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 288

SPONSOR: Governmental Oversight and Productivity Committee

SUBJECT: Open Government Sunset Review of State Agency Employee Assistance Programs

DATE: March 21, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wilson	Wilson	GO	Favorable
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This bill abrogates the scheduled repeal of section 110.1091, Florida Statutes.

II. Present Situation:

Public Records Overview - Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[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 in ch. 119, F.S., was first enacted in 1967.[2] The act has been the subject of amendment almost annually since its inception.

In 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

> 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

[1] Section 1, ch. 5942 (1909) stated: "That all State, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."
[2] Chapter 67-125 (1967 L.O.F.)

> constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

As a result of the adoption of this constitutional amendment, the statutory right of access contained in the Public Records Law was raised to a substantive constitutional right and the legislative and judicial branches of state government were made subject to government-in-the-sunshine requirements. The amendment also "grandfathered" exemptions that were in effect on July 1, 1993.[3]

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Article I, s. 24 (c) of the State Constitution authorizes only the Legislature to create exemptions from government-in-the-sunshine requirements. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption. The exemption may be no broader than necessary to comport with the public necessity. Further, a law that creates a public exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.

A new constitutional requirement for creating public records exemptions was adopted by the electorate in November of 2002. That amendment to Article I, s. 24 of the State Constitution requires that exemptions must be enacted by a two-thirds vote of each house.

In addition to the State Constitution, the Public Records Law[4] specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental entities. Section 119.07(1)(a), F.S., requires:

> 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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee…

The Public Records Law states that, unless specifically exempted, all agency[5] records are to be available for public inspection. The term "public record" is broadly defined to mean:

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[3] Article I, s. 24(d) of the State Constitution.
[4] Chapter 119, F.S.
[5] The 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of 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.[6]

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[9]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, that record may not be released by an agency to anyone other than to the persons or entities designated in the statute.[10] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[11]

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.[12] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are narrowly construed so they are limited to their stated purpose.[13]

Exemptions to open government requirements are subject to repeal five years after their initial enactment unless they are reviewed and saved by the Legislature.[14] An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended if it ". . . expands the scope of the exemption to

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[6] Section 119.011(1), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Art. I, s.24(c) of the State Constitution.
[10] Attorney General Opinion 85-62.
[11] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[12] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365 (Fla. 4th DCA 1997).
[13] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).
[14] An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

include more records or information or to include meetings as well as records."[15] The Open Government Sunset Review Act of 1995,[16] provides for the systematic review and repeal of exemptions through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The Open Government Sunset Review Act states than 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:

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 or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 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.[17]

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, as the Florida Supreme Court has ruled in a series of cases, one session of the Legislature cannot bind another.[18] The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but if it 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 an exemption under this

[15] Section 119.15(3)(b), F.S.
[16] Section 119.15, F.S.
[17] Section 119.15(4)(b), F.S.
[18] As the Florida Supreme Court has ruled in a series of cases, the most recent of which is *Neu v. Miami Herald Publishing Company*, 462 So.2d 821 (Fla. 1985), one legislative body cannot bind a future Legislature to an obligation. In *Neu*, a case addressing the Public Meetings Law, the court stated "A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law." See *Neu v. Miami Herald Publishing Company*, 462 So.2d 821, 824 (Fla. 1985). In an earlier case reviewing a challenge to establishment of geographic municipal boundaries, the court stated that, "[t]he Legislature cannot prohibit a future Legislature by proper enactment changing boundaries which it [the earlier Legislature] established." *Kirklands v. Town of Bradley*, 139 So. 144, 145 (Fla. 1932).

section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10, F.S., any public officer violating any provision of ch. 119, F.S., is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

Section 110.1091, F.S., permits state agencies to operate programs for the assistance of employees who have behavioral, medical, or substance abuse conditions which affects their job performance. Over the interim each state agency received a committee questionnaire eliciting information on its experiences with employee assistance programs. A summary and analysis of those responses is contained in the committee interim report 2003-216 *Open Government Sunset Review of Section 110.1091, F.S.* All state agencies responded with favorable opinions on the program. Some felt that its absence would increase disciplinary actions and interrupt the orderly functioning of agency operations. Others noted that issues unrelated directly to substance abuse were the source of many referrals such that behavioral or emotional issues came to predominate.

III. Effect of Proposed Changes:

The proposed committee bill reinstates the public records exemption on employee assistance program participation records but removes from the prohibition on access items relating to the monitoring of telephone calls by the employer. As such, the bill technically makes the existing exemption less restrictive while still providing protection for the participating employee. Specifically the bill:

1. Makes technical grammatical and syntactical changes to the section;
2. Deletes a provision authorizing the routine monitoring of telephone calls;
3. Makes confidential and exempt from public records only personally identifying information on an employee's participation.
4. Removes the repeal of the exemption in current law scheduled for October 2, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

A recently enacted amendment to the Florida Constitution requires a two-thirds vote by each legislative chamber on public records exemption bills. Article I, s. 24(c), State Constitution, further requires a statement of public necessity to accompany each newly created public records exemption. This bill abrogates the repeal of an existing public records exemption and removes some of its existing restrictiveness.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The failure to re-enact the exemption is believed by the responding state agencies to result in further interruptions in the work place accompanied by disciplinary actions that would otherwise not take place.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.