SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 254

SPONSOR: Comprehensive Planning Committee

SUBJECT: Public Records Exemption

DATE: January 29, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cooper	Yeatman	CP	Favorable
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill amends and reenacts the public records exemption for personnel records of a municipal employee's participation in certain alcohol, drug or mental health programs. The exemption is scheduled for repeal on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature following the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

This bill substantially amends s. 166.0444 of the Florida Statutes.

II. Present Situation:

Open Government Sunset Review Act of 1995

Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909.[1] Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.[2] This law, and the Public Meetings Law in s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies.

In November 1992, the public affirmed its approval of Florida's tradition of "government in the sunshine" by enacting a constitutional amendment to guarantee the practice.[3] The amendment

[1] Ch. 5942, s. 1, 1909; RGS 424; CGL 490.
[2] Ch. 67-125, L.O.F.
[3] Art. 1, section 24 of the State Constitution.

had the effect of including in the Florida Constitution provisions similar to those of the Public Meetings Law and the Public Records Law and of applying those provisions to all three branches of government.

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.[4] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[5]

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that:

- the law creating the exemption 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.

A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government.[6] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[7]

In 1995, the Legislature enacted s. 119.15, F.S., the Open Government Sunset Review Act. Essentially, the law provides that exemptions to the public meetings and public records law be repealed in the 5th year after the exemption was enacted or substantially amended, unless the Legislature acts to reenact the exemption. The law stipulates that the public has a right to have access to records unless there is significant enough reason to override the strong public policy of open government and restrict such access.

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[4] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[5] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[6] *Christy v. Palm Beach County Sheriff's Office,* 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).
[7] *Krischer v. D'Amato,* 674 So.2d 909, 911 (Fla. 4th DCA 1996).

This law requires the Legislature to review the exemption before its scheduled repeal and consider as part of the review process the following:

- The specific records or meetings affected by the exemption;
- The identifiable public purpose or goal of the exemption;
- Whom the exemption uniquely affects, as opposed to the general public; and
- Whether the information contained in the records can be readily obtained by alternative means, and if so, how.

This law specifies 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. The public purpose test is satisfied if the exemption:

- Is necessary for the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exemption;
- 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, only information that would identify the individuals may be exempted; or
- 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.

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.[8] The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

[8] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974)

The President of the Senate has assigned this committee the responsibility for reviewing the exemption for certain personnel records as provided for in s. 125.585, F.S., and recommending whether it should be allowed to repeal, be modified, or reenacted in its present form.

Section 166.0444, Florida Statutes
In 1998, the Legislature enacted s. 166.0444, F.S., to declare that all records relating to an employee's participation in a municipal employee assistance program are confidential and exempt from disclosure as a public record pursuant to s. 119.07(1), F.S.[9]

The law also provided that any communication between a municipal employee and personnel or service provider of a municipal employee assistance program relating to that employee's participation in such program is confidential communication. This is similar to the provision in s. 90.503 (1)(c), F.S., which provides that communication between licensed mental health professionals and the patient, or staff of licensed mental health facilities, is confidential and thereby privileged communication.

Records designated as "confidential and exempt" and communication declared to be confidential may not be disclosed, absent a waiver of the confidentiality, except by order of the court or as provided in state statute.

The law also states that "(A)ny routine monitoring of telephone calls by the municipality does not violate this provision."

Section 166.0444, F.S., defines "employee assistance program" as a program provided by a municipality to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance, through referral for counseling, therapy, or other professional treatment.

Section 125.585, F.S., provides an identical exemption for county employee assistance programs, and s. 110.1091, F.S., provides a similar exemption for state employee assistance programs.

