HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1801 PCB DS 05-02 DSOC Public Meetings and Records Exemption
SPONSOR(S): Domestic Security Committee
TIED BILLS: HB 1715 **IDEN./SIM. BILLS:** CS/SB 1416

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Domestic Security Committee	7 Y, 0 N	Garner	Newton
1) State Administration Council		Garner	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 1801 provides for the exemption of portions of meetings and records of the Domestic Security Oversight Council (DSOC) from public-meetings and public records laws. The bill provides criteria for determining when a portion of the council meeting may be closed, how the council chair shall declare closing a portion of the meeting, who may attend a closed council meeting, and what records must be kept of the proceedings of the council during a closed meeting.

Specifically, the bill provides that the portions of a meeting at which the DSOC will hear or discuss active criminal investigative information or active criminal intelligence information are exempt from open meetings requirements and may be closed if the chair announces the necessity of the closure at a public meeting, states the reasons for the closure in a written document filed in the public records of the DSOC, and the entire closed meeting is recorded. Under the provisions of this bill, the recording of the closed meeting and any minutes or notes are exempt from public records requirements until the criminal investigative or intelligence information ceases to be active. The records of the closed meetings are required to be retained on a schedule adopted by the Department of State's Division of Library Services. Whether information is active is determined under a statutory definition found in Chapter 119, F.S.

The bill provides for a review of this exemption in 2010. The bill takes effect on the same date that the related legislation that creates the Domestic Security Oversight Council takes effect. The bill is not expected to have a significant fiscal impact on state or local governments.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, HB 1801 requires a two-thirds vote for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government

The bill authorizes the conduct of certain governmental meetings, under certain circumstances, to be held outside the public view, and provides for certain records of those meetings to be withheld from public scrutiny.

Maintain public security

The bill protects active criminal investigative information and active criminal intelligence information heard or discussed by the Domestic Security Oversight Council from public disclosure and scrutiny.

B. EFFECT OF PROPOSED CHANGES:

Public Meetings and Records

The "Sunshine Law" was first enacted in 1967.[1] As codified in s. 286.011, F.S., the provision states:

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of 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.
> (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

In effect, the sunshine law requires:

1. Meetings of public boards or commissions to be open to the public;
2. Reasonable notice for meetings;
3. Minutes to be taken.

In 1992, the electorate approved an amendment to the state Constitution that raised the statutory requirement of open meetings to a constitutional mandate. Article I, s. 24(b) of the State Constitution, provides:

> All 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 and meetings of the legislature shall be open and noticed as provided in Article II, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

[1] Section 1, ch. 67-356, L.O.F.

Collegial bodies within the state, including state and local bodies, are subject to open meeting requirements, whether the members are appointed or elected.[2] Further, advisory boards without the authority to take action or to bind a decision-making entity, must comply with open meeting requirements.[3] Fact-finding committees that function solely to find facts and to report them, however, have an exception under open meetings requirements.[4]

Given the increasing reliance of government upon legislatively-created corporations, as well as private service-providers, to perform governmental services, the applicability of open meetings requirements to these entities may arise. The judiciary has found that the Sunshine Law is to be construed liberally in order to give the full effect of its purpose.[5] The sunshine law has been held to apply to private entities created by law or a public agency. It also applies to private entities that provide services to governmental agencies on behalf of those agencies in the performance of their public duties. Generally, a private organization is not subject to the sunshine law unless it has been delegated the authority to perform a governmental function.[6]

Florida also has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.[7] In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, ch. 119, F.S., specifies the conditions under which public access must be provided to governmental records. While the state constitution provides that records are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, of the State Constitution, governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, of the State Constitution, provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act contained in s. 119.14, F.S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The Open Government Sunset Review Act of 1995 provides for the repeal and prior review of any public records exemptions that are created or substantially amended in 1996 and thereafter. The initial review cycle began in 2001. The chapter defines the term "substantial amendment" for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of the existing exemption.

Under the Open Government Sunset Review Act of 1995, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

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[2] City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).
[3] 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. 3d DCA 1988); Monroe County v. Pigeon Key Historical Park, Inc., 647 So.2d 857, 869 (Fla. 3d DCA 1994); Lyon v. Lake County, 765 So.2d 785 (Fla. 5th DCA 2000).
[4] Cape Publications, Inc. v. City of Palm Bay, 473 So.2d 222 (Fla. 5th DCA 1985).
[5] Wood v. Marston, 442 So.29 934 (Fla. 1983); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969).
[6] *See, eg.,* Inf. Op. to Fasano, June 7, 1996, where the Attorney General opined that the Sunshine Law does not apply to meetings of a homeowners' association board.
[7] Section 1, ch. 5942, 1909; RGS 424: CGL 490.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- 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 safety of such individuals; 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 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.

