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 712
INTRODUCER:	Governmental Oversight and Productivity Committee and Transportation Committee
SUBJECT:	Motor Vehicle Crashes/OGSR
DATE:	April 4, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Meyer	TR	**Favorable**
2.	Rhea	Wilson	GO	**Fav/CS**
3.			RC	
4.				
5.				
6.				

I. Summary:

The committee substitute reenacts and amends s. 316.066(3)(c), F.S., which makes confidential and exempt motor vehicle crash reports for a period of 60 days after the date the report is filed. The committee substitute also continues to permit the immediate release of motor vehicle crash reports to certain persons or entities. The committee substitute makes numerous organizational changes to the exemption, as well as standardizes terminology used in the exemption.

Additionally, the committee substitute expands the exemption by merging provisions from Senate Bill 2116. That bill is based upon recommendation in the Banking and Insurance Committee interim project report, *Florida's Motor Vehicle No-Fault Law* (2006-102), and it expands the exemption so that it includes uniform traffic citations associated with crashes and crash investigations. Further, it amends the definition of a victim services program (one of the parties permitted to have immediate access to crash reports by statute) to require that the program operate on a statewide basis, be qualified for nonprofit status under s. 501(c)(3) of the United States Internal Revenue Code, and have a valid consumer's certificate of exemption issued to the organization by the Florida Department of Revenue.

As the bill expands the records protected by the crash report exemption, it contains a statement of public necessity. Further, the bill requires a two-thirds vote of the membership to pass.

This bill substantially amends section 316.066 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]

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 person[4] 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 agency[5] 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

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[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).
[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.

accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] 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]

The Public Records Act[14] 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

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[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*.
[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).

> 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 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 Act[23] 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;

[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.

- [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:

- 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 by 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 Motor Vehicle Crash Reports

Section 316.066(3)(a), F.S., requires law enforcement officers to file written reports of motor vehicle crashes. Those reports are public records except as otherwise made exempt or confidential.[26] However, s. 316.066(3)(c), F.S., provides crash reports revealing the identity, the home or employment telephone number, the home or employment address, or other personal information concerning parties involved in a crash, received or prepared by any agency which regularly receives or prepares information concerning the parties to motor vehicle crashes is

[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[26] Section 119.105, F.S.

confidential and exempt from public disclosure. This information is to remain confidential and exempt for 60 days after the date the report is filed.

The primary policy reason for closing access to these crash reports for 60 days to persons or entities not specifically listed appears to be protection for crash victims and their families from illegal solicitation by attorneys. In September 2000, the Fifteenth Statewide Grand Jury, in a report on insurance fraud related to personal injury protection (PIP) benefits, found a strong correlation between the utilization of crash reports through illegal solicitations and the commission of a variety of frauds, including insurance fraud.

In the statement of public necessity accompanying the creation of the public records exemption found in s. 316.066(3)(c), F.S., the 2001 Legislature identified as justification for the public records exemption: (1) to protect the privacy of persons that have been the subject of a motor vehicle crash and (2) to protect the public from unscrupulous individuals who promote the filing of fraudulent insurance claims by obtaining such information immediately after a crash and exploiting the individual at a time of emotional distress.

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

Interim Project 2006-225: *Sunset Review of the Exemption for Motor Vehicle Crash Reports*

Senate staff reviewed the public records exemption in s. 316.066(3)(c), F.S., pursuant to the Open Government Sunset Review Act and determined the exemption meets the requirements for reenactment, as it protects information of a sensitive personal nature concerning individuals involved in a crash.

However, the First Amendment Foundation provided a written opinion, which indicated "the exemption is simply unworkable" based on numerous complaints over the past five years from the public, reporters and records custodians. Specifically, the Foundation expressed concerns as a result of its experience that occasionally legitimate requests were denied "due to the excessive penalty provision" for records custodians. Section 316.066(d), F.S., clearly provides a state or local agency employee who *knowingly* discloses such information is guilty of a third degree felony. The Foundation's assumption is records custodians would rather deny access to the crash reports and commit a first degree misdemeanor, punishable by a fine not to exceed $1,000 or imprisonment not to exceed one year[27] rather "than risk being penalized with a third degree felony" for mistakenly furnishing a crash report to persons or entities not covered by the exemption. Based on the above, it is the recommendation of the Foundation to allow the exemption to sunset.

In addition, the Department of Financial Services' Division of Insurance Fraud supports the reenactment of this exemption. As indicated during discussions, it is the opinion of the division that PIP fraud begins with solicitation. In a recent study by the Department of Financial Services, "the original purpose of the prohibition on solicitation was to combat the practice of some providers who paid runners to obtain information about accident victims and invite them to be serviced by those providers, who in turn charge high prices and/or over treat the victim to

[27] Section 119.10(1)(b), F.S.

exhaust the PIP coverage and promote filing of a motor vehicle tort claim. While there has been some deterrent value, many cases of apparent runner activity have continued to take place…."[28] However, the restriction on the availability of crash reports continues to aid in deterring illegal commercial solicitation of accident victims.

III. Effect of Proposed Changes:

The committee substitute reenacts and amends s. 316.066(3)(c), F.S., which makes confidential and exempt motor vehicle crash reports for a period of 60 days after the date the report is filed. The committee substitute also continues to permit the immediate release of motor vehicle crash reports to certain persons or entities. The committee substitute makes numerous organizational changes to the exemption, as well as standardizes terminology used in the exemption.

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As the bill expands the records protected by the crash report exemption, it contains a statement of public necessity. Further, the bill requires a two-thirds vote of the membership to pass

This 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 reenacts the public records exemption found in s. 316.066(3)(c), F.S., and expands that exemption. As the public records exemption is expanded, it is subject to a two-thirds vote of the membership.

C. Trust Funds Restrictions:

None.

[28] Study of PIP Insurance Changes, *Effect of Changes Pursuant to the Florida Motor Vehicle Insurance Affordability Reform Act of 2003*, January 2005, by the Florida Department of Financial Services.

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:

The Senate Committee on Banking and Insurance conducted an interim project, *Florida's Motor Vehicle No-Fault Law,* 2006-102, to assess how well the Motor Vehicle No-Fault Law is working in Florida, compared to automobile insurance systems in other states. The Motor Vehicle No-Fault Law is set for repeal effective October 1, 2007, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006.

VIII. Summary of Amendments:

None.