# 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

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| BILL: | CS/SB 1438 |
| INTRODUCER: | Governmental Oversight and Productivity Committee and Senator Argenziano |
| SUBJECT: | Custodial Requirements for Public Records |
| DATE: | March 22, 2006 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Rhea | Wilson | GO | **Fav/CS** |
| 2. | | | JU | |
| 3. | | | WM | |
| 4. | | | RC | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The proposed committee substitute clarifies custodial requirements for public records. It places subheadings in s. 119.021, F.S., the section of the Public Records Act that establishes custodial requirements for public records. It also clarifies that the custodian of public records that are confidential and exempt, as opposed to records that are only exempt, cannot be released except as provided in statute or by court order. This clarification is the standard contained in case law, but some confusion exists because some statutes making records confidential and exempt expressly state that the custodian may not release the confidential and exempt record except as provided in law, while other statutes do not. The proposed committee substitute makes it clear that same standard applies to each exemption that is confidential and exempt by expressly stating this standard in the Public Records Act.

The proposed committee substitute further makes clear that an agency or other governmental entity that is authorized to receive a record that is confidential and exempt is required to maintain the confidential and exempt status of that record. Maintaining the confidential and exempt status of such a record is consistent with limiting the release of such record.

The proposed committee substitute further clarifies that the provision does not limit access to any record by an agency or entity acting on behalf of a custodian, the Legislature or pursuant to court order.

This bill amends s. 119.021 of the Florida Statutes.

## II. Present Situation:

**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 1892.[1] 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.[2] 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[3] 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 examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency[4] records are to be available for public inspection. The term "public record" 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.[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,

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[1] Sections 1390, 1391, F.S. (Rev. 1892). .
[2] Article I, s. 24 of the State Constitution
[3] Chapter 119, F.S.
[4] 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.
[5] Section 119.011(1), F.S.

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

The State Constitution permits only the Legislature the authority to create exemptions to public records requirements.[8] 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.[9] Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10]

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[11] 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.[12] 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.[13]

In *B.B.*, *infra*, at 34, the Court noted with regard to criminal discovery the following:

> In the context of a criminal proceeding, the first district has indicated that "the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure," so that a public records exemption cannot limit a criminal defendant's access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure." Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).

In a footnote, (*B.B.*, *infra*, at 34 n. 4) the Court also noted:

> We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is "not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal

[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] Article I, s. 24(c) of the State Constitution.
[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).
[10] Art. I, s. 24(c) of the State Constitution.
[11] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).
[12] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).
[13] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

> Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution...."

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.

**Confidential and Exempt Records** - There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential.[14] If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such record may not be released by an agency to anyone other than to the persons or entities designated in the statute.[15] 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.[16]

It should be noted that the definition of "agency" provided in the Public Records Act includes the phrase ". . . and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency [emphasis added]*." Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

## III. Effect of Proposed Changes:

The proposed committee substitute clarifies custodial requirements for public records. It places subheadings in s. 119.021, F.S., the section of the Public Records Act that establishes custodial requirements for public records. It also clarifies that the custodian of public records that are confidential and exempt, as opposed to records that are only exempt, cannot be released except as provided in statute or by court order. This clarification is the standard contained in case law, but some confusion exists because some statutes making records confidential and exempt expressly state that the custodian may not release the confidential and exempt record except as provided in law, while other statutes do not. The proposed committee substitute makes it clear that same standard applies to each exemption that is confidential and exempt by expressly stating this standard in the Public Records Act.

The proposed committee substitute further makes clear that an agency or other governmental entity that is authorized to receive a record that is confidential and exempt is required to maintain

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[14] WFTV, Inc. v. The School Board of Seminole, 874 So.2d 48, 53 (5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004).
[15] *Ibid*; *see also* Attorney General Opinion 85-62.
[16] *Ibid at 54; see also, Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

the confidential and exempt status of that record. Maintaining the confidential and exempt status of such a record is consistent with limiting the release of such record.

The proposed committee substitute further clarifies that the provision does not limit access to any record by an agency or entity acting on behalf of a custodian, the Legislature or pursuant to court order.

The bill is effective July 1, 2006.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

See, *supra*. The proposed committee substitute does not create an exemption from public records requirements. It states in the Public Records Act custodial requirements for public records that are already made confidential and exempt in other provisions of statute.

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:

None.

# VIII. Summary of Amendments:

None.