

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 2344

SPONSOR: Governmental Oversight and Productivity Committee and Senator Haridopolos

SUBJECT: Public Records Exemption/Board of Funeral, Cemetery and Consumer Services

DATE: April 27, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/1 amendment</u>
2.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
3.	<u></u>	<u></u>	<u>CJ</u>	<u>Withdrawn</u>
4.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
5.	<u></u>	<u></u>	<u>RC</u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

I. Summary:

In 2004, the Legislature enacted the Florida Funeral, Cemetery, and Consumer Services Act (act), effective October 1, 2005.¹ This act merges the funeral and cemetery regulation provided by the Board of Funeral and Cemetery Services and the Board of Funeral Directors and Embalmers into one board, the Board of Funeral, Cemetery, and Consumer Services (board). The act also establishes the Division of Funeral, Cemetery, and Consumer Services within the Department of Financial Services under the provisions of ch. 497, F.S.² Unless legislation is enacted during the 2005 Session, the new board and the department will not have any public record or meeting exemptions under ch. 497, F.S.

The bill makes exempt those portions of meetings of the board at which licensure examination questions or answers under the chapter are discussed. Further, it exempts meetings of the probable cause panel of the board pursuant to s. 497.153, F.S., and records of those panel meetings until 10 days after a determination regarding probable cause is made. Further, the bill makes confidential and exempt information held by the department pursuant to a financial examination or an inspection until the examination or inspection is completed or ceases to be active. The bill also makes confidential and exempt information held pursuant to an investigation until the investigation is completed or ceases to be active or until 10 days after a determination regarding probable cause is made. Exceptions are provided.

¹ Ch. 2004-301, L.O.F.

² Presently, the Board of Funeral Directors and Embalmers within the Department of Business and Professional Regulation administers the provisions of ch. 470, F.S., which regulates funeral directors, embalming, and the practice of cremating human remains. The Board of Funeral and Cemetery Services within the Department of Financial Services administers the provisions of ch. 497, F.S., which provides for the regulation of cemeteries, cremation services, cemetery companies, and pre-need contracts for funeral merchandise or services.

The bill provides for review and repeal of the exemption on October 2, 2010, and provides a statement of public necessity.

This bill creates section 497.172, Florida Statutes.

II. Present Situation:

Public Records; Exemptions

Section 24(a), Art. I of the Florida 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.”

Section 24(c), Art. I of the Florida Constitution permits the Legislature to create exemptions from the public records law. However, the bill creating the exemption must contain a statement of public necessity that justifies the exemption, and the exemption must be no broader than necessary to accomplish its purpose. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides for the repeal and prior legislative review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The law states that an exemption may be created or expanded only if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer 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 or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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.

Section 119.15(3), F.S., provides that on October 2nd of the fifth year after enactment of a new exemption or substantial amendment of an existing exemption the exemption shall repeal, unless the Legislature reviews and reenacts the exemption.

Background

The Board of Funeral Directors and Embalmers within the Department of Business and Professional Regulation (DBPR) administers and enforces the provisions of chapters 455 and 470, F.S., which regulates funeral directors, embalming, and the practice of cremating human

remains. The Board of Funeral and Cemetery Services within the Department of Financial Services (DFS) administers and enforces the provisions of ch. 497, F.S., which provides for the regulation of cemeteries, cremation services, cemetery companies, and pre-need contracts for funeral merchandise or services.

During the 2004 Regular Session, the Legislature enacted the Florida Funeral, Cemetery, and Consumer Services Act (act), effective October 1, 2005.³ The act merges the funeral and cemetery regulation into one board, the Board of Funeral, Cemetery, and Consumer Services (board), and the Division of Funeral, Cemetery, and Consumer Services within the DFS. The act abolishes the Board of Funeral Directors and Embalmers within the DBPR and the Board of Funeral and Cemetery Services within the DFS. The act sets forth the authority of the new board and the department, including investigatory and examination authority for the department and board.

The 2004 act merges the provisions of ch. 470, F.S., into ch. 497, F.S. The act also incorporates into ch. 497, F.S., relevant provisions from ch. 455, F.S., relating to the administration of the regulation of the ch. 470, F.S., professions. The 2004 act did not address public records and meeting exemptions present in chs. 455, 470, and 497, F.S., because of the single subject limitation under s. 24(c), Art. I, Florida Constitution. Unless legislation is enacted prior to October 1, 2005, the new board will not have any public records or public meeting exemptions.

