

STORAGE NAME: h2153a.go

DATE: April 15, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 2153

RELATING TO: Public Records and Meetings/School Boards

SPONSOR(S): Representative Barreiro

COMPANION BILL(S): SB 2036 (similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
 - (2) COMMUNITY AFFAIRS
 - (3) JUDICIARY
 - (4)
 - (5)
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I. SUMMARY:

HB 2153 provides that certain records and meetings of school board officials relating to the purchase and sale of real property be exempt from the public records and public meetings laws. The bill permits the board, superintendent and appropriate staff to meet in executive session to discuss pending negotiations under certain conditions.

The bill provides a statement of public necessity, as required by Sec. 24 (c), Art. I, Florida Constitution.

The bill has an effective date of July 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Public Records Law

Article I, section 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records. This section provides that:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, section 24, Florida Constitution, also provides that the Legislature may, by general law, exempt public records from the requirements of section 24(a). Such a general law exempting records from public disclosure must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, F.S., provides:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, states that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to meet that public purpose. 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 that such purpose 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 information 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 not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Exemptions are analyzed using the following definition of public necessity: A public necessity justifying an exemption exists when, after considering the public good served by access to the record or meeting and the public or private harm that could be caused by allowing or denying access to the record or meeting, it is determined that the presumption in favor of open records and meetings is overcome because the public's interests are best served by denying access in whole or in part to the record or meeting; and, access is denied to as little of the record or meeting as is practicable.

Public Meetings Law

Article I, section 24(b), Florida Constitution, expresses Florida's public policy regarding access to public meetings. This section provides that:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public....

Article I, section 24(c), Florida Constitution, also provides that the Legislature may, by general law, exempt meetings from the open meetings requirement set forth in section 24(b) if such law states with specificity the public necessity justifying the exemption and the exemption is no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding public meetings is also addressed in the Florida Statutes. Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority or any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, as discussed above regarding public records exemptions, is equally applicable to public meetings exemptions.

B. EFFECT OF PROPOSED CHANGES:

HB 2153 provides that certain records and meetings of school board officials relating to the purchase and sale of real property be exempt from the public records and public meetings laws. The bill permits the board, superintendent and appropriate staff to meet in executive session to discuss pending negotiations under certain conditions.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

Yes. Individuals would no longer have access to the records and meetings of certain school board actions regarding the purchase of real property.

b. If an agency or program is eliminated or reduced:

The bill does not eliminate or reduce an agency of program.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Yes. Individuals would no longer have access to the records and meetings of certain school board actions regarding the purchase of real property.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Yes. School Boards are required to record and transcribe the entire conversation of the executive session, and to file a summary with the clerk.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. By exempting certain public records and public meetings from Government in the Sunshine, school boards will be able to more efficiently and economically negotiate for the purchase of real property.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. Individuals would no longer have access to the records and meetings of certain school board actions regarding the purchase of real property.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends section 235.054, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends an existing public record exemption for every appraisal, offer and counteroffer held by a school board which is seeking to purchase property for educational purposes. Allows the records to become public after a contract is presented to the board for approval at a public meeting, instead of after an option contract is executed or 30 days before a contract for sale is considered by the board.

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Provides a public meeting exemption for an executive session of the school board, superintendent, and appropriate staff to discuss pending negotiations concerning the proposed purchase of real property under certain circumstances:

- The subject matter of the executive session must be confined to the purchase and related strategy.
- The board must give reasonable notice of the time and place of the meeting.
- The session must be recorded, including the times of commencement and termination, names of all present and names of all speaking; and a summary of the record must be transcribed and filed with the clerk within a reasonable time.

Provides that the summary is not exempt from public records laws.

Provides that this section shall be repealed on July 1, 2004, (in accordance with the Open Government Sunset Review Act of 1995, unless reviewed and reenacted by the Legislature).

Section 2: Provides a statement of public necessity for the exemptions which relate to the prevention of inflated pricing of the land and the avoidance of an unfair bargaining position.

Section 3: Provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

School boards will tend to pay less for the real property they purchase than if the executive sessions were public.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to expend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenue.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Section I of the bill deletes language which causes a public record exemption for appraisals, offers and counteroffers to expire 30 days after the termination of negotiations. Florida courts have frowned on such open-ended exemptions where no public policy justifies it. In 1997, the Fifth District Court of Appeal, in *Halifax Hospital Medical Center v. News-Journal Corp.*, 701 So.2d 434, (Fla. 5th DCA 1997), held the public meetings exemption in s. 395.3035(4), F.S., pertaining to discussions of "strategic plans", violative of Fla. Const., Art. I, sec. 24, which requires that an exemption be no broader than necessary to accomplish its stated purpose. Because "strategic plans" was not a defined term, the court determined that it could include more than was necessary to be kept confidential. More particularly, the Fifth District's rationale for holding the public meetings exemption unconstitutional was that the scope of the exemption, as well as the exemption's duration, was overly broad. The court stated:

There is no definition of, and therefore no limitation on, what can be included in a strategic plan. * * * In order to comply with the limitations imposed by the constitution, at the very least the term "strategic plan" must be defined. It is not. Further, there appears no justification for an arbitrary three year duration for the secrecy to continue [that is the three years that the transcript of a closed meeting must be held confidential before it can be released to the public].

On January 21, 1999, the Florida Supreme Court affirmed the decision of the Fifth DCA for the reasons cited above. See *Halifax Hospital Medical Center v. News-Journal Corp.*, (Fla., No. 92047, Jan. 21, 1999). Regarding a possible judicial construction which would narrow the term "strategic plan," the court wrote that it "cannot move into the legislature's province by making the factual determination that would bring this statutory exemption within constitutional boundaries. * * * The task of enacting a more limited statutory exemption appropriately belongs to the legislature in this case." Id.

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In addition, courts have frowned on the inclusion of persons in these "shade meetings" who are not specifically listed in the statutory exemption. The phrase "and appropriate staff" may cause a court to rule the exemption invalid as constitutionally overbroad for not defining the qualified persons with more specificity. See *Zorc v. City of Vero Beach*, 23 Fla. L. Weekly D26222 (4th DCA 1998); *School Board of Duval County v. Florida Publishing Co.*, 670 So.2d 99 (Fla. 1st DCA 1996); AGO 98-06 (1998); and AGO 95-06 (1995).

Article 1, s. 24(c), Fla. Const., provides that laws creating public record and public meeting exemptions shall relate to one subject. Since the bill makes only modest changes to an existing public record exemption in s. 235.054, F.S., such changes would not need to be in a separate bill. Even if the bill created a separate public record exemption, both the public record exemption and the public meeting exemption relate to the same subject -- executive sessions of school boards discussing the purchase of real estate.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 14, 1999, the Committee on Governmental Operations adopted two amendments, which will travel with the bill. The first keeps the current language regarding the expiration of the public record exemption 30 days after the end of negotiations, when the exemption is no longer needed. The second makes more specific the types of persons who can join the school board and superintendent in a "shade meeting" -- so that only those who have some real knowledge or expertise can attend.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

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