
SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 3, 1998

Revised: 4/4/98 _____

Subject: Confidentiality of Public Records for the Department of Labor and Employment Security

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/1 amendment</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Under Art.I, s.24 of the State Constitution, and ch. 119, F.S., the Public Records Law, records of public bodies are open to the public unless made exempt. Committee Substitute for Senate Bill 1408 exempts investigatory records of the Division of Workers' Compensation, Department of Labor and Employment Security, which are received from employers pursuant to its authority to enter work sites and inspect business records to ascertain compliance with workers' compensation coverage requirements, as provided by CS/SB 1406. The committee substitute provides that the investigation or business records become public and are disclosed when the division's investigation is completed or ceases to be active. Under limited circumstances, certain business records remain confidential. This public records exemption provision is similar to current law for other state agencies which obtain records through their compliance-type activities, such as the Department of Insurance and the Agency for Health Care Administration.

This committee substitute takes effect on the effective date of Senate Bill 1406, or similar legislation relating to the powers of the Division of Workers' Compensation. That bill provides specific authority to the Division to enter work sites and inspect business records to ascertain employer compliance with the workers' compensation coverage requirements. This committee substitute further provides a public necessity statement for the exemption, as is required by Article I, s. 24 of the State Constitution, and the exemption is made subject to the Open Government Sunset Review Act of 1995 and is repealed, subject to prior legislative review and reenactment, on October 2, 2003.

This bill creates section 440.108 of the Florida Statutes.

II. Present Situation:

A. Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.¹ In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the State Constitution, provides:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. 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 Law² specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The Public Records Law states that, unless specifically exempted, all agency³ records are to be available for public inspection. The term “public record” is broadly defined 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.⁴

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 used to perpetuate, communicate or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

¹Section 1, ch. 5942 (1909).

²Chapter 119, F.S.

³The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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.”

⁴Section 119.011(1), F.S.

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So.2d 420 (1979).

Exemptions to s. 24, Art. I of the State Constitution and the Public Records Law are permitted. Article I, s. 24(c), of the State Constitution, requires:

1. The Legislature to create exemptions in general law;
2. A law creating an exemption to specifically state the public necessity justifying the exemption; and
3. That an exemption be no broader than necessary to accomplish the stated purpose of the law.⁷

Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸

Section 119.15, F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. 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

⁷Section 119.15, F.S., provides that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption: (a) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; (b) 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 their safety; or (c) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that 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.

⁸Article I, s. 24(c), of the State Constitution.

not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

B. Workers' Compensation Insurance

Under chapter 440, F.S., all public and private employers and employees, unless specifically exempted, must be covered for workers' compensation insurance. The Division of Workers' Compensation within the Department of Labor and Employment Security is responsible for ensuring that employers comply with the mandate of providing coverage for both themselves and their employees. Currently, s. 440.107, F.S., authorizes the division to issue stop-work orders and issue civil penalties for employers who do not comply with the insurance requirements. Division investigators visit job sites to determine compliance with the law and often must review work or business records. However, express statutory authority to enter workplaces, to inspect and copy records, and to issue subpoenas is not currently provided. A separate bill, Committee Substitute for Senate Bill 1406, provides such express authority.

III. Effect of Proposed Changes:

Section 1. Creates s. 440.108, F.S., to provide that investigatory records of the Division of Workers' Compensation which are obtained from businesses pursuant to the division's compliance activities under s. 440.107, F.S., (as amended by CS/SB 1406) and any records necessary to complete an investigation are confidential and exempt from the public records requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. (See Related Issues, below.) The investigatory or business records become public and are disclosed when the division's investigation is completed or ceases to be active. An investigation is considered to be active while such investigation is being conducted by the division with a reasonable, good faith belief that it may lead to the filing of administrative, civil or criminal proceedings.

Under the committee substitute, certain records remain confidential. Specifically, records that:

- (a) Jeopardize the integrity of another active investigation;
- (b) Reveal a trade secret, as defined by s. 688.002, F.S.;⁹
- (c) Reveal business or personal financial information;
- (d) Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or
- (e) Reveal investigative techniques or procedures.

⁹Section 688.002(4), F.S., defines the term "trade secret" to mean: information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The exemption created by the bill would be repealed on October 2, 2003, subject to prior legislative review, in accordance with s. 119.15, F.S., the Open Government Sunset Review Act of 1995.

Section 2. The Legislative findings provided in the bill state that it is a public necessity that these investigatory records be held confidential and exempt during an investigation in order not to compromise the investigation and disseminate potentially inaccurate information. Additionally, revealing such information would impede the effective and efficient operation of investigatory governmental functions.

Section 3. The bill takes effect on the effective date of SB 1406, or similar legislation relating to the powers of the Division of Workers' Compensation. Pursuant to the provisions of the Public Records Act, this bill (CS/SB 1408) contains only the exemption provisions and does not contain other substantive provisions. Committee Substitute for Senate Bill 1406 contains the substantive provisions which relate to the powers of the Division of Workers' Compensation to enter work sites and inspect business records to ensure compliance with the workers' compensation laws.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill provides for a public records exemption relating to employer or investigatory records under chapter 440, F.S. Since this bill relates only to an exemption, it complies with the requirements of s. 24, Art. I, of the State Constitution.

A statement of public necessity justifying the exemption is included in **Section 2** of the bill. The statement provides that it is a public necessity that investigatory and examination records be held confidential and exempt *during an investigation* in order not to compromise the investigation and disseminate potentially inaccurate information. The committee substitute states that if this information were made available to the public, the person under investigation could receive the case file, possibly defeat the purpose of the investigation, and impede the effective and efficient operation of investigatory governmental functions.

The committee substitute, however, also provides that some records are exempt *after the investigation* is closed. Trade secrets, personal financial and business information, for example, are kept confidential. The statement of public necessity does not reflect a reason for keep this type of information exempt.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The statement of public necessity should be amended to state why certain records are kept exempt after the investigation is closed. As currently drafted, the statement only refers to records that are kept confidential during the investigation.

VII. Related Issues:

This bill is linked to Committee Substitute for Senate Bill 1406 which provides specific authority for the Division of Workers' Compensation to enter work sites, inspect and copy records, and to issue subpoenas regarding compliance with maintaining workers' compensation coverage.

VIII. Amendments:

#1 by Governmental Reform and Oversight:

Adds language to the statement of public necessity that explains the reasons for keeping some information exempt after the investigation is closed.