lowest paid personnel capable of providing this service.[24]

This section also allows agencies to reduce or waive the fees provided in this section so long as they are uniformly applied among persons similarly situated.

The bill prohibits an agency from charging a fee for costs associated with review or redaction of information that is not a public record.[25]

Finally, the bill deletes existing s. 119.07(4)(d), F.S., which currently allows agencies to charge a special service fee, in addition to the actual costs of duplication, if the nature or volume of public records requested requires extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved.

Section 6 deletes the following definitions from current s. 119.071, F.S., because the bill moves them to the new consolidated definitions section (proposed s. 119.003, F.S.): "security system plan," "commercial activity," and "commercial entity." (See the description of bill section 3, above.)

Section 7 creates s. 119.13, F.S., which requires the Division of Library and Information Services of the Department of State to adopt a rule to establish a model policy for providing public access to public records.

Section 8 amends s. 119.15, F.S., which is the Open Government Sunset Review Act. The bill provides that an exemption is automatically repealed in the 10th year after it is reenacted, unless the Legislature saves it from repeal by reenacting it. This change, in conjunction with the existing five-year review provisions of the act, means that when a new exemption is created, it will automatically repeal in the fifth year after its original enactment. If the Legislature then reenacts the exemption, it will repeal 10 years after the reenactment.

[24] See the "Technical Deficiencies" section of this bill analysis for a discussion of a variation on this proposed language contained elsewhere in the bill.

[25] As proposed in new s. 119.003(15), F.S., a public record means 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. This is the same definition in current law. See s. 119.011(12), F.S. Therefore, emails of a purely personal nature sent from an official email account, for example, would not constitute a public record.

Although the bill does not directly address what happens to exemptions that have already been reenacted, it is likely that these exemptions would not be subject to 10-year review because typically if bill is reenacted the open government sunset review language is deleted during the reenactment.

Section 9 creates s. 119.20, F.S., governing access to public meetings and to records of those meetings. This new section is comprised of language from existing s. 286.011(1)-(2) and (6), F.S.

Section 10 creates s. 119.201, F.S., prescribing general exemptions from public meetings. This new section is comprised of language from existing ss. 286.011(8) and 286.0113 F.S. However, the exemption (for meetings at which certain vendor negotiations are conducted) which the bill transfers from s. 286.0113, F.S., currently stands repealed on October 2, 2011. In transferring the exemption to the newly created section, the bill extends the repeal date to 2015.

Section 11 creates s. 119.202, F.S., governing the voting requirement at meetings of governmental bodies. This new section is comprised of language from existing s. 286.012, F.S.

Section 12 creates s. 119.30, F.S., prescribing violations of chapter 119, F.S., and penalties for violations. The new section is based upon existing language in s. 119.10, F.S., currently governing public records violations, as well as existing language in s. 286.011, F.S., governing open meetings violations. However, the bill also revises the language. Specifically, the combined new section provides that:

- A violation of any law that relates to access to public records or meetings shall be considered a violation of chapter 119, F.S.
- A person who violates chapter 119, F.S., commits a noncriminal infraction, punishable by a fine not exceeding $500.
- A person who willfully and knowingly violates any of the provisions of the chapter commits a misdemeanor of the first degree. This provision differs from current law in that:
  - Public officers would no longer be subject to suspension and removal or impeachment for refusing access to public records.
  - Currently, public officers who knowingly refuse access to public records can be charged with a misdemeanor of the first degree. The bill adds "willfully" to the standard.
  - Currently, an open meetings violation is a second-degree misdemeanor, while a public records violation is a first-degree misdemeanor. Under this combined penalty section, either violation would be a first-degree misdemeanor.
- Conduct that occurs outside the state which would constitute a knowing violation of the public records and open meetings laws is a misdemeanor of the first degree.
- If a court determines that an agency has denied access to public records; denied access to a meeting where official acts are taken; shown intentional disregard for the public's constitutional right of access as guaranteed by article I, section 24 of the Florida Constitution; or exhibited a pattern of abuse of the requirements of this chapter, the court may assess a penalty against the agency equal to twice the amount awarded pursuant to this section.

Section 13 creates s. 119.31, F.S., to provide that the circuit courts of this state have jurisdiction to issue injunctions to enforce any portion of the public records and open meetings laws in chapter 119, F.S. This language is based upon and transferred from existing s. 286.011(2), F.S. Currently, the circuit courts may only issue injunctions to provide access to the recorded minutes of open meetings. This bill would apply the injunction authority to enforcement of any public records and open meetings requirements of the revised chapter 119, F.S.

Section 14 creates s. 119.32, F.S., governing awards of attorney's fees. This new section is comprised of language from existing s. 286.011(4)-(5), F.S.

Section 15 repeals s. 119.011, F.S., relating to existing definitions under chapter 119, F.S., because a new definitions section is created by the bill (proposed s. 119.003, F.S.).

Section 16 repeals s. 119.10, F.S., relating to existing violations of chapter 119, F.S., because a new violations and penalties section is created by the bill (proposed s. 119.30, F.S.).

