

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: Regulated Industries Committee

BILL: SB 2344

SPONSOR: Senator Haridopolos

SUBJECT: Funeral, Cemetery, and Consumer Services

DATE: April 11, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/1 amendment
2.			BI	
3.			CJ	
4.			GO	
5.			RC	
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

The bill creates a public meetings exemption for the Board of Funeral, Cemetery, and Consumer Services and the Department of Financial Services (department) when holding meetings conducted for the exclusive purpose of developing or reviewing licensure examination questions and answers, holding probable cause panel meetings. The bill creates a public records exception for records pertaining to the scheduling of inspections and special examinations, information obtained by the department pursuant to a financial examination or inspection, and for trade secrets of a licensee or applicant for a license or other approval.

The information will remain confidential and exempt from public disclosure if disclosure would:

- jeopardize another active investigation or examination;
- reveal the identity of a confidential source; or
- reveal investigative techniques or procedures.

The bill provides that the department may release confidential and exempt information to a law enforcement agency, experts engaged with the department to assist in the investigation, the probable cause panel of the board, in response to a media inquiry concerning a specific identified matter, or in the interest of the public health, safety, or welfare.

The bill provides for sunset review and repeal of the exemption in 2010, provides a statement of public necessity, and provides a contingent effective date.

The bill provides an effective date of October 1, 2005.

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.

This bill creates section 497.172, Florida Statutes.

II. Present Situation:

Public Access to Records

Florida 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 1909.¹ In 1992, Florida voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitution level.² Section 24(a), Art. I, Florida Constitution, expresses Florida's public policy regarding access to public records by providing that:

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

In addition to the Florida Constitution, the Public Records Law³ specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.⁴ 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Section 119.011, F.S., broadly defines the term "public records" to mean:

¹ Chapter 5942, L.O.F. (1909).

² Section 24, Art. I, Florida Constitution.

³ Chapter 119, F.S.

⁴ Section 119.011(2), F.S., defines agency 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, 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."

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.

Section 119.011, F.S., defines “agency” 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 . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Public Records Exemptions

Unless exempted by general law, all agency records are available for public inspection. The term “public records” is defined as:

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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open to public inspection unless they are exempt.⁷

The Legislature is the only entity with the authority to create exemptions to the public records requirements.⁸ 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. 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 Section 24, Art. I, Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption.

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁸ *Supra* at n. 2.

⁸ *Id.*

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

⁹ Section 24(c), Art. I, Florida Constitution.

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 certain records confidential, with no provision for its release such that its confidential status will be maintained, such information 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

Access to Exempt Records

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.¹² For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.¹³ The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.¹⁴

Access to Public Meetings

Section 24(b), Art. I 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, 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 III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Exemptions to the public meeting requirement must be created in the same manner as exemptions to public records. A law that exempts a public meeting must state with specificity the public necessity justifying the exemption, the exemption must be no broader than necessary to accomplish the stated purpose of the law, and a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁵

Section 286.011, F.S., provides the conditions under which access to public meetings must be granted and the procedures that must be followed. Section 286.011(1), F.S., provides:

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 *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

¹³ *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).

¹⁴ *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2^d DCA 1990).

¹⁵ Section 24(c), Art. I, Florida Constitution.

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.

Section 286.011(1), F.S., also specifies records and public inspection requirements pertaining to meetings of state and local agencies, including keeping and maintaining minutes of the meeting.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995¹⁶ states that 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 whether 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

The Open Government Sunset Review Act provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment of an exemption from the Public Records Act or the Public Meetings Law. 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.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.¹⁸ The Legislature is only limited in its review process by constitutional requirements. In other words, if

¹⁶ Section 119.15, F.S.

¹⁷ Section 119.15(4)(b), F.S.

¹⁸ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

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, F.S., 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.

Penalties

Under s. 119.10, F.S., any public officer violating any provision of this chapter 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.

Any public officer who violates any provision of the public meetings provision in s. 286.011, F.S., is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.¹⁹

Chapter 2004-301, L.O.F.

