

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 Committee on Rules

BILL: SB 7006

INTRODUCER: Judiciary Committee

SUBJECT: OGSR/Investigation of a Violation of the Florida False Claims Act/Department of Legal Affairs

DATE: January 17, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|-----------------|-----------|---------------------------------------|
| | <u>Davis</u> | <u>Cibula</u> | | JU Submitted as Committee Bill |
| 1. | <u>Brown</u> | <u>Caldwell</u> | <u>GO</u> | Favorable |
| 2. | <u>Davis</u> | <u>Phelps</u> | <u>RC</u> | Favorable |

I. Summary:

SB 7006 is based on an Open Government Sunset Review of a public records exemption that is contained in the Florida False Claims Act. The exemption is scheduled for repeal on October 2, 2018.

The exemption places under seal and protects from public disclosure the legal complaint filed in circuit court by a private citizen who initiates a false claim proceeding. The exemption also protects from disclosure the detailed information and documents that the private citizen provides to the Department of Legal Affairs which support the claim that a violation of the act has occurred.

In addition to helping the state recover monies and property, the broader reasons for maintaining the exemption are to:

- Protect the identity of a person who initiates a false claim action, often an employee of a defendant, while the claim is being investigated;
- Allow the department to privately investigate the merits of the claim to determine if the government will intervene, decline, or dismiss the case before any evidence is destroyed or any information becomes public that could unnecessarily harm the business reputation of the defendant; and
- Maintain the confidentiality of state information that is similarly shielded under a federal public records exemption, which, if disclosed in Florida, would compromise the confidentiality of the federal investigation.

Additionally, maintaining the exemption encourages a private citizen to report fraud and facilitates the recovery of state funds and property that are taken by false claims or fraud.

For these reasons, the bill repeals the automatic repeal of the public records exemption.

The bill takes effect October 1, 2018.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “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.” Section 119.011(2), F.S., defines “agency” as “any 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects trade or business secrets.¹⁹

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²²

The Florida False Claims Act

Qui Tam Actions and the Relator

The Florida False Claims Act²³ authorizes two entities, either a private individual or the state,²⁴ to sue someone who allegedly files a false claim seeking payment or approval for payment from the state. The person who brings a false claims suit is referred to as the “relator.” The action filed by the relator on behalf of the state is referred to as a “qui tam” proceeding.²⁵ Relators are entitled to a significant share of the settlement or proceeds when a recovery is made against a defendant.

The relator does not need to demonstrate that he or she has been harmed by the violator’s actions to adequately state a cause of action. Quite often, the relator is aware of the false claim because he or she was employed by the defendant or has knowledge of industry standards that were violated.

Once the department receives the complaint and accompanying information as discussed below, the department may intervene, decline to intervene, dismiss the action, or settle the case while the information is under seal without making a decision to intervene.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Sections 68.081-68.092, F.S.

²⁴ For purposes of this act, the Department of Legal Affairs is authorized to bring an action, and in some limited circumstances, the Division of Financial Services may bring an action. See s. 68.083(1), (2), and (4), F.S.

²⁵ “Qui tam” is an abbreviated phrase from the larger Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*.” According to Black’s Law Dictionary, it means “who as well for the king as for himself sues in this matter.” A qui tam action is a statutory action that permits a private individual to sue for a penalty, which will be divided between the government or some other public institution and the person who initiates the suit. BLACK’S LAW DICTIONARY (10th ed. 2014).

