

# 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: CS/SB 792

INTRODUCER: Governmental Oversight and Productivity Committee and Government Efficiency Appropriations Committee

SUBJECT: Open Government Sunset Review Act/Department of Revenue; Returns and Accounts Information

DATE: March 29, 2006      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fournier</u>	<u>Johansen</u>	<u>GE</u>	<b>Favorable</b>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill is the result of an Open Government Sunset Review of the Communications Tax Simplification Act by the Committee on Government Efficiency Appropriations. In Interim Project Report 2006-216, that committee found, that based on the Open Government Sunset Review Act, the information in the exemption protects information of a sensitive personal nature concerning communication services taxpayers and their customers and suppliers. The exemption was also found necessary for the effective and efficient administration of Florida's voluntary compliance tax system.

This committee substitute saves from repeal an exemption from the Open Government Review Act for all information contained in returns, reports, accounts, or declarations received by the Department of Revenue pursuant to ch. 202, F.S. The committee substitute makes no substantive changes to law, but reorganizes the exemption.

This bill substantially amends s. 213.053, F.S.

## 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.<sup>1</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

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<sup>1</sup> 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.<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>4</sup> 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<sup>5</sup> 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.<sup>6</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>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</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>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other

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<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> 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.

<sup>5</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.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

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

<sup>10</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>11</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.

substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>13</sup>

The Public Records Act<sup>14</sup> 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.<sup>15</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>16</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>17</sup> 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>18</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

**The Open Government Sunset Review Act** - The Open Government Sunset Review Act<sup>20</sup> 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;

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<sup>12</sup> Art. I, s. 24(c) of the State Constitution.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 119, F.S.

<sup>15</sup> Section 119.07(1)(b), F.S.

<sup>16</sup> Section 119.07(1)(c) and (d), F.S.

<sup>17</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>18</sup> *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

<sup>19</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>20</sup> 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.<sup>21</sup>

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 be 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.<sup>22</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.

All information contained in returns, reports, accounts, or declarations received by the Department of Revenue pursuant to ch. 202, F.S., which governs the communications services tax, is confidential, except when used for official purposes, and is exempt from the state's open government requirements. This public records exemption, codified in s. 213.053(1)(b), F.S., is repealed on October 2, 2006, unless the Legislature reenacts the exemption following review under the Open Government Sunset Review Act of 1995.

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of

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<sup>21</sup> Section 119.15(4) (b), F.S.

<sup>22</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

access to public records to a constitutional level. The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

**Open Government Sunset Review of Section 213.053(1)(b), F.S.** - The Government Efficiency Appropriations Committee performed an Open Government Sunset Review of the exemption found in s. 213.053 (1)(b), F.S. In Interim Project Report 2006-216, the committee found the exemption to serve an identifiable public purpose, and to be no broader than necessary to meet that purpose. The exemption provides tax returns and other tax related documents received by the Department of Revenue pursuant to ch. 202, F.S., the same level of confidentiality afforded to other tax returns and tax-related documents. The Department of Revenue reports that confidentiality allows it to administer the state's tax laws by fostering the trust of those persons required to comply with the laws. The efficient collection of tax revenue depends on the voluntary compliance of the taxpayers.

Confidentiality of tax records was affirmed by the Florida Taxpayer's Bill of Rights, a single document passed by the Florida Legislature in 1992 that explains, in simple and non-technical terms, the rights and obligations of both the taxpayer and the department. Section 213.035 (9), F.S., says that taxpayers have the right to have their tax information kept confidential unless otherwise specified by law.

### III. **Effect of Proposed Changes:**

This committee substitute retains an exemption in s. 213.053(1)(b), F.S., for all information contained in returns, reports, accounts, or declarations received by the Department of Revenue pursuant to ch. 202, F.S., including investigative reports and information and letters of technical advice. The committee substitute makes no substantive changes to law, but reorganizes the exemption for clarity.

### IV. **Constitutional Issues:**

#### A. Municipality/County Mandates Restrictions:

None.

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

This bill is the outcome of an Open Government Sunset Review (Interim Project Report 2006-216) of the exemption found in s. 213.053 (1)(b), F.S., which found the exemption to serve an identifiable public purpose, and to be no broader than necessary to meet that purpose.

#### C. Trust Funds Restrictions:

None.

**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:**

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

None.

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