

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Access to Public Records

Access to the public records of any public body is a right provided by Article 1, section 24(a) of the Florida Constitution:

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 119.07(1), Florida Statutes, provides further implementation of this right:

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.¹

Requirements for Public Records Exemptions

The Legislature may limit the right of the public to inspect or copy any public record by creating an exemption by general law.² This general law must “state with specificity the public necessity justifying the exemption” and be “no broader than necessary to accomplish the stated purpose of the law.”³ The Legislature has created numerous public records exemptions.

Relevant Public Records Exemptions: Legislature

Section 11.0431, Florida Statutes, exempts the following public records⁴ from inspection and copying:

- *Records or information held by the legislative branch of government that would be confidential or exempt if held by an agency⁵ or any other unit of government;⁶*
- A formal complaint about a member or officer of the Legislature or about a lobbyist and the records relating to the complaint;⁷

¹ Fla. Stat. § 119.07(1)(a) (2005).

² Fla. Const. art. 1, § 24.

³ *Id.*

⁴ Fla. Stat § 11.0431(4) (2005) (defines public record as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by the legislative branch.”).

⁵ Fla. Stat. § 119.011 (2005).

⁶ Fla. Stat. § 11.0431(1)(a) (2005).

⁷ Fla. Stat. § 11.0431(2)(b) (2005) (exempt until “the complaint is dismissed, until the complaint is dismissed, a determination as to probable cause has been made, a determination that there are sufficient grounds for review has been made and no probable cause panel is to be appointed, or the respondent has requested in writing that the President of the Senate or the Speaker of the House of Representatives make public the complaint or other records relating to the complaint, whichever occurs first.”).

- A legislatively produced draft, or a legislative request for a draft, of a bill, resolution, memorial, legislative rule, or amendment;⁸
- A draft of a bill analysis or fiscal note;⁹
- A draft, request for a draft, amendment, and supporting documents for a reapportionment plan or redistricting plan;¹⁰
- Records prepared for or used in any executive session of the Senate;¹¹
- Portions of records of former legislative investigating committees whose records are sealed or confidential;¹²
- Requests by members for an advisory opinion concerning the application of the rules of either house pertaining to ethics;¹³ and
- Portions of correspondence held by the legislative branch which, if disclosed, would reveal: (1) information otherwise exempt from disclosure by law; (2) an individual's medical treatment, history, or condition; or (3) the identity or location of an individual if there is a substantial likelihood that releasing such information would jeopardize the health or safety of that individual; or information regarding physical abuse, child abuse, spouse abuse, or abuse of the elderly.¹⁴

A New Public Records Exemption for the Legislature

This bill provides that working papers of the Legislative Sunset Advisory Committee are confidential and exempt from section 119.07(1), Florida Statutes, and article I, section 24(a), Florida Constitution. Working papers includes "all documentary and other information." The working papers must be prepared as part of the work of the Legislative Sunset Advisory Committee in conducting evaluations and preparing reports.

The bill also provides that if a record held by another entity is confidential and exempt by law, it remains confidential and exempt if the Legislative Sunset Committee receives the document in connection with the performance of its duties.

Public Records Exemption Review: Open Government Sunset Review Act

Section 119.15, Florida Statutes, mandates the review and repeal or reenactment of any exemption from public records requirements in the fifth year after the enactment of a new exemption. Unless the Legislature acts to reenact the newly created exemption, it is repealed on October 2nd of the fifth year. The bill recognizes this required review and provides for repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

⁸ Fla. Stat. § 11.0431(2)(c) (2005) (provided the draft "is not provided to any person other than the member or members who requested the draft, an employee of the Legislature, a member of the Legislature who is a supervisor of the legislative employee, a contract employee or consultant retained by the Legislature, or an officer of the Legislature.").

⁹ Fla. Stat. § 11.0431(2)(d) (2005) (until "the bill analysis or fiscal note is provided to a person other than an employee of the Legislature, a contract employee or consultant retained by the Legislature, or an officer of the Legislature.").

¹⁰ Fla. Stat. § 11.0431(2)(e) (2005).