Section 17 repeals s. 119.12, F.S., relating to attorney's fee, because a new attorney's fee section is created by the bill (proposed s. 119.32, F.S.).

Section 18 repeals s. 286.011, F.S., which is the existing open meetings law. The bill merges comparable open meetings provisions into a revised chapter 119, F.S., which will be the Open Government Act and will apply to public records and open meetings.

Section 19 repeals s. 286.0113, F.S., relating to general exemptions from public meetings, because the bill creates a new provision in chapter 119, F.S. (proposed s. 119.201, F.S.).

Section 20 repeals s. 286.012, F.S., relating to voting requirements for meetings of governmental bodies, because the bill creates a new provision in chapter 119, F.S. (proposed s. 119.202, F.S.).

Sections 21 through **33** reenact the following provisions of the Florida Statutes, in order to incorporate the changes made by the bill to specific sections of chapter 119, F.S., that are referenced within those provisions:

- Section 27.02(2), F.S.;
- Section 119.01(2)(f), F.S.;
- Section 119.0712(1)(d), F.S.;
- Section 119.084(2)(a), F.S.;
- Section 455.219(6), F.S.;
- Section 456.025(11), F.S.;
- Section 458.3193(1)(c), F.S.;
- Section 459.0083(1)(c), F.S.;
- Section 472.011(16), F.S.;
- Section 1012.31(2)(e), F.S.;
- Section 17.076(5), F.S.;
- Section 119.0714, F.S.; and
- Section 1007.35(8)(b), F.S.

Section 34 amends s. 11.0431(2)(a), F.S., conforming cross references.

Section 35 amends s. 8.001(2), F.S., conforming cross references.

Section 36 amends s. 28.24(12)(e), F.S., conforming cross references.

Section 37 amends s. 73.0155(2), F.S., conforming cross references.

Section 38 amends s. 97.0585(1), F.S., conforming cross references.

Section 39 amends s. 112.3188(2)(c), F.S., conforming cross references.

Section 40 amends s. 163.61, F.S., conforming cross references.

Section 41 amends s. 257.34(1), F.S., conforming cross references.

Section 42 amends s. 257.35(1), F.S., conforming cross references.

Section 43 amends s. 281.301, F.S., conforming cross references.

Section 44 amends s. 364.107(3)(a), F.S., conforming cross references.

Section 45 amends s. 382.0085(2)(d) and (5), F.S., conforming cross references.

Section 46 amends s. 383.402(9), F.S., conforming cross references.

Section 47 amends s. 550.0251(9), F.S., conforming cross references.

Section 48 amends s. 607.0505(6), F.S., conforming cross references.

Section 49 amends s. 617.0503(6), F.S., conforming cross references.

Section 50 amends s. 636.064(3), F.S., conforming cross references.

Section 51 amends s. 668.50(2)(m), F.S., conforming cross references.

Section 52 amends s. 668.6076, F.S., conforming cross references.

Section 53 amends s. 741.313(4)(c), F.S., conforming cross references.

Section 54 amends s. 787.03(6)(c), F.S., conforming cross references.

Section 55 amends s. 817.568(5), F.S., conforming cross references.

Section 56 amends s. 817.569, F.S., conforming cross references.

Section 57 amends s. 893.0551(3)(a) and (c), F.S., conforming cross references.

Section 58 amends s. 914.27(5), F.S., conforming cross references.

Section 59 amends s. 943.031(9)(a)-(b), F.S., conforming cross references.

Section 60 amends s. 943.0313(7), F.S., conforming cross references.

Section 61 amends s. 943.0314(1)(a), F.S., conforming cross references.

Section 62 amends s. 943.032(2), F.S., conforming cross references.

Section 63 provides an effective date of October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, section 24(a) of the Florida Constitution, the Sunshine Law,[26] and the Public Records Act,[27] specify the conditions under which public access must be provided to meetings and governmental records. Although the changes proposed by this bill substantially modify the Sunshine Law[28] and the Public Records Act,[29] they appear to conform to the intent of the Florida Constitution.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not determined the fiscal impact of this bill.

B. Private Sector Impact:

The impact of this bill on the private sector is indeterminate.

[26] Section 286.011, F.S.
[27] Chapter 119, F.S.
[28] Section 286.011, F.S.
[29] Chapter 119, F.S.

C. Government Sector Impact:

The requirement for the Division of Library and Information Services of the Department of State to adopt a rule to establish a model policy for providing public access to public records will cause the Department of State to incur costs. At this time, the amount of these costs is not known.

The requirement that all elected and appointed public officials undergo training on public records and open meetings will cause state and local governments and agencies to incur costs. At this time, these costs are indeterminate.

The bill authorizes an agency to charge an additional fee if the nature or volume of a public records request necessitates more than 30 minutes of agency resources to fulfill. The fee may be charged for the additional resources incurred and may be charged for the portion of a request requiring more than 30 minutes. However, agencies are prohibited from charging for review and redaction of non-public information, the cost of which to the agency is currently indeterminate. In addition, the bill authorizes agencies to reduce or waive fees provided in the bill so long as they are uniformly applied among persons similarly situated.