During the 2004 Regular Session, the Legislature passed CS/CS/SB 528 by the Banking and Insurance Committee, the Regulated Industries Committee, and Senator Pruitt and others.²⁰ It may be cited as the Florida Funeral, Cemetery, and Consumer Services Act or the Senator Howard E. Futch Act (“the act”). Effective October 1, 2005, the act merges the funeral and cemetery regulation into one board under the Department of Financial Services (DFS or department), and consolidates all cemetery and funeral provisions into one chapter. Before the effective date of the act, the death care industry was regulated by the Board of Funeral Directors and Embalmers with the Department of Business and Professional Regulation (DBPR) and the Board of Funeral and Cemetery Services with the Department of Financial Services.

The act merges the provisions of ch. 470, F.S., into ch. 497, F.S. Before the effective date of the merger, ch. 470, F.S., related to the regulation of funeral directors, embalming, and the practice of cremating human remains, and ch. 497, F.S., related solely to the regulation of cemeteries, cremation services, cemetery companies, and preneed contracts for funeral merchandise or services. The act also duplicates and 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 act creates 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,

¹⁹ Section 286.011(3)(a), F.S.

²⁰ Chapter 2004-301, L.O.F.

including each entity's rulemaking authority. It also provides extensive investigatory and examination authority to the department and board.

The act did not include several public records and meeting exemptions present in chs. 455, 470, and 497, F.S., because of the single subject limitation in s. 24(c), Art. I, Florida Constitution.

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

Before the effective date of the act, s. 497.131, F.S., exempted any probable-cause proceeding of the Board of Funeral and Cemetery Services from the public meetings provisions in s. 286.011, F.S. Pursuant to s. 455.225(4), F.S., probable cause proceedings of the Board of Funeral Directors and Embalmers were 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 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. The 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.

Before the effective date of the act, 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 applied while the investigation was active.

Before the effective date of the act, s. 497.144, F.S., provided that public meetings exemption for meetings of members of the Board of Funeral and Cemetery Services that are for the exclusive purpose of creating or reviewing licensure examination questions or answers under ch. 497, F.S., were 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 in that chapter required a licensure examination.

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 497.172, F.S., to provide several public records and public meetings exceptions related to the administration of ch. 497, F.S., by the Department of Financial Services, the Board of Funeral, Cemetery, and Consumer Services, and the Division of Funeral, Cemetery, and Consumer Services.

Examination Development Meetings

The bill provides a public meetings exemption for meetings of members of the board that are for the exclusive purpose of creating or reviewing licensure examination questions or answers under ch. 497, F.S.

This provision does not appear to create a new exemption. Before the effective date of the act, s. 455.217(5), F.S., provided that such meetings of the DBPR and its boards were 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 regulated by the DFS in that chapter required a licensure examination.

The First Amendment Foundation (FAF) has expressed concerns regarding this exception. The FAF suggest that when a meeting closure is necessary, there be some record made of the board meeting to assure that the board restricted itself to the discussions permitted. This record, which could include a tape recording of the closed meeting, should also become public at a certain point in the future.

Probable Cause Panel Meetings

The bill provides a public meetings exemption for meetings of the probable cause panel of the board pursuant to s. 497.153, F.S. Before the effective date of the act, each board had a similar exemption.²¹ However, probable cause proceedings of the Board of Funeral Directors and Embalmers ceased to be exempt 10 days after probable-cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality.²² The bill does not contain a comparable provision. Reports of the Board of Funeral Directors and Embalmers are also exempted from s. 119.07(1), F.S., cases dismissed prior to a finding of probable cause. The bill also does not contain a comparable provision.

Scheduling of Inspections and Examinations

The bill creates a public records exemption for records of the department which reveal the scheduling of inspections or special examinations under ch. 497, F.S. The bill also provides that such records are confidential. There was no comparable exemption for each board before the effective date of the merger.

Examinations, Inspections, and Investigations

The bill creates a public records exemption for, and classifies as, confidential information held by the department pursuant to a financial examination or inspection. The exemption applies until the examination or inspection is completed or ceases to be active. There was no comparable exemption for either board before the effective date of the merger.