In creating s. 166.0444, F.S., the Legislature stated that:

… it is a public necessity to protect the confidentiality of the information specified in ss. 110.1091, 125.585, and 166.0444, Florida Statutes, because such information is a private matter. A public employee has the right of privacy to protect such personal sensitive information as provided by s. 23, Art. I of the State Constitution. Further, public knowledge of such information could lead to discrimination against the employee, and could compromise the therapeutic process. Therapeutic and treatment programs cannot operate efficiently and effectively if employees are reluctant to participate because their mental health records would be subject to inspection and review. Employees at all levels of government should be encouraged to seek treatment for behavioral or medical disorders, substance abuse problems, or emotional difficulties that could affect the employee's job performance and service to the public.

[9] Ch. 98-8, s. 3, L.O.F.

Additionally, the performance of public employees can be otherwise adequately monitored and evaluated.[10]

Section 166.0444, F.S., provides that this public records exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and are repealed on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature.

Interim Project Report 2003-210

In an effort to obtain information on the operation of the exemption and to assess whether it serves an identifiable public purpose, the committee staffs of the Senate Committee on Comprehensive Planning, Local Government and Military Affairs, the House Committee on State Administration, and the Legislative Committee on Intergovernmental Relations (LCIR) surveyed counties on the operation of the exemption provided in s. 166.0444, F.S. Staff also interviewed staff of the Florida League of Cities.

Interim Project Report 2003-210 contains a compilation of the survey results and concludes that the exemption meets the statutory criteria for reenactment. Specifically, the exemption

- Is necessary for the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exemption; and
- 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.

The report recommended that the current exemption for records related to the municipal Employee Assistance Programs be amended and reenacted. It should be amended to narrow the exemption to exempt only "personal identifying information contained in" records relating to the employee's participation in the program. This would continue to protect the intended sensitive information while preserving the publics' right to access guaranteed under the state constitution.

The report also recommended that the Legislature not re-enact the statement that "any communication between a municipal employee and personnel or service providers of a municipal employee assistance program relating to that employee's participation in such program is confidential communication." The report stated that this provision is either unnecessary, as such a privilege is stipulated in s. 90.503, F.S., or creates an evidentiary privilege that should not be included in this provision of statute.

Likewise, the report recommended that the statement "any routine monitoring of telephone calls by the municipality does not violate this provision" should not be re-enacted, reasoning that s. 943.03, F.S., provides sufficient parameters for authorized, intentional intercepts, disclosure, and use of electronic communications. This provision is either unnecessary or provides authority that should not be included in this public records exemption.

[10] Ch. 98-8, s. 4, L.O.F.

Psychotherapist-Patient Privilege
Section 166.0444(2), F.S., provides that any communication between a municipal employee and personnel or service provider of a municipal employee assistance program relating to that employee's participation in such program is confidential communication. If "personnel" in this provision means personnel employed by the service provider, this provision is unnecessary, as this protection is provided in current law.

Section 90.503(1)(c), F.S., provides that "communication between psychotherapist and patient is confidential if it is not intended to be disclosed to third persons" except under very limited situations. The definition of psychotherapist is very broad, to include:

- A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
- A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
- A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or
- Treatment personnel of facilities licensed by the state pursuant to chapter 394, F.S. (Mental Health Facilities), chapter 395, F.S. (Hospitals), or chapter 397, F.S. (Substance Abuse Services), of facilities designated by the Department of Children and Family Services pursuant to chapter 394, F.S., as treatment facilities, or of facilities defined as community mental health centers pursuant to s. 394.907(1), F.S., who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

Communication declared to be confidential may not be disclosed, absent a waiver of the confidentiality, except by order of the court or as provided in state statute.

If "personnel" in this provision means municipal personnel, it appears to create an evidentiary privilege between any municipal employee (not the employee receiving services) and the service provider.[11] As such, it should not be included in a bill that creates or re-enacts a public records exemption. Article I, s. 24(c), of the State Constitution, provides that:

> Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this sections, and shall relate to one subject."

Subsections (a) and (b) relate to records and meetings, respectively.

