

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

The Florida Watershed Restoration Act and Total Maximum Daily Loads

The federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act (CWA), established the basic framework for pollution control in the nation's water bodies. Its primary goal was to have the nation's water bodies clean and useful. By setting national standards and regulations for the discharge of pollution, the intent of the CWA was to restore and protect the health of the nation's water bodies.¹

Section 305(b) of the CWA requires states to submit to Congress a biennial report on the water quality of their lakes, streams, and rivers. A partial list of water bodies that qualify as "impaired" (i.e., do not meet specific pollutant limits for their designated uses) must be submitted to the U.S. Environmental Protection Agency under section 303(d) of the CWA. States are required to develop total maximum daily loads (TMDL) for each pollutant that exceeds the legal limits for that water body. Section 303(d) and the development of TMDLs generally were ignored by the states until environmental groups began filing lawsuits.²

In 1999, the Florida Legislature passed the Florida Watershed Restoration Act (WRA), which codified the establishment of TMDLs for pollutants of water bodies.³ The WRA requires the Department of Environmental Protection (DEP) to promulgate rules relating to the methodology for assessing, calculating, allocating, and implementing the TMDL process.⁴ The WRA also directs that the TMDL process be integrated with existing protection and restoration programs, and coordinated with all state agencies and affected parties.⁵

TMDLs describe the amount of each pollutant a water body can receive without violating state water quality standards.⁶ TMDLs are the sum of waste load allocations, load allocations, and a margin of safety to account for uncertain conditions. Waste load allocations are pollutant loads attributable to existing and future point sources, such as discharges from industry and sewage facilities. Load allocations are pollutant loads attributable to existing and future nonpoint sources such as the runoff from farms, forests, and urban areas. Even though an individual discharge into a water body may meet established standards, the cumulative and multiplier effect of discharges from numerous sources can cause a water body not to meet the quality standards.⁷

¹ See *House of Representatives Staff Analysis HB 1839 CS* by the State Resources Council, April 25, 2005, at 2.

² *Id.*

³ Chapter 99-223, Laws of Florida; s. 403.067, F.S.

⁴ Section 403.067(3)(b), F.S.

⁵ Subsections (1) and (3) of section 403.067, F.S.

⁶ Section 403.067(6)(a), F.S.

⁷ See *House of Representatives Staff Analysis HB 1839 CS* by the State Resources Council, April 25, 2005, at 2.

DEP may develop a basin management action plan (BMAP) as part of the development and implementation of a TMDL for a water body.⁸ The plan must:

- Integrate appropriate management strategies available to the state through existing water quality protection programs to achieve the TMDL;
- Restore designated uses of the water body;
- Provide for phased implementation of strategies;
- Establish a schedule for implementing strategies;
- Establish a basis for evaluating the plan's effectiveness;
- Identify feasible funding strategies; and
- Equitably allocate pollutant reductions to basins as a whole or to each point or nonpoint source.⁹

The BMAP also must include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is achieved over time.¹⁰ Progress assessments are required every five years and revisions to the plan are required, as appropriate.¹¹

Public Records Exemption

Current law provides a public records exemption for certain agricultural records. Individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information that are reported to the Department of Agriculture and Consumer Services as part of best management practices for reducing water pollution are confidential and exempt¹² from public records requirements.¹³ Upon request, the department may release the confidential and exempt records to DEP or any water management district.

Pursuant to the Open Government Sunset Review Act,¹⁴ the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also makes editorial changes.

The bill maintains the provision requiring DEP or any water management district with authorized access to such records to maintain the confidential and exempt status of those records. In *Ragsdale v. State*,¹⁵ 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.¹⁶

⁸ Section 403.067(7)(a)1., F.S.

⁹ *Id.*

¹⁰ Section 403.067(7)(a)5., F.S.

¹¹ *Id.*

¹² 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).

¹³ Section 403.067(7)(c)5., F.S.

¹⁴ Section 119.15, F.S.

¹⁵ 720 So.2d 203 (Fla. 1998).

¹⁶ *Id.* at 206, 207.

In *City of Riviera Beach v. Barfield*,¹⁷ 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.”¹⁸ As such, the provision is *unnecessary*, because had the Legislature intended for the confidential and exempt status to evaporate then the Legislature would have stated as much.

C. SECTION DIRECTORY:

Section 1 amends s. 403.067(7), F.S., to remove the October 2, 2006, repeal date.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may represent a minimal non-recurring positive impact on state 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 exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

This bill does not create, modify, amend, or eliminate local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹⁷ 642 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*.

¹⁸ *Id.* at 1137.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This 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

On March 22, 2006, the Governmental Operations Committee reported PCB GO 06-14 favorably with one amendment. The amendment reinserts the provision requiring the Department of Environmental Protection or any water management district with authorized access to confidential and exempt records to maintain the confidential and exempt status of those records.