

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 Transportation Committee

BILL: SB 2162

INTRODUCER: Senator Storms

SUBJECT: Public Meetings and Public Records

DATE: April 8, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Pardue</u>	<u>Skelton</u>	<u>MS</u>	<u>Fav/1 amendment</u>
2.	<u>Hansson</u>	<u>Meyer</u>	<u>TR</u>	<u>Favorable</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate bill 2162 exempts from public disclosure that portion of a meeting of the governing board of a public seaport authority at which the board will hear or discuss active criminal investigative or criminal intelligence information as defined in s. 119.011, F.S., or security plan briefings from the Department of Law Enforcement.

The bill also exempts audio and video recordings, minutes, and any notes generated during a closed meeting to discuss exempt information. The bill provides for an expiration of the exemption when the criminal investigative and criminal intelligence information is no longer active or the security plan is no longer in effect. Pursuant to the Open Government Sunset Review Act, the act shall stand repealed on October 2, 2014 unless reviewed and reenacted.

This bill creates section 311.23 of the Florida Statutes.

II. Present Situation:

Public Records and Meetings Exemptions

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The Florida Legislature enacted the first public records law in 1892.¹ In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

¹ Section 1390, 1391 F.S. (Rev. 1892).

Article I, section 24(a) of the Florida Constitution, and the Public Records Act,² specify the conditions under which public access must be provided to governmental records. Article I, section 24(b) of the State Constitution and s. 286.011, F.S., the Sunshine Law, specify the requirements for public meetings. While the State Constitution provides records and meetings are to be open to the public, it also provides the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, section 24 of the Florida Constitution governs the creation and expansion of exemptions to provide, in effect, any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, section 24 of the Florida Constitution provides any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

The Open Government Sunset Review Act,³ provides for the review and repeal of any public records or meetings exemptions that are created or substantially amended in 1996 and subsequently. The chapter defines the term “substantial amendment” for purposes of triggering a review and repeal of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings, as well as records. The law clarifies an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption. The law was amended by ch. 2005-251, Laws of Florida, to modify the criteria under the Open Government Sunset Review Act so consideration will be given to reducing the number of exemptions by creating a uniform exemption during the review of an exemption subject to sunset.

Under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

² Chapter 119, F.S.

³ Section 119.15, F.S.

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., 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 an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

Seaport Security

Section 311.12, F.S. provides statewide minimum seaport security standards for certain Florida public seaports listed in s. 311.09, F.S.⁴ Section 311.12, F.S., also requires each of the seaports to maintain a security plan to provide for a secure seaport infrastructure and promote the safety and security of residents and visitors of the state. In conjunction with the seaports' security efforts, the section requires the Department of Law Enforcement (FDLE) to conduct at least one unannounced inspection annually at each of the listed public seaports. These inspections must determine whether the seaport is meeting the minimum standards and identify necessary changes or recommended improvements.

The department may conduct additional announced or unannounced inspections or operations to test compliance with or the effectiveness of security plans and operations at each seaport. FDLE is required to provide an annual report to the Governor, the President of the Senate, the Speaker of the House, and the chief administrator of each inspected seaport indicating the observations and findings of all inspections or operations conducted along with any recommendations. Section 311.12, F.S., requires the report include responses from each seaport's chief administrator indicating what actions, if any, have been taken or are planned to be taken in response to the recommendations, findings, and observations covered in the report.

Section 311.13, F.S., provides an exemption from public disclosure of seaport security plans. Section 286.0113, F.S., provides that portion of a meeting that would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071 (3) (a), F.S., is exempt from public disclosure.

Section 119.071, F.S., provides a public disclosure exemption from s. 119.07 (1), F.S., and s. 24 (a), Art I of the State Constitution for active criminal intelligence information and active criminal investigative information during the period in which the information remains active.

The FDLE inspection report is typically considered security sensitive information and is exempt from public disclosure under ss. 311.13 and 119.071, F.S.

⁴ The seaports listed in s. 311.09(1), F.S., include the ports of Jacksonville, Port Canaveral, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina. The ports of Fort Pierce and Port St. Joe are currently exempted from annual inspection under the provisions of s. 311.12, F.S., based on a finding that these seaports are considered inactive for purposes of the statute.

III. Effect of Proposed Changes:

Senate bill 2162 creates s. 311.23, F.S., relating to a public-records and public meeting exemption for governing boards of public seaport authorities.

The bill exempts from public disclosure that portion of a meeting of the governing board of a public seaport authority at which the board will hear or discuss active criminal investigative or criminal intelligence information as defined in s. 119.011, F.S., or security plan briefings from the Department of Law Enforcement if:

- The chair of the board announces at a public meeting that in connection with the performance of the board's duties, it is necessary to discuss active criminal investigative or criminal intelligence information or receive a security briefing presentation;
- The chair declares the specific reasons for closing the meeting in a public record document that is filed with the official records of the board; and
- The entire closed meeting is recorded. The recording must include the times of closure commencement and termination, all discussion and proceedings, and the names of persons present. No portion of the closed meeting may be off the record and the recording must be maintained by the board.

The bill also exempts from public disclosure an audio or video recording of, any minutes, or notes generated during a closed meeting of the board relating to active criminal investigative or criminal intelligence information, or the security plan. The exemption ceases as soon as the criminal investigative or criminal intelligence information is no longer active, or the security plan is no longer in effect.

Exempted closed meeting attendance is limited to board members, board supporting staff, and other persons whose presence is authorized by the board's chair. The board must ensure closure of meetings is limited so the state policy in favor of public meetings is maintained.

Senate bill 2162 provides the section of statute created by this act is subject to the Open Government Sunset Review Act pursuant to s. 119.15, F.S. The section shall stand repealed on October 2, 2014, unless reviewed and reenacted by the Legislature.

The bill provides a finding of public necessity for the meetings and records disclosure exemption. This finding states public seaport authority boards are briefed on highly sensitive information involving terrorism activity, counterterrorism methodologies, and operational activities of a coordinated intergovernmental prevention, protection, and response strategy. Public discussion of these activities would result in the sharing of data, methods, and operational techniques that could be used by persons intent on doing harm to the state thereby leading to a successful terrorist attack. The board must be able to hear and discuss this exempt information in full in order to make sound fiduciary decisions based on risks, threats, and vulnerabilities to the critical infrastructure owned and operated by the seaport authority. The ability to fully understand and discuss the details of criminal investigative and criminal intelligence information related to terrorist activities, and counterterrorism measures as part of an overall strategy is critical to the ability of the board to defend against terrorist attacks.

The bill provides this act shall take effect on the same date as SB 2168 or similar legislation takes effect. Senate bill 2168 adds a requirement that FDLE provide an assessment briefing to the board members of the governing authority of each seaport and the co-chairs of the corresponding regional domestic security task force after it completes an unannounced seaport inspection. The briefing must address inspection findings, areas of concern, and recommendations for improvement. The bill provides for the assessment of a fine of \$10,000 on the governing authority of a seaport in the event of a cancellation of an assessment briefing due to lack of board member attendance.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, section 24 of the State Constitution permits the Legislature to provide by general law, passed by two-thirds vote of each house, for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁵

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The cost to maintain records of those closed portions of a seaport authority's meetings pertaining to criminal investigative and criminal intelligence information and seaport security plan briefings is indeterminate, but likely negligible.

VI. Technical Deficiencies:

None.

⁵ See, *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)

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.)

None.

B. **Amendments:**

Barcode 163334 by Military Affairs and Domestic Security on March 26, 2009:
This technical amendment links enactment of this bill to the enactment of SB 2168 or similar legislation.