Meetings of the Domestic Security Oversight Board

In the aftermath of the events of September 11, 2001, a number of initiatives were undertaken to assess Florida's domestic security preparedness and establish an effective organizational structure within state government to meet the emerging terrorist threat.

On September 11, 2001, Governor Jeb Bush issued Executive Order #2001-262, which required increased security, intelligence and investigative operations, activated the State Emergency Operations Center, and assigned specific tasks to the Executive Director of Florida Department of Law Enforcement (FDLE), the Interim Director of the Division of Emergency Management (DEM), and the Florida National Guard. Subsequently, Governor Bush issued Executive Order #2001-300, on October 11, 2001, incorporating by reference Executive Order #2001-262, which remained in effect, and directing state agencies to take specific actions based on the recommendations made by multi-disciplinary working groups. The Governor also created the "Florida Domestic Security Advisory Panel," made up of eleven Governor-appointed community leaders who were to serve as advisors to the Governor, the Chief of Domestic Security Initiatives, and the Legislature by providing and evaluating recommendations to combat terrorism. This Panel met several times before being allowed to disband.

In conjunction with the Governor's Executive Orders, FDLE determined that it would need interagency consensus and support to perform the duties related to domestic security, now codified in Chapter 943, Florida Statutes. For this reason, a new oversight panel, generally known as the "State Domestic Security Oversight Board" (DSOB) was called together to assist FDLE in managing the new domestic security function and responsibilities.

This panel has held regular sessions since November 2001 and has served as a "sounding board" for actions recommended by FDLE to the Governor and Legislature, but has never been formally constituted nor recognized as a state board or advisory council. The DSOB brings together many local, state and federal agencies across multiple preparedness and response disciplines and has taken on an increasingly important role regarding the state's domestic security policy. However, it currently acts without the formal backing of law.

Although the DSOB is not recognized in the Florida Statutes as an official body of state government, at a recent meeting it adopted formal by-laws and changed its name to the Domestic Security Oversight Council (DSOC). A workgroup appointed by FDLE Commissioner, Guy Tunnell, recommended that the body be codified into law to ensure that it remain an integral part of Florida's domestic security governance model, and a recent Interim Project Report, 2005-143, published by the Florida Senate has reached a similar conclusion.

Due to the nature of certain subjects that may be brought before the DSOC, it is clear that there may be a need to exempt portions of its meetings from public meetings and public records laws. According to FDLE, discussion of active criminal intelligence or investigative information is a regular occurrence in DSOC meetings.

Effects of HB 1801

HB 1801 creates s. 943.0314, F.S., to exempt portions of meetings and records of the Domestic Security Oversight Council from public-meetings and public records laws. The bill provides specific guidelines for such closure and for maintenance of records of all closed portions of a council meeting.

Specifically, the bill provides that the portions of a meeting at which the DSOC will hear or discuss active criminal investigative information or active criminal intelligence information are exempt from open meetings requirements and may be closed if the chair announces the necessity of the closure at a public meeting, states the reasons for the closure in a written document filed in the public records of the DSOC, and the entire closed meeting is recorded.

Under the provisions of this bill, the recording of the closed meeting and any minutes or notes are exempt from public records requirements until the criminal investigative or intelligence information ceases to be active. Whether information is active is determined under a statutory definition found in Chapter 119, F.S. Exempt criminal investigative information and criminal intelligence information is retained or disposed of pursuant to the existing requirements for such information that are provided in s. 119.021, F.S. Section 119.021, F.S., requires custodial agencies to comply with rules establishing retention schedules and disposal processes for public records which are adopted by the Department of State's Division of Library and Information Services.

The bill also authorizes the DSOC chair to determine who, other than council members, may attend a closed meeting.

The bill provides for a review of this exemption in 2010. This bill takes effect on the same date that the related legislation that creates the Domestic Security Oversight Council takes effect.

C. SECTION DIRECTORY:

Section 1. Creates s. 943.0314, F.S., providing a public records and meetings exemption for the Domestic Security Oversight Council; providing what information triggers the exemption; providing procedures for closing meetings of the council; providing for recording of closed meetings; providing for who may attend closed meetings of the council; providing for sunset review.

Section 2. Provides a statement of public necessity for the public records and meetings exemption.

Section 3. Provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See the FISCAL COMMENTS section below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Domestic Security Oversight Council will be staffed by personnel of the Department of Law Enforcement, and that agency will act as the custodian of records for the Council. Because FDLE personnel regularly handle exempt criminal investigative and intelligence records, the department is not expected to incur any additional training costs. Retention of records will be accomplished pursuant to existing laws regarding archiving and rules promulgated by the Department of State's Division of Library and Information Services. Therefore, no fiscal impact is expected to state government in providing for the storage and archiving of exempt records. FDLE may incur a minimal cost in providing a method and medium for recording meetings, as required by the bill. However, because the Council meets approximately four times each year, this cost is also expected to be insignificant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, HB 1801 requires a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

No additional exercise of rule-making authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES