

# 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: CS/SB 2496

SPONSOR: Governmental Oversight & Productivity Committee and Senator Fasano

SUBJECT: Military Installations/Public Records

DATE: March 25, 2004      REVISED: \_\_\_\_\_

|    | ANALYST          | STAFF DIRECTOR   | REFERENCE | ACTION                 |
|----|------------------|------------------|-----------|------------------------|
| 1. | <u>Krasovsky</u> | <u>Krasovsky</u> | <u>MS</u> | <u>Fav/1 Amendment</u> |
| 2. | <u>Rhea</u>      | <u>Wilson</u>    | <u>GO</u> | <u>Fav/CS</u>          |
| 3. | _____            | _____            | <u>RC</u> | _____                  |
| 4. | _____            | _____            | _____     | _____                  |
| 5. | _____            | _____            | _____     | _____                  |
| 6. | _____            | _____            | _____     | _____                  |

**I. Summary:**

This committee substitute exempts from the public disclosure certain records held by the Governor’s Advisory Council on Base Realignment and Closure (BRAC) or the Office of Tourism, Trade, and Economic Development. Specifically, that portion of a record is confidential and exempt that relates to the: (1) strengths and weakness of military installations or missions in the state; (2) vulnerability or immunity of military installations in other states; and (3) state’s strategy to retain its military installations in response to the 2005 BRAC round. Portions of the Governor’s BRAC Advisory Council meetings or subcommittee meetings are exempt from the Sunshine Law when the above exempt records are presented or discussed. Any records generated at those closed portions of the Advisory Council’s meetings are also exempt from the public records law. The exemption repeals on May 31, 2006.

This bill creates two new, unnumbered sections of law.

**II. Present Situation:**

**Base Realignment and Closure**

The Department of Defense has once again embarked on another round of base realignments and closures, commonly referred to as “BRAC,”<sup>1</sup> during which military installations across the nation will be reviewed to determine whether functions and bases can be consolidated or closed. The BRAC process reflects a desire to eliminate excess capacity, experience the savings from that reduction in capacity, and fund higher priority weapon platforms and troop training.

<sup>1</sup> See the Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510, as amended through the National Defense Authorization Act of Fiscal Year 2003.

Capacity reductions may reach as high as 20-25 percent. There have been four BRAC rounds between 1988 and 1995. During the 1993 round, four Florida bases were closed.<sup>2</sup>

Only tourism and agriculture contribute more to Florida's economy than the 21 military installations and three unified commands that are situated in 13 counties throughout this state. That contribution, including associated defense industries, recently estimated at \$44 billion statewide, has a significant impact on the economic well being of each local host military community and the state as a whole.<sup>3</sup>

In 2003 the Governor created an advisory council comprised of 18 members of the private sector, including retired military officers, and state government to advise him on the BRAC 2005. The specific mission of the Advisory Council is to:

- Keep Florida's military installations off the base closure list;
- Know the capabilities of Florida's military installations for realignment potential from other locations; and
- Support Florida's local community BRAC efforts by acting as a coordinator to the Governor's office and the state's efforts.

The Advisory Council's responsibilities are divided in to four Committees as follows; Intra State Activities, Federal Activities, Public Communications, and Competitive Advantages. As part of the responsibilities of the Intra State Activities Committee, a statewide tour of all the military installations in Florida was undertaken this past summer. From the time the Advisory Council was created until March 11 of this year, it has spent \$7,783 on expenses and \$499,451 on contracts for outside services including an assessment of Florida military installations which has now been completed. All costs were paid for with state revenues.

The BRAC process has, in fact, started and activities of the BRAC Advisory Council will continue to increase as the final date for the President to approve or reject the list of base closures gets closer. What follows is a summary of the important dates in the BRAC process. Most of 2004 will be spent by the various service branches assessing their bases in order to make a recommendation to the Secretary of Defense by September of 2004. Not later than March 15, 2005, the President of the United States must nominate the nine members of the federal BRAC Commission, who are subject to confirmation by the Senate. By May 16, 2005, the Secretary of Defense is to make his recommendations regarding all the service branches to the BRAC Commission. Not later than September 8, 2005, the BRAC Commission must make its report to the President. The President must approve or reject the list in its entirety. November 7, 2005, is the last date for the President to submit to Congress his approval and certification of the Commission's recommendations. If Congress disapproves the President's report, it must do so by joint resolution within 45 days of the date of the President's submittal.

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<sup>2</sup> Florida lost the Naval Aviation Depot Pensacola, the Naval Aviation Station Cecil Field Jacksonville, the Naval Training Center Orlando, and Homestead Air Force Base

<sup>3</sup> Recent study conducted by the University of West Florida on the economic impact of military spending in Florida.

## Access to Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.<sup>4</sup> The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.<sup>5</sup> In November 1992, the public approved a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

(a) 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.

The State Constitution, the Public Records Law,<sup>6</sup> 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.