VI. Technical Deficiencies:

On lines 451-454, the bill provides that the cost of clerical or supervisory assistance may be *no greater than* the base hourly rate of the lowest paid personnel capable of providing this service. In its definition of "agency resources," however, the bill provides that costs for clerical or supervisory assistance *must be charged at* the base hourly rate of the lowest paid personnel capable of providing the assistance. (See lines 155-157.) Thus, the bill appears to create conflicting standards.

Line 447 of the bill requires a technical amendment to insert "of."

VII. Related Issues:

Currently, under s. 286.011, F.S., 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 are subject to the open meeting laws. Although the bill incorporates this language into the proposed ss. 119.20, F.S., and 119.201, F.S., in an attempt to keep the same entities subject to the open meetings laws, this change creates some confusion. For example, lines 918-927 of the bill state that if a court determines that an agency has violated s. 119.20, F.S., then the court may assess a penalty against the agency equal to twice the amount awarded. However, s. 119.20, F.S., does not refer to an agency; instead it refers to 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 being open. This terminology difference may create a question regarding who is subject to the double penalty.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the CS.)

CS by Community Affairs on March 9, 2010:
The committee substitute:

- Requires all elected and appointed public officials to undergo education and training on the public records and open meeting laws.
- Revises the definition of "actual cost of duplication" to provide that the agency's overhead costs, associated with duplication of public records, cannot be included in the fee charged for public records requests that take more than 30 minutes to complete.
- Adds the definition of "security system plan" as currently defined in the Florida Statutes to the list of definitions in chapter 119, F.S.
- Deletes the new fee list for duplication of public records and provides that materials and staff time may only be charged if the public records request takes more than 30 minutes for staff to complete. The committee substitute also reinstates the current statutory fee list for public record requests that take longer than 30 minutes. The current statutory fee list authorizes charges up to 15 cents per one sided copy, no more than an additional 5 cents for each two-sided copy, and for all other copies the actual cost of duplication.
- Provides that an agency may not charge a fee for redaction of personal information that is not considered a public record. Also, after January 1, 2013, an agency may not charge for redaction of a record that is considered exempt or confidential and exempt from public records.
- Provides that if agency is able to convert the public record into the electronic format requested as a step in the process of copying or exporting the requested record, the agency must provide the record in the format requested.
- Changes the definition of who is subject to the open meetings laws by deleting the provision that "any collegial body of any agency" is required to have open meetings. This causes the original statutory language to be reinstated, which provides that 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" must be open to the public.
- Requires the Division of Library and Information Services of the Department of State to adopt a rule to establish a model policy for providing public access to public records.
- Changes the punishments for violations of the open meetings and public records laws. In the committee substitute, any violation of a law that relates to public records or open meetings is now considered a violation of chapter 119, F.S., and violators can be punished accordingly. Also, any conduct that occurs outside the state which is a knowing violation of the public records and open meetings laws is now a misdemeanor of the first degree. Finally, if a court determines that an agency has denied an individual access to open meetings or public records, or exhibited a pattern of abuse of the open meeting or public records laws, the court may double the monetary penalty against the agency.

- Provides that if an individual is charged with a violation of the public records or open meetings laws and is acquitted, the agency may reimburse the individual for any portion of his or her reasonable attorney's fees.

CS/CS by Judiciary on March 26, 2010:
The committee substitute:

- Changes the name of the revised chapter 119, F.S., to the "Sunshine in Government Act" (rather than the "Open Government Act").
- Restores the definition of the term "actual cost of duplication" used in existing law.
- Defines the term "agency resources."
- Specifies that a violation of the bill's requirement for training of elected and public officials is not subject to the bill's proposed penalty provisions in newly created s. 119.30, F.S.
- Adds a requirement for an agency to consider whether an electronic recordkeeping system is capable of redacting information that is exempt or confidential and exempt, including when the agency designs, acquires, or upgrades the system.
- Removes proposed language that prohibited an agency from charging the actual cost of duplication if fulfillment of a public records request required less than 30 minutes.
- Authorizes an agency to charge an additional fee if the nature or volume of a public records request necessitates more than 30 minutes of agency resources to fulfill.
- Removes the proposed prohibition against an agency charging fees after January 1, 2013, for costs associated with redaction of exempt or confidential and exempt information from a public record.

CS/CS/CS by Governmental Oversight and Accountability on April 6, 2010:
The committee substitute for committee substitute:

- Makes technical corrections to conform the name of the revised chapter 119, F.S., the "Sunshine in Government Act," throughout the bill.
- Makes technical corrections to ensure that the phrase "30 minutes of agency resources" is used consistently throughout the bill.
- Inserts the language currently existing in s. 286.011(4)-(5), F.S., relating to award of attorney's fees, into the bill as a replacement for the prior revised provisions pertaining to award of attorney's fees.
- Makes clarifying drafting changes to the prohibition against agency charges for review and redaction of information which is not a public record.

B. Amendments:

None.