

# 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: Governmental Oversight and Productivity Committee

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BILL: SPB 7050

INTRODUCER: For consideration by Governmental Oversight and Productivity Committee

SUBJECT: Open Government Sunset Review; Archaeological Sites

DATE: November 29, 2005 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson		<b>Pre-meeting</b>
2.				
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5.				
6.				

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## I. Summary:

Florida has been inhabited for over 10,000 years. Evidence of the presence of human beings is contained in archaeological sites located throughout the state. These sites contain human remains, artifacts, and other information that is historically, culturally, and archaeologically valuable. The Legislature has declared that historic properties are a rich and unique heritage of the state and an important legacy to be valued and conserved for present and future generations. It is state policy to record, preserve, protect, and interpret this information. The Division of Historical Resources of the Department of State presently holds approximately 28,000 archaeological site files. The Legislature has found that the state has a serious problem with archaeological looting and that the destruction of these nonrenewable historical resources will engender a significant loss to the state's quality of life, economy, and cultural environment.

Section 267.135, F.S., provides an exemption for any information identifying the location of archaeological sites contained in site files or other records maintained by the division, if the division finds that disclosure of such information will create a substantial risk of harm, theft, or destruction at a site. This exemption was made subject to s. 119.15, F.S., the Open Government Sunset Review Act of 1995, and will expire October 2, 2006, unless it is reviewed and saved from repeal. The exemption was reviewed pursuant to the standards of the Open Government Sunset Review Act of 1995 and retention of the exemption is recommended as the exemption is narrowly-drawn to meet the stated public necessities for the exemption. Further, retention is recommended because the exemption is necessary for the effective and efficient administration of a government program.

This bill amends section 267.135, Florida Statutes.

## II. Present Situation:

**Public Records** – The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

(a) 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution, 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.

Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection. The term Apublic record@s 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.<sup>5</sup>

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.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Article I, s. 24 of the State Constitution

<sup>3</sup> Chapter 119, F.S.

<sup>4</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>5</sup> Section 119.011(11), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</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>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act of 1995<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. 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. The three statutory criteria are if the exemption:

- (a) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (b) protects 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
- (c) protects 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.<sup>15</sup>

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?

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

<sup>9</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>10</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>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(4)(b), F.S.

- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

In addition to these considerations, pursuant to amendments to the section made by ch. 2005-251, L.O.F.,<sup>16</sup> but that are not effective until October 1, 2005, consideration must also be given to the following:

- (1) Is the record or meeting protected by another exemption?
- (2) 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 of 1995 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.<sup>17</sup> 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.

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 penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates 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.

**The Department of State, Division of Historical Resources** - The Florida Department of State is created in s. 20.10, F.S. The head of the department is the Secretary of State, who performs the functions conferred by the State Constitution upon the custodian of state records.<sup>18</sup> Six divisions are established in law, including the Division of Historical Resources (the “division”).<sup>19</sup>

Chapter 267, F.S., the Florida Historical Resources Act, establishes the powers and duties of the division. Among a variety of other duties, the division is assigned the responsibility to cooperate with federal and state agencies, local governments, and private organizations and individuals to direct and conduct a comprehensive statewide survey of historic resources and to maintain an inventory of those resources.

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<sup>16</sup> See, Committee Substitute for Senate Bill 1144 by the Committee on Governmental Oversight and Productivity and Senator Argenziano.

<sup>17</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>18</sup> For example, s. 2(c), Art. XI of the State Constitution requires the constitution revision commission to file its constitutional revision proposals with the custodian of state records.

<sup>19</sup> The other divisions established in the Legislature include the Divisions of: (1) Elections; (2) Corporations; (3) Library and Information Services; (4) Cultural Affairs; and (5) Administration.

Section 267.061, F.S., establishes the state policy on historic property and resources.<sup>20</sup> Subsection (1) of this section provides:

The rich and unique heritage of historic properties in this state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations. The destruction of these nonrenewable historical resources will engender a significant loss to the state’s quality of life, economy, and cultural environment. It is therefore declared to be state policy to: (1) Provide leadership in the preservation of the state’s historic resources; (2) administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship; (3) contribute to the preservation of non-state-owned historic resources and to give encouragement to organizations and individuals undertaking preservation by private means; (4) foster conditions, using measures that include financial and technical assistance, for a harmonious coexistence of society and state historic resources; (5) encourage the public and private preservation and utilization of elements of the state’s historically built environment; and (6) assist local governments to expand and accelerate their historic preservation programs and activities.

The division is required to establish, maintain, and administer a state historic preservation program meeting the requirements of an approved program under the National Historic Preservation Act of 1966, as amended,<sup>21</sup> and to fulfill the responsibilities of state historic preservation programs as provided in s. 101(b) of that act. Under that act, the Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.<sup>22</sup> The Federal government awards grant monies to implement the act.