Filings

All qui tam actions for the state are filed in the Circuit Court of the Second Judicial Circuit, Leon County.²⁶ According to the clerk of court, 37 qui tam cases have been filed in Leon County since June 2013. There were 21 qui tam cases pending as of September 2017.²⁷

Since the Legislature enacted the public records exemption for qui tam actions in 2013, the Department of Legal Affairs estimates that it intervened in 10-20 cases, dismissed a small number of cases, and settled a number of cases before announcing a decision to intervene. The department's most common response is to decline to intervene in a case, which occurs in approximately 90 percent of the cases. The department estimates that more than 400 active qui tam cases have been filed on behalf of the state and are pending in either the Second Judicial Circuit of Leon County or any of the federal district courts across the nation. Medicaid fraud cases represent approximately 95 percent of the Florida False Claims Act cases.²⁸ In non-Medicaid cases, Florida received \$38,087,788 under both the Florida and Federal False Claims Act between 2010 and 2016. This amount represents the total recovery before deductions were paid for the relator's share.²⁹

History

The Legislature enacted the Florida False Claims Act in 1994 and modeled it after the Federal Civil False Claims Act.³⁰ The Florida act has been amended several times, most recently in 2013, to closely follow the Federal False Claims Act. The federal law was first enacted in 1863, partially because of bad mules and putrid provisions. While the Civil War was being fought, nascent defense contractors "sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations and provisions among other unscrupulous actions."³¹ President Lincoln urged Congress to pass the earliest version of the federal false claim law, which became known as an "Informer's Law" or "Lincoln's Law" in an effort to prevent the Union Army from being defrauded.

Recoverable Awards, Costs, and Fees

At the core of the Florida Act is the relator's right to earn a substantial portion of the recovery against a defendant. This provides a relator tremendous financial incentive to report misconduct. It also provides the state an opportunity to be made whole when damaged by fraudulent actions it did not know were occurring.

²⁶ Section 68.083(3), F.S.

²⁷ Email from John Mickler, Office of Gwen Marshall, Clerk of the Circuit Court and Comptroller for Leon County, Florida, (Sept. 6, 2017) (on file with the Senate Committee on Judiciary).

²⁸ Email from the Department of Legal Affairs (Sept. 7, 2017) (on file with the Senate Committee on Judiciary).

²⁹ Department of Legal Affairs, *Non-Medicaid FFCA Recoveries, Before Relator's Share* (Aug. 2017) (on file with the Senate Committee on Judiciary).

³⁰ 31 U.S.C. ss. 3729-3733. According to the Department of Justice, the statute has been amended by Congress several times and has been interpreted by federal courts on hundreds of occasions. U.S. Department of Justice, *The False Claims Act: A Primer*, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last visited Nov. 15, 2017).

³¹ Larry D. Lahman, "Bad Mules: A Primer on the Federal False Claims Act", 76 Okla. B. J. 901, 901 (2005), available at <http://www.okbar.org/members/BarJournal/archive2005/Aprarchive05/obj7612fal.aspx> (last visited Nov. 15, 2017).

An individual who successfully brings an action is entitled to receive a portion of the proceeds or settlement of the claim. The relator will receive at least 15 percent, but no more than 25 percent, of the proceeds of the action or a settlement of the claim if the department proceeds with the action.³² A court may not award more than 10 percent of the proceeds if the action is based primarily upon publicly disclosed information.³³ If the department does not intervene and the relator proceeds alone, the relator may receive between 25 and 30 percent of the proceeds, as well as reasonable expenses incurred, plus reasonable attorney fees and costs. These amounts will be awarded against the defendant.³⁴ The awards might be substantial, but that is viewed as compensation to the relator who risks a job or possibly a career to bring a qui tam action.

In contrast, a violator is liable for a civil penalty of not less than \$5,500 and not more than \$11,000 and treble the amount of damages the state sustains because of the violator's actions.³⁵ Under limited circumstances, a court may reduce the damages to twice the amount of damages sustained by the state.³⁶ If the department does not intervene, the state files a notice of declination. At that point, the relator can then serve the complaint and proceed with an action and conduct discovery. If the defendant prevails, a court may award reasonable attorney fees and expenses if the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."³⁷ The state is not liable for those costs if it does not prevail.

