

# 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.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/SB 2644

SPONSOR: Governmental Oversight and Productivity Committee and Senator Sebesta

SUBJECT: Public Records; Exemptions; Lobbying Disclosure

DATE: March 31, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Rubinas</u>	<u>EE</u>	<u>Fav/1 amendment</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The Committee Substitute for Senate Bill 2644 is linked to Senate Bill 2646, which creates an electronic filing system for quarterly legislative and executive lobbying activity reports filed with the Division of Legislative Information Services (the division) and the Florida Commission on Ethics (commission), respectively. Lobbying activity reports contain information on compensation, expenditures, and areas of lobbying interest. The bill has a contingent effective date upon Senate Bill 2646, or similar legislation, becoming law. The committee substitute creates the following exemptions, each of which are subject to Open Government Sunset Review:

- A public records exemption for user identifications and passwords held by the Division of Legislative Information Services pursuant to s. 11.0455, F.S.;
- All draft lobbying activity reports and files stored in the electronic filing system pursuant to s. 11.0455, F.S., until the report has been submitted as filed;
- Records relating to the compensation-reporting audit or records relating to an investigation pursuant to s. 112.3215, F.S.; and
- Any meetings held pursuant to an investigation or at which a compensation-reporting audit is discussed, until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the commission determined whether probable cause exists that a violation has occurred.

Article I, s. 24(c), Fla. Const., requires a two-thirds vote of each house for passage of a newly created public records or public meetings exemption.

This bill creates section 11.0456 of the Florida Statutes.

## II. Present Situation:

### A. Public 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.<sup>1</sup> In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, expresses Florida's public policy regarding access to public records by providing that:

(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.

In addition to the State Constitution, the Public Records Law<sup>3</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. 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.

The Public Records Law states that, unless specifically exempted, all agency<sup>4</sup> records are to be available for public inspection. The term "public records" 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>5</sup>

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,

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<sup>1</sup> Chapter 5942, L.O.F. (1909).

<sup>2</sup> Article I, s. 24, Fla. Const.

<sup>3</sup> Chapter 119, F.S.

<sup>4</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" (emphasis added). *The Legislature, hence the Division of Legislative Information Services, is not within the scope of the term "agency" as defined in Chapter 119.*

<sup>5</sup> Section 119.011(1), F.S.

communicate or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

The State Constitution grants the Legislature exclusive authority to create exemptions to public records requirements.<sup>8</sup> 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.<sup>9</sup> 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>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

The Open Government Sunset Review Act of 1995<sup>13</sup> 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 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

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

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

<sup>8</sup> Article I, s. 24(c), Fla. Const.

<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); I, 724 So.2d 567 (Fla. 1999).

<sup>10</sup> Article I, s. 24(c), Fla. Const.

<sup>11</sup> Attorney General Opinion 85-62.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>13</sup> Section 119.15, F.S.

who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>14</sup>

The Open Government Sunset Review Act of 1995 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 exemption, one session of the Legislature cannot bind another.<sup>15</sup> The Legislature is only limited in its review process by constitutional requirements. In other words, if 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 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.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.

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<sup>14</sup> Section 119.15(4)(b), F.S.

<sup>15</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

<sup>16</sup> *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1<sup>st</sup> DCA 1985).

<sup>17</sup> *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4<sup>th</sup> DCA 1999).

<sup>18</sup> *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

**B. Filing of Periodic Lobbying Activity Reports**

Florida law requires all legislative and executive branch lobbyists to file semi-annual expenditure reports on paper forms provided by the division or commission, respectively. Principals must also file certain expenditures through their “designated,” or primary, lobbyist.

Expenditure reports are due no later than 45 days after the end of the reporting period. The reporting dates are August 14 (reporting period January 1 through June 30) and February 14 (reporting period July 1 through December 31). Reports must be filed by 5 p.m. on the designated due date; however, any report that is postmarked no later than midnight of the due date is considered timely filed.

This public records bill is linked to 2646, which creates a mandatory electronic filing system for all quarterly lobbying activity reports filed with the division and commission, whichever is applicable.

**III. Effect of Proposed Changes:**

The committee substitute creates the following exemptions:

- a public records exemption for user identifications and passwords held by the Division of Legislative Information Services pursuant to s. 11.0455, F.S.;
- all draft lobbying activity reports and files stored in the electronic filing system pursuant to s. 11.0455, F.S., until the report has been submitted as filed;
- records relating to the compensation-reporting audit or records relating to an investigation pursuant to s. 112.3215, F.S.; and
- any meetings held pursuant to an investigation or at which a compensation-reporting audit is discussed, until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the commission determined whether probable cause exists that a violation has occurred.

The bill provides that these exemptions will repeal on October 2, 2010, unless reviewed and saved from repeal, pursuant to the requirements of s. 119.15, F.S, the Open Government Sunset Review Act of 1995.

If enacted by a two-thirds vote of each chamber, the bill takes effect upon becoming law *provided* that Senate Bill 2646 or similar legislation creating the electronic filing systems is also enacted into law.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

Section 24, Art. I of the State Constitution provides that the Legislature may enact exemptions from open records and open meeting requirements in general law passed by a two-thirds vote of each house. A law creating an exemption must state with specificity the public necessity justifying the exemption and cannot be any broader than necessary to accomplish the state purpose of the law.

The constitution provides that “[l]aws enacted pursuant to this subsection shall contain only *exemptions . . .*” from the requirements of s. 24, Art. I, provisions relating to enforcement, and must relate to a single subject. Enforcement is defined to include the maintenance, control, destruction, disposal, and disposition of records.

**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:**

This public records bill is linked to Senate Bill 2646, which creates a mandatory electronic reporting system for the filing of quarterly legislative and executive lobbying activity reports.

## VIII. **Summary of 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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