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****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2002-61, Laws of Florida

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
FINAL ANALYSIS**

BILL #: HB 287 (PCB SA 02-09)
RELATING TO: Public Records and Meetings Exemptions
SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S):

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

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
- (2) SMARTER GOVERNMENT COUNCIL YEAS 11 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

On April 22, 2002, HB 287 was approved by the Governor and became law as Chapter 2002-61, Laws of Florida (act). The effective date of this act is October 1, 2002.

The Open Government Sunset Review Act of 1995 (OGSRA) 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. The OGSRA, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 943.031(7), F.S., was certified by the Division of Statutory Revision for repeal on October 2, 2002, unless otherwise reenacted by the Legislature. The section provides a public meeting exemption for any portion of a Florida Violent Crime and Drug Control Council meeting wherein active criminal investigative information or active criminal intelligence information is discussed. Also, a tape recording of, and any minutes and notes generated during the closed portion of a council meeting are confidential and exempt from public disclosure until such time as the criminal investigative or criminal intelligence information ceases to be active.

This act reenacts the public records and public meetings exemptions. The act also eliminates duplicative language and removes the sentence that requires repeal of the exemptions.

This act does not appear to have a fiscal impact on state or local governments.

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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 and Public Meetings Laws

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.

In regard to public meetings, Article I, s. 24(b), Florida Constitution, provides that

[a]ll 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, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records and meetings 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.

Article 1, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

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.

With regard to public meetings, section 286.011, F.S., provides that

[a]ll 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.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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 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, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or “substantial amendment”¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.²

Section 943.031, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.³ Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.⁴

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption can be in a separate bill.⁵

Florida Violent Crime and Drug Control Council

The Florida Violent Crime and Drug Control Council (council) was created within the Department of Law Enforcement (FDLE) and serves in an advisory capacity to FDLE. The council was created based on a need to “develop and implement a statewide strategy to address violent criminal activity and drug control efforts by state and local law enforcement agencies.”⁶ The council consists of 14 members⁷ who serve without compensation.⁸ The council must report annually on its activities to the executive director, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the Senate and House committees having principal jurisdiction over criminal law.⁹

¹ An exemption is “substantially amended” if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

² See s. 119.15(3)(d), F.S.

³ The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

⁴ Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

⁵ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

⁶ Section 943.031, F.S.

⁷ See s. 943.031(1), F.S.

⁸ See s. 943.031(2)(d), F.S.

⁹ See s. 943.031(5), F.S.

Section 943.031(7), F.S.

Section 943.031(7), F.S., provides a public records and public meetings exemption for the council.¹⁰ This section provides a public meetings exemption for meetings wherein active criminal investigative information¹¹ or active criminal intelligence information¹² is discussed. Such information contains details regarding an ongoing homicide investigation, clues found at the homicide scene, possible location of suspects, or information that could identify a person in the victim / witness protection program.¹³ Additionally, this section provides a public records exemption for a tape recording of, and any minutes and notes generated during the closed portion of a council meeting.

The primary reason for the public records and public meetings exemptions contained in s. 943.031(7), F.S., is “to protect the compromise of active criminal investigations and protect active criminal intelligence, as well as protecting victims and witnesses who are under ‘witness protection.’”¹⁴

Open Government Sunset Review Questionnaire

The Florida House of Representatives Committee on State Administration developed an Open Government Sunset Review Questionnaire (questionnaire). The questionnaire was mailed to FDLE. The Assistant General Counsel for FDLE completed the survey on July 10, 2001. When asked if FDLE supported the reenactment of the exemptions found in s. 943.031, F.S., FDLE’s response was “The Florida Department of Law Enforcement strongly supports the reenactment of the exemptions.” FDLE further supported their position by stating:

The exemption provides a necessary and important means of denying access to specified records. The public release of such records could compromise active criminal investigations and could also be of severe consequences to the affected victims, witnesses, and family members.

Further, with the new role of the Council in funding proposed drug investigations, it is essential that the documents and information received by the Council relating proposals (that if funded will become investigations) remain confidential –for obvious reasons!

Information relevant to the funding decisions made by the Council would not be made available to the Council without the current exemptions provided for in the law. The Council could not fulfill its statutory missions.

¹⁰ The public records and public meetings exemptions for the council were created in chapter 97-73, Laws of Florida (L.O.F.).

¹¹ Section 943.045(6), F.S., defines “criminal investigative information” as “information about an identifiable person or group, compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific criminal act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators, informants, or any type of surveillance.”

¹² Section 943.045(5), F.S., defines “criminal intelligence information” as “information about an identifiable person or group in an effort to anticipate, prevent, or monitor possible criminal activity.”

¹³ See House Committee on State Administration Open Government Sunset Review Questionnaire, Response by James D. Martin, Assistant General Counsel, FDLE, July 10, 2001.

¹⁴ *Id* at 7.

C. EFFECT OF PROPOSED CHANGES:

This act reenacts the public meetings and public records exemptions found in s. 943.031(7), F.S. Accordingly, any portion of a Florida Violent Crime and Drug Control Council (council) meeting wherein active criminal investigative information or active criminal intelligence information is discussed is closed to the public. A tape recording of, and any minutes and notes generated during the closed portion of a council meeting is confidential and exempt from public disclosure until such information ceases to be active. Additionally, this act amends the subsection by eliminating duplicative language and removing the sentence that requires repeal of the exemptions.

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act 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 act 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:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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