

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 664

INTRODUCER: Governmental Oversight and Productivity Committee and Community Affairs Committee

SUBJECT: Code Enforcement Officers/Open Government Sunset Review

DATE: April 4, 2006

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|-------------------------|
| 1. | <u>Vickers</u> | <u>Yeatman</u> | <u>CA</u> | <u>Fav/2 amendments</u> |
| 2. | <u>Rhea</u> | <u>Wilson</u> | <u>GO</u> | <u>Fav/CS</u> |
| 3. | _____ | _____ | <u>RC</u> | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This committee substitute reenacts and amends s. 119.071(4)(d)5., F.S., to continue the public records exemption for personal identifying information concerning code enforcement officers. The committee substitute narrows the exemption by eliminating social security numbers from the exemption as those numbers are protected by the general exemption for social security numbers. Additionally, as survey responses indicated that certain family information is not collected by agencies, specifically photographs of children and spouses, those records are deleted from the exemption.

This bill substantially amends section 119.071 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ 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. . . .

Unless specifically exempted, all agency⁵ records are 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.⁶

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.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

³ Article I, s. 24 of the State Constitution.

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ 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.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *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).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

The Public Records Act¹⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ The records custodian must state the basis for the exemption, in writing if requested.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So. 2d 203 (Fla. 1998).

²¹ 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994).

focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.²²

It should be noted that the definition of “agency” provided in the Public Records Law 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.

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. 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.

The act 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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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.²⁴

The act also requires consideration of the following:

²² *Ragsdale*, 720 So. 2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

²³ Section 119.15, F.S.

²⁴ Section 119.15(4) (b), F.S.

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²⁵ The Legislature is only limited in its review process by constitutional requirements.

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.

Records Exemption for Code Enforcement Officers - Code enforcement officers are responsible for the administration of a wide range of health, safety, and environmental regulations. Section 119.071(4)(d)5., F.S., prohibits the public disclosure of certain personal identifying information relating to code enforcement officers.²⁶ Specifically, this public records exemption includes home addresses, telephone numbers, social security numbers, and photographs of current or former code enforcement officers. In addition, the exemption extends to the names, home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such personnel. Finally, the names and locations of schools and day care facilities attended by the children of such personnel are also included within the scope of the exemption.

In the accompanying statement of public necessity for this exemption the Legislature found that the exemption was justified because the previous exemption did not completely shield the identities of county and municipal code enforcement officers. The enacting legislation further stated:

The responsibilities of these employees regularly take them into areas of neglect, abuse, and personal danger. Citations issued in response to violations that they encounter often lead to retribution by the offenders. Their personal files are reviewed on numerous occasions by code violators seeking information relating

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

²⁶ Chapter 2001-249, Laws of Florida.

*to code enforcement officers and their families. The disclosure of this personal information has led to threats, acts of violence, and unwarranted risk to the officers and their families.*²⁷

This exemption expires October 2, 2006, unless it is reviewed and reenacted by the Legislature.

Interim Project 2005-208: Sunset Review of the Exemption for Code Enforcement Officers - Senate staff reviewed the public records exemption in s. 119.071, F.S., pursuant to the Open Government Sunset Review Act, and determined that, with modification, the exemption meets the requirements for reenactment. The exemption protects code enforcement officers and their family members from potentially dangerous individuals. Based on the surveys and interviews, there is a reasonable basis to believe the release of the personal identifying information contained in the exemption could jeopardize the safety of officers and their families. Additionally, the exemption furthers the effective administration of governmental programs by enabling code enforcement personnel to perform their duties and responsibilities with reduced concern for possible retaliation.

Surveys and interviews with code enforcement officers indicated that most have taken steps to safeguard their personal identifying information. For example, almost all of the officers staff contacted reported they had unlisted home telephone numbers. Similarly, a number of officers reported that they had contacted private entities (credit reporting agencies, utility providers) and local governmental entities (property appraisers, tax collectors, and elections supervisors) to ensure that personal identifying information remained, to greatest extent possible, confidential.

Representatives of local governments and individual code enforcement officers expressed unanimous support for reenactment of this exemption. The overall consensus was that the exemption provided safeguards for at-risk public employees and enabled staff to carry out their responsibilities more effectively. In addition, several survey respondents reasoned that the exemption does not impact the public's ability to access meaningful agency or employee records, including documents that reflect an officer's qualifications, past performance evaluations, salary and work history, disciplinary actions, and complaints.

Based on the findings of the Open Government Sunset Review, staff concluded that certain information currently contained within the exemption is protected by another exemption or is not maintained by agencies. For this reason, the following information should not be included within this public records exemption:

- Social security numbers (protected by existing public records exemptions contained in s. 119.071, F.S.) and
- Photographs of the employee's spouse and children (not collected by agencies).

In addition, staff concluded that it would be advisable to require code enforcement officers to provide a written statement that they have made reasonable efforts to protect such information from being accessible through other means available to the public, before such information can

²⁷ *Ibid.*

be exempt from public disclosure. This requirement has recently been incorporated into similar record exemptions for certain categories of non-law enforcement personnel.

III. Effect of Proposed Changes:

This committee substitute reenacts and amends s. 119.071(4)(d)5., F.S., to continue the public records exemption for personal identifying information concerning code enforcement officers.

The committee substitute narrows the exemption by eliminating social security numbers from the exemption as those numbers are protected by the general exemption for social security numbers.

Additionally, as survey responses indicated that certain family information is not collected by agencies, specifically photographs of children and spouses, those records are deleted from the exemption.

The bill provides for an effective date of October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill narrows and reenacts the public records exemption found in s. 119.071(4)(d)5., F.S.

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

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.

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