It is not essential that a relator be involved in a case in order for the state to proceed with an investigation and a lawsuit under the Florida act.³⁸ However, an action is characterized as a qui tam proceeding only when a private individual, and not the state, files the complaint. The department is not required to investigate a violation but "may" diligently investigate a violation.³⁹

Pertinent Provisions

A person violates the Florida False Claims Act if he or she:

- Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made a false record or statement that is material to a false or fraudulent claim;
- Conspires to make a false claim;
- Possesses property or money to be used by the state and knowingly delivers or causes to be delivered less than the total property or money;
- Is authorized to make or deliver a document that certifies receipt of property for the state and with the intent to defraud the state, makes or delivers the receipt without knowledge that the information on the receipt is true;

³² Section 68.085(1)(a), F.S.

³³ Section 68.085(1)(b), F.S.

³⁴ Section 68.085(2), F.S.

³⁵ Section 68.082(2), F.S.

³⁶ Section 68.082(3), F.S.

³⁷ Section 68.086(2), F.S.

³⁸ Section 68.083(1), F.S.

³⁹ *Id.*

- Knowingly buys or receives, as a pledge or obligation of a debt, public property from an officer or employee of the state who may not sell or pledge the property; or
- Knowingly makes a false record or statement that is material to an obligation to pay the state or knowingly conceals or improperly avoids or decreases an obligation to pay or transmit money or property to the state.⁴⁰

Relevant Portions for Sunset Review Purposes

In 2013, the Legislature enacted a public records exemption relating to a qui tam action.⁴¹ Specifically:

Except as otherwise provided in this subsection, the complaint and information held by the department pursuant to an investigation of a violation of s. 68.082 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.⁴²

Accordingly, and for purposes of this sunset review, it is necessary to focus on the two areas that involve the confidential and exempt provision: first, the complaint that is filed by a private individual who initiates the lawsuit; and second, the information, or supporting evidence, held by the department during an investigation.

Complaint

When the relator files a complaint, the statute requires that it be identified as a qui tam action and be filed in the Circuit Court of the Second Judicial Circuit, in and for Leon County.⁴³ The seal provision applies only to complaints filed by private citizens in qui tam actions. The seal does not apply to a complaint filed by the Department of Legal Affairs or the Department of Financial Services. Once the complaint is filed, a copy of the complaint and any written disclosure of substantially all material evidence and information the relator possesses must be immediately served on the Attorney General and on the Chief Financial Officer. The Department of Legal Affairs, or in limited circumstances, the Department of Financial Services,⁴⁴ may elect to intervene and proceed with the action on behalf of the state within 60 days after it receives both the complaint and the material evidence and information.⁴⁵ The department also has the authority to voluntarily dismiss an action over the objections of the relator.⁴⁶

⁴⁰ Section 68.082(2), F.S.

⁴¹ Chapter 2013-105, L.O.F.

⁴² Section 68.083(8)(a), F.S.

⁴³ Section 68.083(3), F.S.

⁴⁴ The Department of Financial Services is authorized to take over a case when a person brings an action based upon the facts of a pending investigation conducted by the Department of Financial Services. When that happens, the Department of Financial Services must notify the Department of Legal Affairs in writing that it is conducting the investigation and will take over the action. This does not happen often. The Department of Legal Affairs is generally the “department” mentioned in this statute.

⁴⁵ Section 68.083(3), F.S.

⁴⁶ Section 68.084(2)(a), F.S.

While the Florida False Claims Act assumes that a complaint is filed under seal, there is no directive in the statute to do so. A later reference in the statute mentions a 60-day seal and assumes that a 60-day seal period has been authorized. In contrast, the federal act states that the complaint is filed in camera and will remain under seal for 60 days.⁴⁷ To remedy this situation, Judge Jonathan Sjostrum, Chief Judge of the Second Judicial Circuit, issued an administrative order in 2016 addressing and clarifying the initial state sealing. The administrative order provides that the clerk will seal the entire case file for 90 days. There is no need for an initial motion to seal the case file. If the Attorney General's Office does not request an extension of the seal within that 90-day period after the case is filed, the clerk will make public the entire case file unless the court has previously entered an order sealing all or part of the case file. If the Attorney General's Office files a timely motion to extend the seal period, the clerk will keep the entire file sealed pending the ruling on the motion. This complaint is placed under seal when it is filed.⁴⁸ If a false claim action is filed by the Attorney General or the Chief Financial Officer and no relator is involved, the complaint is not filed under seal.

