

STORAGE NAME: h1565.ccc.doc

DATE: April 16, 2001

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS**

BILL #: HB 1565

RELATING TO: Public Records/Archaeological/Culture

SPONSOR(S): Representative(s) Hogan

TIED BILL(S): None

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

- (1) TOURISM YEAS 5 NAYS 0
- (2) STATE ADMINISTRATION YEAS 4 NAYS 0
- (3) COUNCIL FOR COMPETITIVE COMMERCE
- (4)
- (5)

I. SUMMARY:

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

House Bill 1565 provides an exemption from the public records law for information contained in site files or other records maintained by the Division of Historical Resources of the Department of State concerning location of archaeological sites, if the division finds that release of such information creates a substantial risk of the sites being harmed or destroyed. The exemption is to expire on October 2, 2006, unless reviewed and reenacted by the Legislature.

Although the exemption is narrowly drawn for archaeological sites, the public necessity statement as written does not conform to the exemption but refers both to an exemption of information identifying the location of archaeological sites and of cultural sites.

The bill does not appear to have a fiscal impact on state or local governments.

On April 4, 2001, the Committee on Tourism passed an amendment to address the inconsistency between the exemption and the public necessity statement. See "Amendments Or Committee Substitutes" section for a more detailed explanation of the amendment.

On April 12, 2001, the Committee on State Administration reported HB 1565 favorably with a strike-all amendment traveling with the bill. It incorporated the Tourism Committee amendment and removes all references to confidentiality, thereby making the exemption and the public necessity statement conform.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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, s. 24(c), Florida Constitutions, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., 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 the official business by any agency.

This definition of "public records" has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business that are used to perpetuate, communicate, or formalize knowledge (*Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form (*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)).

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides in paragraph (4)(b) 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 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.

Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

Law Governing Archaeological Sites -- Department of State, Division of Historical Resources

Responsibilities & Duties – Historic Preservation

In the area of historic preservation, which includes archaeological sites, the responsibilities, duties and policies of the state, Department of State, and its Division of Historical Resources, are primarily governed by Chapter 267, F.S., and the National Historic Preservation Act of 1966, as amended.

Although there are specific provisions relating to only archaeological sites and the activities engaged in and the objects found at those sites, most of the law refers to terms such as "historic

property or resource" and *"preservation or historic preservation"*. Florida law includes the language of the federal law but is more descriptive. The definitions in s. 267.021, F.S., are included below so that when these terms are used, the broad context is understood.

(3) *"Historic property" or "historic resource"* means any prehistoric or historic district, site, building, object, or other real or personal property of historical, architectural, or archaeological value, and folklife resources. These properties or resources may include, but are not limited to, monuments, memorials, Indian habitations, ceremonial sites, abandoned settlements, sunken or abandoned ships, engineering works, treasure trove, artifacts, or other objects with intrinsic historical or archaeological value, or any part thereof, relating to the history, government, and culture of the state.

(4) *"Preservation" or "historic preservation"* means the identification, evaluation, recordation, documentation, analysis, recovery, interpretation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, or reconstruction of historic properties.

Under Chapter 267, F.S., the Division of Historical Resource of the Department of State is charged with encouraging identification, evaluation, protection, preservation, collection, conservation, and interpretation of and public access to information about Florida's historic sites, properties, and objects related to Florida history and to archaeological and folk cultural heritage. The division administers public information programs, the statewide historic preservation plan, the operation of historic sites and properties, and state and federal grants for historic preservation. Its duties also include the maintenance and operation of Florida's state historic museums, promotion, and administration of the Florida Folklife Program, and administration of various archaeological research and preservation programs. To accomplish this the division is divided into three major categories: Archaeological Research, Historic Museums, and Historic Preservation.

Many of the division's responsibilities regarding the area of archaeology are included in s. 267.061, F.S., including specific requirements to do the following:

- Cooperate with federal and state agencies, local governments, and private organizations and individuals to direct and conduct a comprehensive statewide survey of historic resources and to maintain an inventory of such resources;
- Advise and assist, as appropriate, federal and state agencies and local governments in carrying out their historic preservation responsibilities and programs;
- Carry out on behalf of the state the programs of the National Historic Preservation Act of 1966, as amended, and to establish, maintain, and administer a state historic preservation program meeting the requirements of an approved program and fulfilling the responsibilities of state historic preservation programs as provided in subsection 101(b) of that act;
- Take such other actions necessary or appropriate to locate, acquire, protect, preserve, operate, interpret, and promote the location, acquisition, protection, preservation, operation, and interpretation of historic resources to foster an appreciation of Florida history and culture;
- Acquire, maintain, preserve, interpret, exhibit, and make available for study objects that have intrinsic historical or archaeological value relating to the history, government, or culture of the state. Such objects may include tangible personal property of historical or archaeological value. Objects acquired under this paragraph belong to the state, and title to such objects is vested in the division; and
- Establish and maintain a central inventory of historic properties for the state that shall consist of all such properties as may be reported to the division. This inventory shall be known as the Florida Master Site File.

