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 736

INTRODUCER: Governmental Oversight and Productivity Committee and Commerce and Consumer Services Committee

SUBJECT: Open Government Sunset Review

DATE: April 20, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	**Favorable**
2.	Sanford	Whiddon	CF	**Favorable**
3.	Rhea	Wilson	GO	**Fav/CS**
4.			RC	
5.				
6.				

I. Summary:

The Commerce and Consumer Services Committee performed an Open Government Sunset Review of the records and meetings exemptions in ss. 414.106, 414.295 and 445.007(9), F.S. Each exemption prevents public disclosure of personal identifying information of recipients of temporary cash assistance provided through the Temporary Assistance to Needy Families (TANF) program. The committee recommended that the exemptions be saved from repeal.

This committee substitute clarifies and saves from repeal the current meeting exemption at which personal identifying information contained in TANF records are discussed in s. 414.106, F.S., and repeals a redundant meeting exemption for the same information and the same entities in s. 445.007(9), F.S., Further, the committee substitute clarifies and saves from repeal an exemption for personal identifying information in records relating to a temporary cash assistance program under s. 414.295, F.S.

This bill amends ss. 414.106 and 414.295 of the Florida Statutes. The bill repeals s. 445.007(9) 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

[1] Sections 1390, 1391, F.S. (Rev. 1892).

> . . . 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 accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other

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[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.
[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.

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 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

[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).

> 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;
- [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

[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.

> 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.

Temporary Cash Assistance

Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 which required welfare recipients to begin working two years after beginning assistance, provided funding to states to establish and maintain work transition programs, increased funding for child care and medical coverage to foster the welfare to work transition, and granted states increased flexibility in managing their financial assistance programs. The federal act ended entitlement to financial assistance for eligible families (Aid to Families with Dependent Children) and replaced it with Temporary Assistance to Needy Families (TANF).

The federal TANF program provides funding for "a wide variety of employment and training activities, supportive services, and benefits that will enable clients to get a job, keep a job and improve their economic circumstances."[26] More specifically, the TANF program is designed to do the following:

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[24] Section 119.15(4) (b), F.S.

[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

[26] Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance. *Helping Families Achieve Self-Sufficiency: A Guide on Funding Services for Children and Families through the TANF Program,* p.4. http://www.acf.dhhs.gov/programs/ofa/funds2.htm. 31 August 2005.

- Provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- End the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- Prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- Encourage the formation and maintenance of two-parent families.[27]

To qualify for TANF block grants, states must impose work requirements on financial assistance recipients and establish time limits on the receipt of TANF cash assistance, also known as temporary cash assistance.

In response to the passage of the federal legislation, the Florida Legislature created the Work and Gain Economic Self-sufficiency (WAGES) program in 1996. In 2000, the Workforce Innovation Act replaced the WAGES Program with a new Welfare Transition Program that stream-lined cash assistance delivery in the state by combining functions of the Department of Children and Families with the workforce development system. Temporary cash assistance is one of the programs now administered under the Workforce Innovation Act.

The federal TANF law expressly includes cash payments as one form of assistance to families. More specifically, 45 CFR Section 260.31(a)(1) states:

> The term 'assistance' includes cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).

The temporary cash assistance program provides cash assistance to families with children under the age of 18 (or under age 19 if full–time secondary school students) that meet the technical, income and asset requirements of the program. More specifically, temporary cash assistance is available to families whose income falls below 185 percent of the federal poverty level.[28] Such cash assistance does not include short term non-recurrent benefits to meet a crisis situation or support services that are provided to the employed.

Personally Identifying Information - Federal law, 42 U.S.C. Section 602(a)(1)(A)(iv), requires that states:

> Take such reasonable steps as [they deem] necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal Government.

Consequently, federal regulation, 45 CFR Section 205.50, requires that states provide, *by state statute*, safeguards to protect personal identifying information of applicants and recipients and

[27] 45 CFR Section 260.20.
[28] Section 414.085, F.S.

other information further detailed in the federal regulation (emphasis supplied).[29] Sections 414.106, 414.295, and 445.007(9), F.S., incorporate these federal requirements.

Chapter 414, F.S., which outlines Florida's family self-sufficiency measures, and ch. 445, F.S., which outlines the related workforce requirements, incorporate the federal directives. Section 414.106, F.S., and s. 445.007(9), F.S., implement the required public meeting exemptions, and s. 414.295, F.S., implements the required public records exemption.

Senate Interim Project - During the 2005-2006 interim, the Senate Committee on Commerce and Consumer Services conducted a review of the temporary cash assistance records and meetings exemptions and issued an interim project report.[30] This report reviewed the public meetings exemptions in ss. 414.106 and 445.007(9), F.S., as well as the public records exemption in s. 414.295, F.S. The report found that the records of individuals who receive temporary cash assistance contain sensitive personal information. The report also found that meetings where temporary cash assistance recipient cases are discussed could potentially expose personal information to the public. Survey responses also indicate that, in regard to all three exemptions, personal identifying information includes, but is not limited to, names, social security numbers, home and mailing addresses, demographic descriptions, employment addresses, school addresses and telephone numbers.