Information

The "information held by the department pursuant to an investigation" refers to information held by the Department of Legal Affairs but not the Department of Financial Services.⁴⁹ The information is derived from two sources. The first source is the information or supporting documents that the relator's attorney serves on the department as proof of fraud. This is often referred to as a disclosure statement. The disclosure statement is a narrative detailing what the relator knows. In practical terms, it is a specific and particular road map full of information that the state may follow in establishing the government's case for fraud. Some examples include fraudulent billing records or inflated medical billing codes that are overstated in an effort to obtain a higher diagnosis code in order to receive greater reimbursement from Medicaid. The disclosure statement is not provided to the clerk when the complaint is filed.

The second source of material is the information discovered by the department during the course of its investigation. Only the Department of Legal Affairs may conduct discovery proceedings and the relator is not authorized to take discovery during the investigation by the department. Similarly, the authority to request an extension of the 90-day seal while pursuing an investigation is given to department, not the relator, although the relator may object.

Time Periods for Seal and Exemption

Qui tam actions are protected from public access as long as false claim violations are being investigated by the department to determine whether the state should intervene in the relator's case. During this period, the complaint is under seal and the information is confidential and exempt. At this point, the defendant should have no knowledge that it is being investigated for fraudulent behavior. As mentioned above, the Second Judicial Circuit administrative order provides that the complaint is initially under seal for 90 days. For good cause shown, the

⁴⁷ 31 U.S.C. 3730(b)(2).

⁴⁸ *In Re: Qui Tam Cases Under the Florida False Claims Act*, Admin. Order No. 2016-01 (Fla. 2nd Cir. Ct., Jan. 26, 2016) (on file with the Senate Committee on Judiciary).

⁴⁹ The Department of Financial Services relies on s. 17.0401, F.S., to maintain the confidentiality and exemptions for its work. When Medicaid fraud is being investigated, the Department of Legal Affairs relies on the confidential and exempt provisions found in s. 409.913(12), F.S.

department may request the court to extend the seal period. Extensions of the seal period are often requested by the department and granted by the court. The extensions are generally requested to grant the department additional time to investigate possible fraud charges.

Either the Department of Legal Affairs or the Department of Financial Services, whichever is appropriate, may elect to intervene and proceed with a suit on behalf of the state within 60 days after it receives the complaint and the material evidence and information.⁵⁰ Before the 60-day period or any extensions expire, the department must proceed with an action, which is conducted by the department on behalf of the state or notify the court that it declines to take over the action which allows the relator to conduct the action on behalf of the state.⁵¹ When the state chooses not to intervene, it is often because the evidence in the case is not strong enough, the existing workload and limited resources prevent it, or the amount of the recovery does not justify pursuing the case. As a practical matter, very few relators proceed of their own accord because the costs of conducting an investigation and underwriting an extensive lawsuit are prohibitive.

Information made confidential and exempt is no longer confidential and exempt after the investigation is complete unless the information is protected in some other way by a different statute. An investigation is considered complete and the information becomes public when the department files an action or closes its investigation without filing an action or the qui tam action is unsealed or voluntarily dismissed before it is unsealed.⁵²

Jurisdiction and Subject Matter Areas

While a few cases arise solely under the Florida False Claims Act and are filed in Leon County, the majority of cases are filed in federal district court and the Florida claim is a state pendent claim.⁵³ By adding the Florida count in the federal complaint, the relator is allowed to access money awarded to the state if a recovery is made.