The bill creates a public records exemption for, and classifies as confidential, information, including consumer complaints, held by the department pursuant to an investigation of alleged unlicensed practice in violation of ch. 497, F.S. The exemption applies until the examination or inspection is completed or ceases to be active. Before the effective date of the act, each board had a similar exemption.²³

The bill creates a public records exemption for, and classifies as confidential, complaints against any licensee under ch. 497, F.S., investigative records relating to the department's investigation of the complaint, and portions of the record of a probable-cause-panel proceeding, if any,

²¹ See ss. 455.225(4) and 497.131, F.S.

²² See s. 455.225(2), F.S.

²³ See ss. 455.225(10) and 497.131, F.S.

relating to consideration and action concerning such compliant. The exemption is effective until 10 days after a finding of probable cause.²⁴ The FAF has also expressed concerns regarding this exception. The FAF recommends that the bill should be amended to provide that the investigative records become public regardless of whether or not probable cause is found.

Disclosure of Confidential Information

The bill provides the following circumstances in which confidential information may be disclosed:

- During and in furtherance of an investigation or examination, to experts engaged by the department, and to witness or possible witnesses for the purpose of obtaining information from such witnesses or persons;
- To the probable-cause panel of the board for the purpose of probable-cause proceedings;
- Any law enforcement agency or other government agency for use by the other agency in its official duties and responsibilities;
- The department may confirm that it has the specific matter inquired about under investigation when responding to a media inquiry regarding a specific identified matter; and
- In the course of an investigation, the department may disseminate such information as it deems necessary for the public health, safety, or welfare.

The bill provides that if the department shares confidential information with a law enforcement agency or other government agency to further an investigation of matters within its jurisdiction, the information shall remain exempt until that agency's investigation is complete or ceases to be active.

The bill provides the following circumstances in which confidential information would remain confidential after the department completes its investigation or examination, or the investigation or examination ceases to be active and after probable cause is found:

- 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.

There were no comparable provisions for either board before the effective date of the merger.

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. A comparable provision is in s. 497.131, F.S. The Board of Funeral Directors and Embalmers does not have a comparable provision in ch. 455, F.S., or ch. 470, F.S.

²⁴ Before the effective date of the act, each board had a similar exemption. *See* ss. 455.225(10) and 497.131(10), F.S.

Trade Secrets

In subsection (5) of s. 497.172, F.S., the bill provides a public records exemption for any trade secret, as the term is defined in s. 812.081, F.S.²⁵ The exemption is limited to the extent of such trade secret.

Review and Appeal

The bill provides that s. 497.172, F.S., is subject to the Open Government Review Act of 1995 in accordance with s. 119.15, F.S. It also provides that this section shall stand repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 of the bill, as required by s. 24, Art. I, Florida Constitution, provides a statement of public necessity for each of the public meetings and public records exceptions in the bill.

Section 3 of the bill provides an effective date of October 1, 2005. The bill provides that the bill “shall not take effect unless SB ____ or substantially similar legislation is adopted in the same session or an extension thereof and becomes law.” The bill should be amended to reference the SB 2346, relating to funeral and cemetery regulation. However, the bill should not be contingent upon any other bill passing; the exemptions to the public meetings and the open meetings law are not tied to the provisions of any other bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill contains several public records and public meetings exceptions. All of the public records and public meetings exceptions in this bill relate to the administration of ch. 497, F.S., by the Department of Financial Services and the Board of Funeral, Cemetery, and Consumer Services. The bill provides a statement of public necessity for each of the public meetings and public records exceptions in the bill.

²⁵ Section 812.081(1)(c), F.S., defines the term “trade secret” to mean:

the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. “Trade secret” includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

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. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.²⁶ Section 24, 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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 3 of the bill references a companion Senate Bill, but does not specify the bill's number. The problem was addressed in Amendment Barcode #293096 by the Committee on Regulated Industries.

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.

²⁶ Section 24(c), Art. I, Florida Constitution.

VIII. Summary of Amendments:

Barcode 293096 by Regulated Industries:

This amendment provides a non-contingent effective date of October 1, 2005.

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