In enacting the original exemptions, the Legislature recognized, in s. 4, ch. 2001-160, L.O.F., that the fear of public disclosure could be a "significant disincentive" to individuals and families attempting to attain self-sufficiency. The original law expressly provides that the state has a compelling interest to:

- ensure that in meetings concerning assistance cases, the parties present are able to fully consider pertinent facts related to potential recipients' eligibility;
- protect recipients and their family or household members from the type of trauma that may result from public disclosure of their financial situations; and
- protect participants who may be victims of domestic violence.

The survey responses support these concerns. The survey responses concur that release of temporary cash assistance recipient information would threaten the protection and safety of individuals and families while hampering the ability of state entities to deliver services to clients.

Survey responses also show that interagency functions would be adversely affected if the state entities charged with assisting temporary cash assistance recipients could not share information as needed to properly serve those clients.

Furthermore, several responses indicate that the federal TANF law requires states to provide confidentiality safeguards for client records. Failure to do so could place Florida TANF funding at risk.

[29] *See also*, Staff Analysis to HB 1385 (2001).
[30] Florida Senate, *Open Government Sunset Review of ss. 414.106, 414.295 and 445.007(9), F.S., Temporary Cash Assistance Records Exemptions*, Report No. 2006-206 (Oct. 2005).

The report recommended that the Legislature maintain the public meetings exemption in ss. 414.106, F.S., and 445.007(9), F.S., as written. The report also recommended that the Legislature revise the public records exemption in s. 414.295, F.S., to include only those state agencies that possess or may be required to possess records of temporary cash assistance recipients.

III. Effect of Proposed Changes:

Section 1 of the bill reenacts the exemption in s. 414.106, F.S., and removes the sunset review and repeal provision required by the Open Government Sunset Review Act.

Currently, s. 414.106, F.S., allows the Department of Children and Families (DCF), Workforce Florida, Inc., and regional workforce boards or their local committees to close a portion of a meeting or an entire meeting to the public if personal identifying information contained in records of temporary cash assistance recipients is discussed.

Section 2 of the bill amends and reenacts the exemption in s. 414.295, F.S., and removes the sunset review and repeal provision required by the Open Government Sunset Review Act. Further, technical conforming changes are made. Reference to "service providers" is removed as those entities are agencies under the definition of "agency" in ch. 119, F.S., and are "acting on behalf of" the government agencies specified in the statute. Additionally, language reiterating the authority of the courts related to confidential and exempt records is removed as such language is unnecessary.

Currently, s. 414.295, F.S., declares personal identifying information of temporary cash assistance recipients confidential and exempt. This protection applies to information contained in records held by DCF, the Agency for Workforce Innovation, Workforce Florida, Inc., the Department of Health, the Department of Revenue, the Department of Education, a regional workforce board or one of its local committees.

All but one of the state agencies and twenty-four (24) regional workforce boards named in s. 414.295, F.S., and surveyed indicated that this exemption is necessary to protect temporary cash assistance recipient information. Survey responses also indicate that interagency functions would be adversely affected if the state entities charged with assisting temporary cash assistance recipients could not share information as needed to properly serve those clients.

In its survey response, however, the Department of Management Services indicated that it neither maintains nor shares any records protected by s. 414.295, F.S., (or any of the statutes that were reviewed in the Senate Interim Report). That agency also stated it should be removed as a covered agency under this statute.

Section 414.295, F.S., also permits the release of temporary-cash-assistance-related records under certain limited circumstances, including administration of the state's TANF plan. Specifically, paragraph 414.295(1)(a), F.S., protects disclosure of information within and among DCF, the Agency for Workforce Innovation, Workforce Florida, Inc., the Department of Health, the Department of Revenue, the Department of Education, and regional workforce boards or their local committees to facilitate administration of the state plan. Survey responses and

information obtained subsequent to the publication of the Senate Interim Project report indicate that two state entities that currently receive and share information about temporary cash assistance recipients are not mentioned in the statute. The bill adds those two entities, the Department of Military Affairs and school districts, to the list of authorized recipients.

Section 3 of the bill repeals the meeting exemption in s. 445.007, F.S., because it is redundant of the meeting exemption in Section 1. of the bill.

Section 4 of the bill provides an effective date of October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill amends and reenacts one public meetings exemption and one public records exemption and repeals a redundant public meeting exemption. Under the Open Government Sunset Review Act, consideration is to be given to whether a record or meeting protected by another exemption and, if there are multiple exemptions for the same type of record or meeting, consideration is to be given regarding the appropriateness of merging those exemptions. Sections 414.106 and 445.007(9), F.S., both protect the same information in the same meetings. As such, it would be appropriate to eliminate one exemption.

C. Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Information that is covered by these exemptions will continue to be confidential and exempt from open government provisions. Costs for maintaining these exemptions will continue to be borne by state and local agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.