Sections 267.11, 267.12, 267.13, and 267.14, F.S., set forth requirements for designation for archaeological sites, for issuance of permits for excavation and surface reconnaissance and for procedures to be followed in such activities, prohibited acts and penalties, and legislative intent regarding field investigations on private property.

To assist the division in its responsibilities in the area of archeology, s. 267.061(4), F.S., requires the division director to hire a State Archaeologist and other archaeologists as needed to fulfill the requirements of the state and federal laws. Additionally, one of the division's three bureaus is dedicated to the area of archaeology, the Bureau of Archeological Research. The bureau plans, directs, and coordinates research and surveys of archaeological sites throughout Florida and underwater sites on the state-owned submerged lands; issues permits for excavations and surveys on public land; and maintains a computerized inventory of reported archaeological and historical sites.

Florida Master Site File

The Florida Master Site File (File) is a central inventory of historic properties reported to the Division of Historical Resources. This includes paper and computer records as well as a geographic information system. The File currently contains about 120,000 sites and increases by several thousand each year. About 80% of the sites are historical and 20% are archaeological. Most of the sites are in private ownership. The File provides entities with essential information for providing historic preservation services and ensuring the protection of threatened historic properties. Authorization for the File is found in ss. 261.061(3)-(5) and 267.031(2) and (3), F.S. The File also fulfills federal requirements of the National Historic Preservation Act of 1966, as amended.

State Policy Relative to Historic Properties

In s. 267.061(1), F.S., the public policy of the state regarding historic preservation is outlined to include the following:

- Provide leadership in the preservation of the state's historic resources;
- Administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship;
- Contribute to the preservation of non-state-owned historic resources and to give encouragement to organizations and individuals undertaking preservation by private means;
- Foster conditions, using measures that include financial and technical assistance, for a harmonious coexistence of society and state historic resources;
- Encourage the public and private preservation and utilization of elements of the state's historically built environment;
- Assist local governments to expand and accelerate their historic preservation programs and activities; and
- Require that all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Historical Resources of the Department of State for the purposes of administration and protection.

Federal Law Requirements

Not only are Florida's historic preservation initiatives governed by state law but also by the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470). The federal law sets forth the

requirements for state historic preservation programs, both structure and responsibilities. It also provides for both direct grants and for matching grants to the states with funds appropriated annually by Congress. A state historic preservation program must be approved by the Secretary of the Interior. One requirement of the program is the designation of a State Historic Preservation Officer by the Governor to administer the programs for the state.

Section 101 of the Act sets forth the responsibilities of the State Historic Preservation Officer that are mirrored in s. 267.061(3), F.S., as well as other sections of ch. 267, F.S. One of the requirements is the maintenance of historical and archaeological databases. In section 101(3)(l)(ii) and (j), federal law specifically states that the State Historic Preservation Officer is required to consult with the appropriate federal agencies in accordance with this Act on federal undertakings that may affect historical properties and the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties.

Also, section 106 of the Act requires site-specific information sharing between federal agencies and the State Historic Preservation Officer.

Finally, section 304 of the Act authorizes the head of a federal agency or other public official receiving grant assistance pursuant to the Act, after consultation with the Secretary of the Interior, to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may cause a significant invasion of privacy, risk harm to the historic resource, or impede the use of a traditional religious site by practitioners. Provisions are outlined for what persons may access the information and for what purposes.

Problems Identified by Archaeological Law Enforcement Task Force

In 2000, the Florida Secretary of State established the Archaeological Law Enforcement Task Force to examine the preservation protection needs in the area of archaeological sites, including the protection of objects found at such sites and determine how best to address looting and vandalism of such sites.

During these discussions, it was determined that thirty-five states have protective clauses or exemptions relating to cultural resource site locations. Florida and Alabama are the only two states in the Southeast not providing such an exemption. According to counsel of the Department of State, who participates on the Task Force, it is not known how many other states have rules or regulations providing or have court decisions requiring such an exemption.

One of the issues identified for action by the Task Force is outlined by Ms. Marsha Kearney, Forest Supervisor, US Forest Service in Florida, Task Force member, in a letter to Secretary Harris in which she expressed her office's desire to better protect sites from vandalism and looting. She stated that her agency is concerned with the lack of "protective clauses or exemptions for sensitive archaeological site location information in the Florida Sunshine Law." The lack of such puts them in a precarious situation regarding compliance with the National Historic Preservation Act which both requires them to share information concerning historic and archaeological sites with the State Historic Information Officer and to protect specific information when sharing that information could place the sites in jeopardy.

