

# 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: Community Affairs Committee

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BILL: SPB 7002

SPONSOR: For consideration by Community Affairs Committee

SUBJECT: Open Government Sunset Review/Human Resource Directors

DATE: September 23, 2005 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Vickers	Yeatman		<b>Pre-meeting</b>
2.				
3.				
4.				
5.				
6.				

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## I. Summary:

This Senate Provisional Bill (SPB) reenacts and amends s. 119.071(4)(d)2., F.S., to continue the public records exemption for personal identifying information concerning human resource directors and managers. The SPB narrows the exemption by eliminating certain information currently contained within the exemption that is protected by another exemption or is not maintained by agencies. In addition, the SPB requires human resource directors and managers 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 be exempt from public disclosure.

This SPB substantially amends section 119.071 of the Florida Statutes.

## II. Present Situation:

**Florida Public Records Law** - Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, the electors of Florida approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides:

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.

The Public Records Law<sup>1</sup> specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency<sup>2</sup> records are to be available for public inspection.

Section 119.011(11), F.S., defines the term “public record” to include:

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.

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 “intended to perpetuate, communicate, or formalize knowledge.”<sup>3</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>4</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>5</sup> 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.<sup>6</sup> A bill enacting an exemption<sup>7</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>8</sup>

**Open Government Sunset Review Act - The Open Government Sunset Review Act<sup>9</sup>** establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the

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<sup>1</sup> Chapter 119, F.S.

<sup>2</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.” 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.

<sup>3</sup> *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>5</sup> Article I, s. 24(c) of the State Constitution.

<sup>6</sup> *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).

<sup>7</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>8</sup> Art. I, s. 24(c) of the State Constitution.

<sup>9</sup> Section 119.15, F.S.

exemption is repealed on October 2, unless the Legislature reenacts the exemption. 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, revised, or maintained only if: (1) it serves an identifiable public purpose; and (2) 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:

“[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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”

[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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of such information would injure the affected entity in the marketplace.”<sup>10</sup>

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

- 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 so, 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 appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.<sup>11</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

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<sup>10</sup> Section 119.15(6)(b), F.S.

<sup>11</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(8), 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.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who 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.

**Records Exemption for Human Resource Directors** - Section 119.071(4)(d)2., F.S., prohibits the public disclosure of certain personal identifying information relating to human resource managers.<sup>12</sup> Specifically, this public records exemption includes home addresses, telephone numbers, social security numbers, and photographs of current or former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers of any local government agency or water management district whose duties include hiring and firing employees, labor contract negotiation, administration, or other personnel-related duties. 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 is justified because, if the information were not exempt from disclosure, human resource personnel or their family members could be harmed or threatened with harm by a current or former employee or a friend or family member of a current or former employee. This exemption expires October 2, 2006, unless it is reviewed and reenacted by the Legislature.

**Interim Project 2005-207: Sunset Review of the Exemption for Human Resource Directors** - 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 personnel managers and their family members from potentially dangerous employees involved in layoffs, disciplinary proceedings, terminations, and other emotionally-charged employment actions. Additionally, the exemption furthers the effective administration of governmental human resource programs by enabling personnel managers to perform their duties and responsibilities with reduced fear of retaliation by affected employees.

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<sup>12</sup> Chapter 2001-249, Laws of Florida.

Surveys and interviews with human resource professionals indicated that most have taken steps to safeguard their personal identifying information. For example, the majority of managers Senate staff contacted reported they had unlisted home telephone numbers or listed their number under another name in the local directory. Similarly, a number of human resource managers indicated that they had contacted credit reporting agencies, utility providers, and local governmental entities (property appraisers, tax collectors, elections supervisors, etc.) to ensure that personal identifying information remained confidential.

Representatives of local governments and individual human resource managers expressed support for reenactment of this exemption. The overall consensus was that the exemption provided an important safety measure for managers and enabled staff to carry out their responsibilities more efficiently and effectively. In addition, human resource managers reasoned that the exemption does not affect the public's ability to access meaningful agency or employee records, including documents that reflect an individual's qualifications, 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 human resource managers 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 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 SPB amends s. 119.071, F.S., to reenact the public records exemption for specified human resource personnel. The SPB modifies the exemption by narrowing the exempted information to only include:

- The home address, telephone number, and photographs of current and former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers.
- The names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel.
- The identity of the daycare or school of such employee's children.

In addition, the SPB requires that human resource directors and managers provide a written statement that they have made reasonable efforts to protect such information from being accessible through other means available to the public.

The SPB 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 SPB narrows and reenacts the public records exemption found in s. 119.071(4)(d)2., 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.

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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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## **VIII. Summary of Amendments:**

None.

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