<b>Federal HFP Grant Awards FY 00-05<sup>23</sup></b>		
<b>Fiscal Year</b>	<b>Federal Grant Number</b>	<b>Amount</b>
2000	12-00-15311	\$ 683,831.00
2001	12-01-16409	\$ 981,893.00
2002	12-02-17539	\$ 817,580.00
2003	12-03-18209	\$ 697,618.00
2004	12-04-19310	\$ 717,696.00
2005	12-05-20411	\$ 741,369.00
<b>Total</b>		<b>\$4,639,987.00</b>

Additionally, s. 267.031(5) (b), F.S., requires the division to develop a statewide comprehensive historic preservation plan. Numerous other provisions of Florida law are intertwined with this plan.

<sup>20</sup> Section 267.021(3), F.S., defines the terms “historic property” and “historic resource” to mean “. . . any prehistoric or historic district, site, building, object, or other real or personal property of historical, architectural, or archaeological value, and folklife resources. These properties or resources may include, but are not limited to, monuments, memorials, Indian habitations, ceremonial sites, abandoned settlements, sunken or abandoned ships, engineering works, treasure trove, artifacts, or other objects with intrinsic historical or archaeological value, or any part thereof, relating to history, government, and culture of the state.”

<sup>21</sup> The National Historic Preservation Act, 16 U.S.C. 470 et. seq. Subsequent amendments to the Act include Public Law 91-243, Public Law 93-54, Public Law 94-422, Public Law 94-458, Public Law 96-199, Public Law 96-244, Public Law 96-515, Public Law 98-483, Public Law 99-514, Public Law 100-127, Public Law 102-575, Public Law 103-437, Public Law 104-333, Public Law 106-113, Public Law 106-176, Public Law 106-208, and Public Law 106-355.

<sup>22</sup> The Secretary, in consultation with national historic and archaeological associations, is required to establish or revise criteria for proper-ties to be included on the National Register and criteria for National Historic Landmarks under 16 U.S.C. 470a(a).

<sup>23</sup> Information provided by the Department of State.

Chapter 253, F.S., requires the location, identification, evaluation and protection of historic resources be considered in all state land management plans. Chapter 187, F.S., makes historic preservation an integral part of the State Comprehensive Plan. Chapter 186, F.S., provides for the implementation of the state plan through state agency functional plans and regional comprehensive plans. Chapter 163, F.S., makes historic preservation an integral part of local government comprehensive planning.

Section 267.061, F.S., also assigns other executive branch state agencies a variety of responsibilities related to historic properties, including consideration of the effect of an undertaking on any historic property that is included in, or eligible for inclusion in, the National Register of Historic Places.<sup>24</sup> Further, it encourages the establishment of programs to locate, inventory, and evaluate all historic properties under the agency's ownership or control that appear to qualify for the National Register.

Section 267.115, F.S., also requires the division to acquire, maintain, preserve, interpret, exhibit, and make available for study objects which have intrinsic historical or archaeological value relating to the history, government, or culture of the state. The division is also required to maintain an adequate record of all objects in its custody each year which have a historical or archaeological value and must take an annual inventory of such objects.

The Bureau of Historic Preservation, a bureau of the division, maintains the most complete information on historical sites in the state. The Florida Master Site File (the "site file")<sup>25</sup> is maintained at the R.A. Gray Building, 500 S. Bronough St., in Tallahassee, Florida. There are currently more than 150,000 historical structures and archaeological sites listed in the site file, including approximately 28,000 Florida archaeological sites.<sup>26</sup> These sites represent the known physical remains of Florida's prehistoric and historic cultural heritage. Many of the archaeological sites recorded in the site file have not yet been excavated.

The site file is a paper file archive, as well as a computer data base, including GIS<sup>27</sup> and EDMS.<sup>28</sup> Files are organized alphabetically by county and resources are assigned numbers sequentially as they are recorded. Copies of survey reports are maintained as part of the site file for use by researchers. Several computerized search tools have been developed to assist file users, including searches by key words and authors. The staff assists researchers and sometimes performs limited research on request.

The artifacts in the archaeological sites recorded in the site files often have monetary value to looters. Section 267.13, F.S., prohibits practices that result in the removal or destruction of archaeological artifacts on state-owned lands, the destruction of archaeological sites on state-owned lands, or the sale of artifacts from sites the seller knows are from such sites. Penalties range from a misdemeanor of the first degree to a felony of the third degree.

The division provided information regarding several recent violations of s. 267.13, F.S. For example, in May of 2004, Department of Environmental Protection agents arrested two individuals who were digging at Newnan's Lake, a site on state lands that has evidence of an Archaic American Indian occupation. According to the division, the site was heavily damaged by the digging. Sites in the area are known for "Newnan's Points," artifacts that may fetch high prices on the Internet and at artifact shows. The damage assessment totaled archaeological value, cost of the assessment and repair at \$8,960.56.