Public Records Exemptions in Chapters 455 and 497, F.S.

Prior to the October 1, 2005 effective date of the act, s. 497.131, F.S., exempts any probable-cause proceeding of the Board of Funeral and Cemetery Services from the public meetings provisions under s. 286.011, F.S. Section 455.225(4), F.S., provides that probable cause proceedings of the Board of Funeral Directors and Embalmers are exempt from s. 286.011, F.S., until 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality. Section 455.225(2), F.S., exempts from s. 119.07(1), F.S., reports of Board of Funeral Directors and Embalmers for all cases dismissed prior to a finding of probable cause.

However, s. 455.225(10), F.S., exempts complaint and all investigation information obtained by the Board of Funeral Directors and Embalmers from s. 286.011, F.S., until 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality. This exemption in s. 455.225(10), F.S., does not apply in actions against unlicensed persons. Section 455.225(10), F.S., also provides a process for the subject of an investigation to inspect the investigative file, and respond to the information contained in the file. A request to inspect must be in writing, and responses to the information contained in the investigative file must be filed with the board within 20 days of the inspection.

Presently, s. 497.131(10), F.S., provides a public records exemption for any complaints, investigative reports, and all records and information relating to an investigation compiled by the Board of Funeral and Cemetery Services or the Department of Financial Services. This exemption applies while the investigation is active.

³ Ch. 2004-301, L.O.F.

Section 455.217(5), F.S., provides that meetings of the DBPR and its boards to develop licensure examinations are exempt from s. 286.011, F.S. Before the effective date of the act, ch. 497, F.S., had no similar provision because none of the licenses previously regulated by the DFS in that chapter required a licensure examination.

III. Effect of Proposed Changes:

The bill makes exempt those portions of meetings of the board at which licensure examination questions or answers under the chapter are discussed. Further, it exempts meetings of the probable cause panel of the board pursuant to s. 497.153, F.S., and records of those panel meetings until 10 days after a determination regarding probable cause is made. Further, the bill makes confidential and exempt information held by the department pursuant to a financial examination or an inspection until the examination or inspection is completed or ceases to be active. The bill also makes confidential and exempt information held pursuant to an investigation until the investigation is completed or ceases to be active or until 10 days after a determination regarding probable cause is made. Exceptions are provided.

The bill permits department to share confidential information with a law enforcement agency or other government agency to further an investigation of matters within its jurisdiction. In such cases, the information shall remain confidential and exempt until that receiving agency's investigation is complete or is no longer active.

The bill provides the following circumstances in which information would remain confidential and exempt subsequent to the department completing or ceasing its investigation or examination or after probable cause was found by the board:

- Disclosure of information would jeopardize the integrity of another active investigation or examination;
- Disclosure of information would reveal the identity of a confidential source; and
- Disclosure of information would reveal investigative or examination techniques or procedures that the department has reasonable good-faith belief will be used in future investigations or examinations.

The bill provides that an investigation, inspection, or examination is active when it is proceeding with reasonable dispatch and the agency has reasonable good-faith belief that the investigation, inspection, or examination may lead to the filing of an administrative, civil, or criminal proceeding or the denial or conditional grant of an application for license or other approval required under ch. 497, F.S.

The bill also makes confidential and exempt trade secrets, as defined in s. 812.081, F.S.

The exemptions are made subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S, and will expire October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a statement of public necessity for each of the public meetings and public records exemptions in the bill.

Section 3 provides an effective date of October 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24, Art. I, Florida 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. The bill provides a statement of public necessity for each of the public meetings and public records exceptions in the bill.

The bill does not require exempt meetings to be documented by means of a transcript or tape recording to ensure that the board restricts its meetings to the exempted topic and to preserve a record of the meeting.

Section 24(a), Art. I, Florida Constitution, requires a two-thirds vote of each house for passage of a newly created public records or public meetings exemption.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption in the bill would prevent disclosure of confidential sources. The public disclosure of such information could discourage individuals from providing information regarding alleged violations of the law.

The bill also exempt records containing trade secrets from disclosure, protecting businesses under investigation from the unfair practices that could arise if a competitor were able to obtain these records as the result of a public records request.

C. Government Sector Impact:

The public records exemption may provide the Department of Financial Services and the Board of Funeral, Cemetery, and Consumer Services with effective investigatory tools to assist in the performance of its compliance and enforcement duties relating to ch. 497, F.S. The exemption may help to protect the integrity of ongoing investigations and examinations.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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