Many false claim cases arise in the healthcare industry and involve Medicare and Medicaid fraud⁵⁴ as well as in the pharmaceutical industry. Other fraudulent schemes involve fraudulent billing, issues involving durable medical equipment, illegally marketing prescription drugs and kickbacks, defective testing, misrepresenting the value of imported goods for tariff purposes, inflated billing for work performed, failing to report known product defects, winning a contract by using kickbacks or bribes, and forging signatures.⁵⁵

⁵⁰ Section 68.083(3), F.S.

⁵¹ Section 68.083(6), F.S.

⁵² Section 68.083(8)(c) and (d), F.S.

⁵³ Black's Law Dictionary explains that "pendent jurisdiction" arises when a plaintiff brings a lawsuit in federal court and claims that the defendant, in a single transaction, violated both federal and state law. The federal court has jurisdiction over the federal claim but also has jurisdiction to hear the state claim that is pendent to the federal claim. But for the federal claim, the court would not have jurisdiction over the state claim. BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁴ The Department of Legal Affairs has a Medicaid Fraud Control Unit that exclusively investigates violations of the Medicaid statutes. The public records exemption for those investigations are controlled by a separate statute, s. 409.913(12), F.S. Similarly, when the Chief Financial Officer conducts an investigation of fraud allegations, the office also relies on a separate public records exemption to maintain the confidentiality of its work, s. 17.0401, F.S.

⁵⁵ Taxpayers Against Fraud, *What is the False Claims Act?* Available at https://taf.org/Resources_by_Topic/FAC_False_Claims_Act/Overview/Public/Resources_by_Topic/FCA_False_Claims_Act/Overview.aspx?hkey=661e1890-336d-42e9-bbb6-f4933a685435.

Staff Research of Practitioners and Interested Parties

In an effort to survey people for this report who have experience with these confidential and exempt qui tam provisions, staff contacted 22 individuals and organizations. Contacts included members of the Attorney General's office, the Chief Financial Officer's staff, Second Judicial Circuit judges, attorneys who litigate in this area and represent the relator or the defendant, a former U.S. Attorney, and several former assistant U.S. Attorneys who once litigated for the federal government but currently work in private practice representing relators and defendants.⁵⁶ Of that total, 14 supported continuing the exemption, 1 supported repeal, 1 judge was neutral due to a lack of experience, 1 organization was neutral, and 5 either expressed no opinion or did not respond.

Reasons Given for Continuing the Exemptions

The most common reasons given for continuing the exemption are that the exemption:

- Protects the identity of a person who reports a false claim, often an employee of a defendant, while the claim is being investigated.
- Encourages more relators to come forward with allegations of fraudulent conduct because they know that their identity is protected and their risk of retaliation from the defendant is reduced.
- Provides a financial incentive for people with unique inside knowledge of an industry to expose fraud and assist the state in recovering damages caused by a defendant.
- Delays service of process on a potential defendant during the seal period so that the defendant is not alerted to the allegations before a thorough investigation is conducted by the department.
- Avoids alerting the defendant that the department is conducting an investigation, thereby reducing the likelihood that the defendant will misplace or destroy incriminating evidence or flee the jurisdiction.
- Encourages witnesses to give full and accurate statements of their knowledge when given confidentiality.
- Allows the government to privately investigate the merits of a claim, without public pressure, before deciding whether to intervene or dismiss a case.
- Protects the reputation of a defendant while a claim is being investigated because there is no public accusation of wrongdoing and no public stigma that could negatively impact the defendant's business. Some have suggested that publicly disclosing that a defendant is being investigated often amounts to using the law as an economic weapon.
- Deters future misconduct by demonstrating that fraudulent behavior can be reported and cost the defendant thousands and even millions in fines and penalties.
- Maintains the reciprocal shield of federal and state public records exemptions which protects sensitive information from disclosure during an investigation.

According to several respondents, this last point is extremely important. If Florida's act did not have the two public records exemptions that the federal act contains, the federal government would not be inclined to permit the state to join in cases that involve violations of both federal

⁵⁶ It appears that the majority of Florida attorneys who represent relators in these actions reside in South Florida while a smaller number reside in central or north Florida.

and Florida law. While the federal exemptions would protect certain confidential information, the state would be compelled to turn over the state information if there were no seal or exemption. The information under federal seal would be breached and the investigation damaged. This would be harmful to a federal or multi-state investigation. Additionally, if Florida were not permitted to join in federal suits, Florida would not be allowed to share in the financial recovery, thereby potentially losing millions of dollars in revenue.

From a procedural standpoint, it is difficult to understand how the state statute would work in federal-state cases if only the federal information was protected but the state information was open for inspection. The disclosure of state information would negatively affect the federal claims. Repealing the Florida public records exemption would likely render state-federal cooperation impossible. The situation would be equally complicated if other states were joined in a lawsuit and those states had confidentiality provisions. To repeal the Florida public records exemption would make information that is confidential in other states available to the public in this state.

Reason Given for Repealing the Exemptions

The survey respondent who supports repealing the public records exemption stated that the exemption places the defendant at a distinct disadvantage. While the state may spend months secretly investigating a claim and gathering evidence, the defendant is unaware that a legal action is being prepared against it. This secrecy is disconcerting to a defense lawyer. It is then an uphill battle for the defendant to gather information and gain equal footing with the state.

The respondent said that it would seem a fair balance to allow the defendant to be made aware of the proceedings when the complaint is filed under seal and the claim is being investigated. This would put the parties on equal terms and allow an exchange of information while an investigation is occurring. The playing field would then be level.

Conclusion and Recommendation

Based upon a review of this public records exemption under the Open Government Sunset Review Act and discussions with interested parties and offices, the professional staff of the Judiciary Committee recommends that the Legislature retain the public records exemption established in s. 68.083(8)(a), F.S. It is in the state's best interests to continue the exemption to encourage private citizens to report fraud and facilitate the recovery of state funds or property. The exemption protects the identity of the relator and preserves the integrity of the false claims investigation while the facts are being reviewed by the department. Maintaining the exemption also keeps Florida law consistent with the confidentiality provisions of the Federal False Claims Act.

If this exemption is not reenacted, information would be disclosed which would jeopardize the state's ability to investigate false claims against the state. The identities of both the relator who brings the suit and the defendant who is being investigated would be revealed.

Finally, this public records exemption is narrowly tailored and sufficiently limited in its duration to meet the state's interest. The seal period is not indefinite. Under the judicial administrative order mentioned earlier, the initial seal period is 90 days and can be extended only by an order of

the court. When the Department of Legal Affairs notifies the court of its decision to intervene or decline, the clerk of the court will make the entire file public.

III. Effect of Proposed Changes:

This bill is based on an Open Government Sunset Review of a public records exemption that is contained in the Florida False Claims Act. The exemption is scheduled for repeal on October 2, 2018.

The exemption places under seal and protects from public disclosure the legal complaint filed in circuit court by a private citizen who initiates a false claim proceeding. The exemption also protects from disclosure the detailed information and documents that the private citizen provides to the Department of Legal Affairs which support the claim that a violation of the act has occurred.

The reasons provided as justification for the public records exemption remain valid. Therefore, the bill removes the scheduled repeal of the public records exemption. By repealing the automatic repeal of the exemption, the exemption is no longer subject to a review under the Open Government Sunset Review Act, unless the exemption is broadened or expanded.

The bill takes effect October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill, by preserving the public records exemption, will continue to protect the identity of relators who seek to recover state funds or property under the Florida False Claims Act. This protection appears to be a key financial feature that encourages relators to file suits.

C. **Government Sector Impact:**

By preserving the public records exemption and protecting the identity of relators, the state will continue to recover funds or property under the Florida False Claims Act. If the exemption were not continued, the state might recover less money.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 68.083, Florida Statutes.

IX. Additional Information:

A. **Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.