

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

Section 395.1056, F.S., provides public records and public meetings exemptions regarding emergency management plans. The exemptions were enacted during the 2001 C special session following the September 11, 2001, attacks on the United States.

Public Records Exemptions

Portions of a comprehensive emergency management plan that address a public or private hospital's response to an act of terrorism, held by the Agency for Health Care Administration, a state or local law enforcement agency, a local government emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs, is confidential and exempt¹ from public records requirements.² Portions of a comprehensive emergency management plan that address a public hospital's response to an act of terrorism held by that public hospital is confidential and exempt from public disclosure.³

Portions of an emergency management plan that address a hospital's response to terrorism include

[S]ecurity systems or plans; vulnerability analyses; emergency evacuation transportation; sheltering arrangements; postdisaster activities, including provisions for emergency power, communications, food, and water; postdisaster transportation; supplies, including drug caches; staffing; emergency equipment; and individual identification of residents, transfer of records, and methods of responding to family inquiries.⁴

The exemptions do not apply to the Governor's certification of sufficiency of a comprehensive emergency management plan addressing a hospital's response to an act of terrorism.⁵

Public Meetings Exemption

Any portion of a public meeting that would reveal confidential and exempt emergency management plans is exempt from public meetings requirements.⁶

¹ There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

² Section 395.1056(1), F.S.

³ Section 395.1056(2), F.S.

⁴ Section 395.1056(1) and (2), F.S.

⁵ Section 395.1056(4), F.S.

⁶ Section 395.1056(3), F.S.

Open Government Sunset Review Act

Pursuant to the Open Government Sunset Review Act,⁷ the exemptions will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal dates, thereby reenacting the public records and public meetings exemptions. It reorganizes the section and makes editorial changes.

The bill removes the provision requiring an agency with authorized access to such plan to maintain the confidential and exempt status of that plan. In *Ragsdale v. State*,⁸ the Supreme Court held that

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the 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.⁹

In *City of Riviera Beach v. Barfield*,¹⁰ the court stated “[h]ad 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.”¹¹ As such, the provision is unnecessary and has been removed, because had the Legislature intended for the exempt status to evaporate then the Legislature would have stated as much.

C. SECTION DIRECTORY:

Section 1 amends s. 395.1056, F.S., to remove the repeal dates.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

⁷ Section 119.15, F.S.

⁸ 720 So.2d 203 (Fla. 1998).

⁹ *Id.* at 206, 207.

¹⁰ 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

¹¹ *Id.* at 1137.

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may represent a minimal non-recurring positive impact on state and local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment as a result of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the public records exemption, state and local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.