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<sup>24</sup> 16 U.S.C. 470a (a) provides for the National Register of Historic Places.

<sup>25</sup> Section 267.031(5) (n), F.S. See, also, Rule 1A-46, F.A.C.

<sup>26</sup> See answers to Question Nos. 1 and 3(a) of the staff survey. Roughly 18% of historic properties on the Florida Master Site File are classified as archaeological sites pursuant to the rule definition (27,561/152,177).

<sup>27</sup> Geographic Information System

<sup>28</sup> Electronic Document Management System; this system serves the general purpose of allowing accurate facsimiles of paper records to be scanned, indexed, stored, displayed, printed, and transmitted to users.

In another recent case, two individuals were arrested for unauthorized excavation and for removing arrowheads and tools at Enclave B in Pasco County. The damage assessment for looting at the site was estimated at totaled \$37,249.82.

Other recent examples of digging and looting on state-owned lands include: (a) the arrest of two individuals at the Withlacoochee State Forest in May of 2004 by Department of Agriculture and Consumer Affairs law enforcement officers; (b) the arrest of two individuals for digging at a site in the Lochloosa Wildlife Conservation Area in March 2005; and (c) the arrest of an individual in June 2005 for removing artifacts from sites in the Tomoka State Park in Volusia County.<sup>29</sup>

**Exemption Under Review** – Section 267.135, F.S.,<sup>30</sup> provides that

[a]ny information identifying the location of archaeological sites contained in site files or other records maintained by the Division of Historical Resources of the Department of State is exempt . . . if the Division of Historical Resources finds that disclosure of such information will create a substantial risk of harm, theft, or destruction at such sites. . . .

The public necessity statement provides that it is a public necessity to exempt the location of archaeological sites because

. . . the state has a serious problem with archaeological looting. The exact location of an archaeological site should be exempt from disclosure if the Division of Historical Resources determines that disclosure of the site location will create a substantial risk of harm, theft, or destruction at the site.

Additionally, the public necessity statement notes that the lack of protection for sensitive sites puts the federal government in a difficult position, noting:

[t]he Federal Government is mandated to share site-specific information with the Florida State Historic Preservation Officer to comply with section 106 of the National Historic Preservation Act of 1966, as amended. However, section 304 of the National Historic Preservation Act of 1966, as amended, protects specific information concerning the location and character of cultural resources, which includes archaeological sites, when sharing that information could place them in jeopardy.<sup>31</sup>

Finally, the public necessity statement notes that new implementation guidelines for the National Historic Preservation Act of 1966, as amended, require increased consultation with federally recognized tribes. As a result, the Legislature found that managing information concerning Native American sacred sites and sites of cultural patrimony requires the exemption “. . . because credible stewardship in this area necessitates the ability to protect sensitive information from public dissemination.”

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<sup>29</sup> These examples are not a comprehensive listing of violations of s. 267.13, F.S.

<sup>30</sup> Chapter 2001-162, L.O.F.

<sup>31</sup> Under 16 U.S.C. 470w-3(a), the head of a Federal agency or other public official receiving grant assistance pursuant to the National Historic Preservation Act of 1966, as amended, after consultation with the Secretary, must withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may: (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. Further, under 16 U.S.C. 470a (b), if the Secretary of the Interior determines that a major aspect of a State program is not consistent with the act, he or she must disapprove the program and suspend in whole or in part any contracts or cooperative agreements with that State and the State Historic Preservation Officer until the program is consistent, unless the Secretary determines that the program will be made consistent with the act within a reasonable period of time.

**III. Effect of Proposed Changes:**

The proposed Senate bill removes the repeal date for s. 267.135, F.S., ensuring the continued exemption for any information identifying the location of archaeological sites contained in site files or other records maintained by the Division of Historical Resources of the Department of State if the Division of Historical Resources finds that disclosure of such information will create a substantial risk of harm, theft, or destruction at such sites

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

The exemption was reviewed pursuant to the requirements of s. 119.15, F.S., the Open Government Sunset Review Act and, based upon the review, retention of the exemption was recommended.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Continued exemption of information that identifies the location of archaeological sites in the state could protect landowners with archaeological sites on their property.

**C. Government Sector Impact:**

Continued exemption of information that identifies the location of archaeological sites in the state helps to ensure continued federal funding for certain programs.



<b>Federal HFP Grant Awards FY 00-05<sup>32</sup></b>		
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2000	12-00-15311	\$683,831.00
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2003	12-03-18209	\$697,618.00
2004	12-04-19310	\$717,696.00
2005	12-05-20411	\$741,369.00
<b>Total</b>		<b>\$4,639,987.00</b>

**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 introducer or the Florida Senate.

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<sup>32</sup> Information provided by the Department of State.



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

None.

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