

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1305 Pub. Rec./Officers-Elect

**SPONSOR(S):** Government Operations Appropriations Subcommittee; Adkins

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1464

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N	Williamson	Williamson
2) Government Operations Appropriations Subcommittee	12 Y, 0 N, As CS	Topp	Topp
3) State Affairs Committee			

### SUMMARY ANALYSIS

The State Constitution and the Florida Statutes set forth the state's public policy regarding access to government records and meetings. However, current law does not specifically address if officers-elect are subject to the Public Records Act or the Government in the Sunshine Law. The Third District Court of Appeal has ruled on the issue providing that members-elect of boards, commissions, and agencies are within the scope of the Government in the Sunshine Law. Although the Public Records Act was not addressed by the Third District Court of Appeal, the Department of State has routinely archived transition records for incoming governors.

The bill declares that it is the policy of the state that the Public Records Act (Act) applies to officers-elect upon their election to public office. The term "Officer-Elect" applies only to the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. The bill requires officers-elect to adopt and implement reasonable measures to ensure compliance with the obligations set forth in the Act. It also requires an officer-elect to maintain his or her public records in accordance with the policies and procedures of the public office to which the officer has been elected.

As part of the transition process, if an officer-elect creates or uses an online or electronic communication or recordkeeping system, all public records maintained on such system must be preserved so as not to impair the ability of the public to inspect or copy such records. Upon taking the oath of office, the officer-elect must deliver to the person responsible for records in such public office all public records kept or received in the transaction of official business during the period following election to public office.

Finally, the bill provides that a meeting with or attended by any person elected to a specific board or commission who has not yet taken office, during which official acts are to be taken, is deemed a public meeting. Reasonable notice of such meeting must be provided.

The Department of State indicates no fiscal impact as a result of HB 1305. The bill does not appear to have a fiscal impact on state or local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### State Constitution: Public Records and Open Meetings

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of the executive branch and local government be open and noticed to the public.

###### Florida Statutes: Public Records and Open Meetings

Public policy regarding access to government records and meetings also is addressed in the Florida Statutes.

###### *Public Records Act*<sup>1</sup>

Section 119.07(1), F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. "Public record" is 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.<sup>2</sup>

"Agency" is defined to mean

[A]ny 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.<sup>3</sup>

The Public Records Act does not apply to legislative<sup>4</sup> or judicial<sup>5</sup> records.

###### *Government in the Sunshine Law*

Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," further requires 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, at which official acts are to be taken be open to the public at all times.<sup>6</sup> The board or commission must provide reasonable notice of all public meetings.<sup>7</sup> Public meetings may not be held at any location that discriminates on the basis of

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<sup>1</sup> See chapter 119, F.S.

<sup>2</sup> Section 119.011(12), F.S.

<sup>3</sup> Section 119.011(2), F.S.

<sup>4</sup> See *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992) (definition of "agency" in the Public Records Act does not include the Legislature or its members).

<sup>5</sup> Relying on separation of powers principles, the courts have consistently held that the judiciary is not an agency for purposes of chapter 119, F.S. See, e.g., *Times Publishing Company v. Ake*, 660 So.2d 255 (Fla. 1995) (the judiciary, as a coequal branch of government, is not an "agency" subject to supervision or control by another coequal branch of government).

<sup>6</sup> Section 286.011(1), F.S.

<sup>7</sup> *Id.*

sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.<sup>8</sup> Minutes of a public meeting must be promptly recorded and be open to public inspection.<sup>9</sup>

#### Officers-elect

Officers-elect have been held subject to public record and public meeting requirements upon certification of their election.<sup>10</sup> Although not specifically addressed in current law, this principle has been adopted through case law. In *Hough v. Stemberge*,<sup>11</sup> the Third District Court of Appeal held that "members-elect of boards, commissions, agencies, etc. are within the scope of the Government in the Sunshine Law."<sup>12</sup> Although the Public Records Act was not addressed in *Hough*, the Department of State has routinely archived transition records for incoming governors.

#### **Effect of Bill**

The bill declares that it is the policy of the state that the Public Records Act (Act) applies to officers-elect upon their election to public office. The term "Officer-Elect" applies only to the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture.

The bill requires officers-elect to adopt and implement reasonable measures to ensure compliance with the obligations set forth in the Act. It also requires an officer-elect to maintain his or her public records in accordance with the policies and procedures of the public office to which the officer has been elected.

As part of the transition process, if an officer-elect creates or uses an online or electronic communication or recordkeeping system, all public records maintained on such system must be preserved so as not to impair the ability of the public to inspect or copy such records.

Upon taking the oath of office, the officer-elect must deliver to the person responsible for records in such public office all public records kept or received in the transaction of official business during the period following election to public office.

Finally, the bill provides that a meeting with or attended by any person elected to a specific board or commission who has not yet taken office, during which official acts are to be taken, is deemed a public meeting. Reasonable notice of such meeting must be provided.

#### **B. SECTION DIRECTORY:**

Section 1 creates s. 119.035, F.S., relating to officers-elect.

Section 2 amends s. 286.011, F.S., to include officers-elect under the provisions of the Sunshine Law.

Section 3 reenacts s. 112.3215, F.S., for purposes of incorporating changes made to s. 286.011, F.S.

Section 4 provides an effective date of July 1, 2012.

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<sup>8</sup> Section 286.011(6), F.S.

<sup>9</sup> Section 286.011(2), F.S.

<sup>10</sup> See Attorney General Opinion 74-40.

<sup>11</sup> 278 So.2d 288 (Fla. 3<sup>rd</sup> DCA 1973).

<sup>12</sup> *Hough* at 289.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

The Department of State indicates that there will be no fiscal impact on the department.<sup>13</sup>

The bill could create a minimal fiscal impact on the office of an officer-elect complying with public record requests. The costs would be absorbed, however, as they would be part of the day-to-day responsibilities of the person responsible for responding to records in such office.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

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<sup>13</sup> Department of State Bill Analysis on HB 1305, January 30, 2012, on file with the Government Operations Appropriations Subcommittee.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or require additional rulemaking authority. It merely requires that an officer-elect comply with the policies and procedures of the public office to which he or she has been elected.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 13, 2012, the Government Operations Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute.

- The amendment provided that the term "Officer-Elect" applies only to the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. In addition, the amendment provides that a meeting with or attended by any person elected to a specific board or commission who has not yet taken office, during which official acts are to be taken, is deemed a public meeting and that reasonable notice of such meeting must be provided.

This analysis is drafted to the committee substitute as passed by the Government Operations Appropriations Subcommittee.