According to Ms. Kearney, the Task Force, and the Department of State, two recent developments accentuate the urgency of this issue:

1. The development of GIS databases listing sites located in the Florida Master Site File which is a valuable tool for recording site location and survey data for valid researchers, land use planning, and site stewardship by land managers and law enforcement but which provides

quick dissemination of information to the general public over the internet if protections are not provided for the sharing of the information.

2. The new implementation guidelines for the National Historic Preservation Act require increased consultation with federally recognized Tribes. Managing information about Native American sacred sites and sites of cultural patrimony comes with a responsibility of confidentiality. Credibility of stewards of these areas is crucial and relies upon the ability to protect sensitive information from public dissemination.

C. EFFECT OF PROPOSED CHANGES:

House Bill 1565 provides an exemption from the public records law for information contained in site files or other records maintained by the Division of Historical Resources concerning location of archaeological sites, if the division finds that release of such information creates a substantial risk of the sites being harmed or destroyed. The exemption is to expire on October 2, 2006, unless reviewed and reenacted by the Legislature.

Persons affected by the exemption justify its need by stating that the exemption allows the state or its political subdivisions, as well as affected federal agencies in the state, to effectively and efficiently administer their responsibilities under state and federal laws and regulations regarding protection of archaeological sites. Without this exemption they contend that their ability to administer the laws will be significantly impaired and that irreplaceable artifacts and knowledge of the history of the state will be lost to its citizens.

Specifically, in the public necessity statement the reasons provided for the exemption are as follows:

- The state has a serious problem with archaeological looting; therefore, archaeological site location information should be exempt unless the Division of Historical Resources determines that disclosure will not create a substantial risk of harm, theft, or destruction at the site.
- The lack of protection for sensitive sites puts the federal government in a difficult position since federal law requires them to share site-specific information with the state but also requires the protection of information if such sites would be placed at risk.
- The development of Geographic Information System databases listing sites located in the Florida Master Site File maintained by the Department of State places sensitive data on sites on the internet and easily accessible by the public at large and, therefore, at greater risk of harm.
- Credible stewardship in managing information concerning Native American sacred sites and sites of cultural patrimony requires the ability to protect sensitive information from public dissemination. This is heightened by new implementation guidelines for the National Historic Preservation Act of 1966, as amended.

Although the exemption is narrowly drawn for archaeological sites, the public necessity statement as written does not conform to the exemption but refers both to an exemption of information identifying the location of archaeological sites and of cultural sites.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Committee on Tourism

As stated earlier, although the exemption is for archaeological sites, the public necessity statement as written refers not only to archaeological sites but also to cultural sites. In addition, the references to the National Historic Preservation Act and the Florida Site File are incorrect. The proper titles are the National Historic Preservation Act of 1966, as amended and the Florida Master Site File. Finally, on page 2, line 18 the word "in" appears to be missing after the word "participating".

Committee on State Administration

This bill raises a few concerns. The public necessity statement finds that any information identifying the location of archaeological sites contained in site files or other records maintained by the Division of Historical Resources, of the Department of State, be made both *confidential* and exempt, whereas the bill only makes the record *exempt* from public disclosure. The exemption states that the disclosure of such information would create a substantial risk of destruction or harm, whereas the public necessity statement finds that disclosure of such information would create a substantial risk of harm, *theft*, or destruction at the site. Finally, the public necessity statement contains certain unclear language.

The sponsor has filed a strike-everything amendment that appears to address these concerns.

VI. **AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

On April 4, 2001, the Committee on Tourism passed HB 1565 as favorable with one amendment. The amendment amends the public necessity statement in Section 2 of the bill to do the following:

1. Remove the reference to exemption of information on location of cultural sites in subsection (1) to conform the public necessity statement with the exemption which is limited to archaeological sites and removes another reference to cultural locations in subsection (3);
2. Clarify in subsection (2) on page 2, lines 10 and 11 that the term "cultural "resources used in the National Historic Preservation Act of 1966, as amended, includes archaeological sites;
3. Make three technical changes: change the references to the "National Historic Preservation Act" to the "National Historic Preservation Act of 1966, as amended"; change the reference to the "Florida Site File" to the "Florida Master Site File"; and add the word "in" on page 2, line 18 in between the words "participating" and "research".

The amendment also corrects the title to reflect that the public records exemption is for information identifying the location of specified archaeological sites and not to both archaeological and cultural sites.

On April 12, 2001, the Committee on State Administration adopted a strike-everything amendment to HB 1565. The traveling amendment by the Committee on Tourism is incorporated into the strike-everything amendment. The strike-everything amendment removes all references to confidentiality, thereby making the exemption and the public necessity statement conform. (The records are made "exempt" not "confidential and exempt.") In addition, the amendment removes certain unclear language in the public necessity statement. The committee reported the bill favorably, with one amendment.

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VII. SIGNATURES:

COMMITTEE ON TOURISM:

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Staff Director:

Judy C. McDonald

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