

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 1834

INTRODUCER: Committee on Governmental Oversight and Accountability and Committee on Governmental Oversight and Accountability

SUBJECT: OGSR/Nonpublic manuscripts

DATE: March 18, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Wilson	GO	CS/Fav
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill saves from repeal under the Open Government Sunset Review Act¹ a public record exemption for a manuscript or other archival material that is donated to an official archive of a municipality or county contingent upon special terms and conditions that limit the right to inspect or copy such manuscript or other material. The bill also co-locates with the public record exemption under review a similar public record exemption for archival materials held by the Florida State Archives.

The bill creates a definition for “nonpublic manuscript or other archival material,” reorganizes the exemption, makes editorial changes, and makes conforming changes. The bill does not substantially amend the exemption by expanding the types of records included and therefore does not require a two-thirds vote.

This bill amends ss. 257.35 and 257.38, F.S. This bill repeals s. 257.38(2), F.S.

¹ Section 119.15, F.S.

II. Present Situation:

BACKGROUND

Public Records

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 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. 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 “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴ Unless specifically exempted, all agency⁵ records are to be available for public inspection.

Only the Legislature is authorized to create exemptions to open government requirements.⁶ Exemptions must be created by general law and such law must specifically state the public

² Section 119.011(1), F.S., defines “public record” to include “all documents, papers, letters, maps, books, tapes, photographs, film, 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.”

³ *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Section 119.011(2), F.S., defines “agency” as “... 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.

⁶ Article I, section 24(c) of the State Constitution.

necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting 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 record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects 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 two-thirds vote for passage are required.¹² If the exemption is narrowed, or if an exception to the exemption is created¹³, then a public necessity statement and a two-thirds vote for passage are not required.

The Florida State Archives

The Florida State Archives is created within the Division of Library and Information Services ("division") of the Department of State for the preservation of public records, manuscripts, and

⁷ *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).

⁸ Section 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Article I, section 24(c) of the State Constitution.

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ Section 119.15, F.S.

¹² Article I, section 24(c) of the State Constitution.

¹³ Section 257.35(1), F.S.

other archival material.¹⁴ Current law provides a public record exemption for the Florida State Archives. Any public record transferred to the division and that is provided by law to be confidential or prohibited from being inspected must be made accessible only after a period of 50 years from the date of the creation of the record. In addition, any nonpublic manuscript or other archival material placed in the keeping of the division under special terms and conditions is accessible only in accordance with those terms and conditions and is exempt from public records requirements.¹⁵

Public Record Exemption Under Review

Current law also provides a public record exemption for archival material held by a local government.¹⁶ A manuscript or other archival material donated to and held by an official archive of a city or county contingent upon special terms and conditions that limit the right to inspect or copy such manuscript or other material is confidential and exempt from public records requirements. Such manuscript or archival material is available for public inspection 50 years after the date of its creation, at an earlier date specified in the special terms or conditions, or upon a showing of good cause before a court of competent jurisdiction.

The exemption does not apply to a manuscript or archival material made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.¹⁷

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2009, unless reenacted by the Legislature.

Open Government Sunset Review of s. 257.38, F.S. (Senate Interim Report 2009-211)

To assist in the sunset review process on which this bill is based, the Florida Senate Committee on Governmental Oversight and Accountability created report number 2009-211, titled "Open Government Sunset Review of s. 257.38, F.S., a Public Record Exemption for Donated Manuscripts and Archival Material." The report concluded that the public purpose of the exemption, to ensure the donation and preservation of private information that may have significant archival value, still exists, and that the exemption should therefore be retained. The report further recommended that the exemptions contained in s. 257.38, F.S. and s. 257.35(1)(b), F.S. be merged in order to comply with the requirements of s. 119.15, F.S., and to reduce the number of exemptions.

III. Effect of Proposed Changes:

The bill removes the repeal date in s. 257.38, F.S., thereby reenacting the public record exemption for certain local government archival material.

¹⁴ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

¹⁵ Section 257.35(1), F.S.

¹⁶ Section 257.35(1)(b), F.S.

¹⁷ Section 257.38(1), F.S.

The bill moves the public record exemption for materials held by the Florida State Archives from s. 257.35(1)(b), F.S. to s. 257.38, F.S. Thus, s. 257.28, F.S. will provide the public record exemptions for both the state and local government archives.

The bill defines “nonpublic manuscript or other archival material” to mean “a manuscript or archival material that is not otherwise made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.”

The bill reorganizes the exemption, makes editorial changes, and makes conforming changes.

Section Directory

Section 1 amends s. 257.35, F.S., to transfer the public record exemption for archival material held by the Florida State Archives, and to make editorial and conforming changes.

Section 2 renumbers and amends s. 257.38, F.S., to create a definition, to include the public record exemption for archival material held by the Florida State Archives, and to make editorial and conforming changes.

Section 3 provides an effective date of October 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on March 18, 2009:

The committee substitute makes no substantial changes to the prior version of the bill. Rather, the committee substitute corrects a statutory cross-reference listed on line 26 of the prior bill, changing it from “s. 119.011” to “s. 119.011(12)”.

- B. **Amendments:**

None.