[11] If such a privilege exists, county employees cannot be compelled to testify in court regarding verbal communications between such persons and the employee receiving services

Interception of Electronic Communications
Section 166.0444(2), F.S., states that any "routine monitoring of telephone calls by the municipality" does not violate the provision establishing "any communication between a municipal employee and personnel or service provider of a municipal employee assistance program relating to that employee's participation in such program" as confidential communication. This provision should be deleted for four reasons:

- We are recommending the evidentiary privilege recognized or created in the previous sentence be deleted, and the telephone monitoring provision relates directly to that sentence;
- It should not be included in a bill that creates or re-enacts a public records exemption.
- It may be unnecessary, because the interception of electronic communications is governed by the Security of Communications Law in ch. 943, F.S.; and
- If this provision provides authority beyond that provided by the Security of Communications Law in ch. 943, F.S., it is contrary to the parameters established in that law and recognized by the Attorney General and the courts.

Section 934.03, F.S., provides parameters for authorized, intentional intercepts, [12] disclosure, and use of electronic communications. Paragraph (2)(d) stipulates that it is unlawful to "intercept a wire, [13] oral, [14] or electronic communication *unless all of the parties to the communication have given prior consent to such interception*."[15] Section 934.03(4), F.S., provides that unauthorized intercept, disclosure, and use of electronic communications is punishable as a third-degree felony.

However, ch. 934, F.S., does provide local governments the authority to intercept communications without prior consent in limited circumstances. Section 934.03(2)(g), F.S., specifically authorizes the central abuse hotline authorized in s. 39.201, F.S., '911' systems, an ambulance service, a fire station, a public utility, and law enforcement agency, and any other entity with published emergency telephone numbers, to intercept and records incoming wire communications. In addition, '911' system employees may also intercept and record incoming wire communications from published non-emergency telephone numbers staffed by trained dispatchers at public safety answering points.

[12] "Intercept" means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Section 943.02(3), F.S.
[13] "Wire communication" means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce." Section 943.02(1), F.S.
[14] "Oral communication" means "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." Section 943.02(2), F.S.
[15] Italics mine; also see Attorney General Opinions 02-05, January 11, 2002, and 02-56, August 21, 2002.

III. Effect of Proposed Changes:

This bill amends and reenacts the public records exemption for personnel records of a municipal employee's participation in certain alcohol, drug or mental health programs.

Section 1 amends s. 166.0444(1), F.S., to make style changes to the definition of employee assistance program.

Subsection (2) is amended to narrow the exemption to "personal identifying information contained in" records relating to the employee's participation in the program. This change will ensure that sensitive information is protected while preserving the publics' right to access guaranteed under the state constitution.

The statement that any communication between a municipal employee and personnel or service provider of a municipal employee assistance program relating to that employee's participation in such program is confidential communication is deleted. This provision is either unnecessary, as such a privilege is stipulated in s. 90.503, F.S., or creates an evidentiary privilege that should not be included in this provision of statute.

Subsection (2) is also amended to delete the provision stating that any routine monitoring of telephone calls by the municipality does not violate this exemption, as it is either unnecessary or provides authority that should not be included in this public records exemption. Section 943.03, F.S., provides sufficient parameters for authorized, intentional intercepts, disclosure, and use of electronic communications.

In addition, an obsolete reference to the provision's repeal is deleted.

Section 2 provides for an effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill reenacts the public records exemption for municipal Employee Assistance Programs. Relying on the criteria provided in the Open Government Sunset Review Act, s. 119.15, F.S., the public records exemptions contained in s. 166.0444, F.S., meet the requirements for maintaining an exemption to the public records law.

In the November 2002 election, 76.5% of voters approved a constitutional amendment concerning public records. The amendment to Article I, s. 24 of the State Constitution requires any law after the effective date of the amendment containing exemptions to public records or public meetings be passed by a two-thirds vote of each house of the Legislature. The constitution previously required a simple majority vote to enact public records exemptions.

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:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.