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<sup>7</sup> records are to be available for public inspection. The term "public record" is broadly defined to mean:

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 official business by any agency.<sup>8</sup>

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<sup>4</sup>Section 1, ch. 5942, 1909; RGS 424; CGL 490

<sup>5</sup> Chapter 67-125, L.O.F.

<sup>6</sup> Chapter 119, F.S.

<sup>7</sup> 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."

<sup>8</sup> Section 119.011(1), F.S.

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.<sup>9</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>10</sup>

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.<sup>11</sup>

### **Open Government Sunset Review of Public Records Exemptions**

Exemptions to open government requirements are subjected to a review and repeal process 5 years after their initial enactment.<sup>12</sup> 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 under the act if it “. . . expands the scope of the exemption to include more records or information or to include meetings as well as records.”<sup>13</sup> The Open Government Sunset Review Act of 1995<sup>14</sup> establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, 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 and statutory citation of each exemption scheduled for repeal the following year.<sup>15</sup> If the division does not include an exemption on the certified list that should have been included that exemption “. . . is not subject to legislative review and repeal under this section.”<sup>16</sup> If the division later determines that an exemption should have been certified, it “. . . shall include the exemption in the following year’s certification after that determination.”<sup>17</sup> As part of the review process, the Legislature is to consider:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?

<sup>9</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>10</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> 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.

<sup>13</sup> Section 119.15(3)(b), F.S.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(3)(d), F.S.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?<sup>18</sup>

Under s. 119.15(4)(b), F.S., 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 specified criteria, one of which must be met by the exemption, 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.<sup>19</sup>

### **Constitutional Access to Public Meetings**

Article I, s. 24(b) of the Florida Constitution expresses Florida's public policy regarding access to public meetings by providing that:

- (b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, city, 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...

Florida courts have determined that advisory bodies whose powers are limited to making recommendations to a public agency and possess no authority to bind the agency in any way are subject to the Sunshine Law.<sup>20</sup> The Sunshine Law also applies to advisory committees that are appointed by a single public official as well as those appointed by a collegial board.<sup>21</sup> The Attorney General's Office has also issued numerous opinions citing the application of the Sunshine Law to advisory committees.

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<sup>18</sup> Section 119.15(4)(a), F.S.

<sup>19</sup> Section 119.15(4)(b), F.S.

<sup>20</sup> See, *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974). Accord, *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3<sup>rd</sup> DCA 1988)

<sup>21</sup> See e.g., *Wood v. Marston*, 442 So.2d 934 (Fla. 1983)

The Constitution does, however, permit the Legislature to provide by general law for the exemption of meetings from the requirements of s. 24(c). However, as noted above for public records, the general law exempting access to public meetings must state with specificity the public necessity justifying the exemption and can be no broader than necessary. Section 286.011, F.S., states the provisions for access to public meetings and further provides that s. 119.15, F.S., outlined above, governs the exemption provisions for access to public meetings.

### **III. Effect of Proposed Changes:**

As the Governor's BRAC advisory council pursues its responsibilities in conjunction with local host military communities, certain specific questions will have to be asked, relative data will have to be collected, and the questions will have to be answered. These questions include an honest assessment of our military installations, an assessment of what missions can be realigned to Florida installations from installations closed in other states, and an overall state strategy to keep Florida installations off the base closure list for BRAC 2005. Some of this information will be of a sensitive nature that would be valuable to other states and outside consultants, and probably detrimental to the Florida effort if not protected. It appears reasonable, therefore, that specific, select information as described in this bill be exempt from what is commonly referred to as Florida's public records and sunshine laws.

The bill exempts from section 119.07(1), Florida Statutes, and section 24(a), Article I of the State Constitution that portion of records held by the Governor's BRAC Advisory Council or the Office of Tourism, Trade, and Economic Development that relate to;

- The strengths or weaknesses of military installations or military missions in this state relative to the selection criteria of the Department of Defense for base realignment and closure,
- The vulnerability or immunity of military installations or military missions in other states or territories with respect to closure or realignment, and
- The state's strategy to retain its military installations as a response to the federal authorization of realignments and closures of military installations in 2005.

To be able to have any critical impact, the BRAC Advisory Council must be able to use this information without disclosing it to the public, and more importantly, to other states also developing their own BRAC strategy. Therefore, meetings of the Advisory Council, its committees or subcommittees, at which the above information is presented or discussed are closed to the public and exempt for section 286.011, Florida Statutes, and section 24(b) of the State Constitution. Any records generated at these closed portions are also exempt from inspection under the public records law.

A person who willfully and knowingly violates this section commits a misdemeanor of the first degree.

The exempt repeals on May 31, 2006 and the records made confidential and exempt are open for public inspection.

The bill also provides the public necessity justifying the exemption. That justification includes not putting the state in a competitive disadvantage with other states seeking to retain their bases, providing the Advisory Council with equal standing with other states that do not have to disclose such information and the obligation of the state to protect our bases and the economic contribution they make to our state.

The bill is effective upon becoming law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

No provision is made for an Open Government Sunset Review of the exemption because the exemption does not need to be continued once a determination is made regarding which bases are to be closed.

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.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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