¹¹ Fla. Stat. § 11.0431(2)(f) (2005) (until "10 years after the date on which the executive session was held.").

¹² Fla. Stat. § 11.0431(2)(g) (2005) (applies to records "as of June 30, 1993, which may reveal the identity of any witness, any person who was a subject of the inquiry, or any person referred to in testimony, documents, or evidence retained in the committee's records; however, this exemption does not apply to a member of the committee, its staff, or any public official who was not a subject of the inquiry.").

¹³ Fla. Stat. § 11.0431(2)(h) (2005) (unless "the member requesting the opinion authorizes in writing the release of such information; provided, however, that all advisory opinions must be open to inspection except that the identity of the member shall not be disclosed in the opinion unless the member requesting the opinion authorizes in writing the release of such information.").

¹⁴ Fla. Stat. § 11.0431(2)(i) (2005).

Public Records Exemption for Alternative Investments: Public Necessity Statement

This bill provides a public necessity statement to comport with the requirements of article 1, section 24(c) of the Florida Constitution.

Contingent Effective Date

The bill takes effect July 1, 2006 only if HB 1123 or similar legislation is adopted by the Legislature.

C. SECTION DIRECTORY:

Section 1: Creates section 21.0195, Florida Statutes, to create a public records exemption for the Legislative Sunset Advisory Committee.

Section 2: Sets forth the public necessity statement for the public records exemption.

Section 3: Provides an effective date of July 1, 2006, provided HB 1123 or similar legislation is adopted.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

This bill may have a fiscal impact on state government expenditures because staff responsible for complying with public records requests will require training relating to the newly created public records exemption.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There does not appear to be a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not appear to reduce the percentage of a state tax

shared with counties or municipalities. This bill does not appear to reduce the authority that counties or municipalities have to raise revenue.

2. Other:

Article 1, section 24(c) of the Florida Constitution contains three requirements for any general law creating an exemption to the constitutional 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: (1) passed by a two-third votes of each house, (2) state with specificity the public necessity justifying the exemption, and (3) be no broader than necessary to accomplish the stated purpose of the law. As such, the bill requires a two-thirds vote for passage. The adequacy of the public necessity statement and whether the bill is broader than necessary are ultimately matters of judicial interpretation. It should be noted, however, that the exemption for the working papers is broad and does not have a time limitation or provision related to the release to third parties outside of the legislative process as contained in other legislative exemptions.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Placement of Exemption

This bill places this public records exemption in chapter 21, as recreated by HB 1123 (2005). Yet, public records exemptions specific to the Legislature are currently in section 11.0431, Florida Statutes. The sponsor may wish to place this public records exemption in this section or elsewhere in chapter 11, Florida Statutes, which relates to legislative organization, procedures, and staffing.

Expansive Exemption: Work Papers

Including "all documentary or other information" in the exemption for working papers makes the exemption quite broad. The provision also has no time limitation or provision related to the release to third parties outside of the legislative process as contained in other legislative exemptions. The sponsor may wish to consider narrowing the scope of the exemption.

Duplicative Exemption: Flow of Confidentiality and Exemption

The provision of the bill which provides that the confidential and exempt status of any record stays with it when used by the Legislative Sunset Advisory Committee appears to be duplicative of the exemption in section 11.0431(2)(a), Florida Statutes, which already provides that records or information held by the legislative branch of government remains confidential or exempt if that record would be confidential and exempt if held by an agency or any other unit of government.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Governmental Operations Committee adopted a "strike-everything" amendment and reported the bill favorably as a committee substitute. The amendment narrowed the scope of the public records exemption to only include the required agency report and other records, including working papers and drafts, which are prepared or maintained in order to present the report of the Legislative Sunset Advisory Committee. The amendment also narrowed the timeframe for the exemption to six months after the report is presented. The amendment added a provision, which is contained in other public records exemptions of the Legislature, to make these records public if they are released to persons other than the specified members and employees of the Legislature.

On April 21, 2006, the State Administration Council adopted a "strike-everything" amendment which returned the original language of the bill as filed.