

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 Community Affairs Committee

BILL: SB 1054

INTRODUCER: Senator Altman

SUBJECT: Public Records

DATE: January 22, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Howes	Yeatman	CA	Favorable
2.			EE	
3.			GO	
4.			RC	
5.				
6.				

I. Summary:

This bill exempts from public records and meetings requirements those records and meetings associated with a county's established local investigatory process. The bill makes the statutory provision subject to the Open Government Sunset Review Act and provides a statement of public necessity.

This bill substantially amends section 112.324 of the Florida Statutes.

II. Present Situation:

Public Records and Meetings

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 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. 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 record¹ 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.”² All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.³ Unless specifically exempted, all agency⁴ records are to be available for public inspection.

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

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.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.

¹ Section 119.011(1), F.S., defines “public record” to include “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.”

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

³ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁴ 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.

⁵ Article I, section 24(c) of the State Constitution.

⁶ *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).

⁷ 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.

⁸ Article I, section 24(c) of the State Constitution.

⁹ Attorney General Opinion 85-62, August 1, 1985.

Section 24(b), Art. I, of the State Constitution, provides that:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Florida's Sunshine Law, s. 288.011, F.S. states that:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

The purpose of the Sunshine Law is to prevent crystallization of secret governmental decisions at nonpublic meetings to the point just short of ceremonial acceptance.¹⁰ Having been enacted in the public interest to protect the public from "closed door" politics, the Sunshine Law is construed liberally by the courts in favor of open government so as to frustrate all evasive devices.¹¹ The law has been held to apply only to a meeting of two or more public officials at which decision making of significance, as opposed to fact finding or information gathering, will occur.¹² Two or more public officials subject to the Sunshine Law may interview others privately concerning the subject matter of the entity's business, or discuss among themselves in private those matters necessary to carry out the investigative aspects of the entity's responsibility; but at the point where the public officials make decisions, such discussion must be conducted at a public meeting, following notice.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁴ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It

¹⁰ *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. Dist. Ct. App. 4th Dist. 1998); *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. Dist. Ct. App. 3d Dist. 1994); *News-Press Pub. Co., Inc. v. Carlson*, 410 So. 2d 546 (Fla. Dist. Ct. App. 2d Dist. 1982).

¹¹ *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983); *Pinellas County School Bd. v. Suncam, Inc.*, 829 So. 2d 989, (Fla. Dist. Ct. App. 2d Dist. 2002); *Brown v. City of Lauderhill*, 654 So. 2d 302 (Fla. Dist. Ct. App. 4th Dist. 1995); *Krause v. Reno*, 366 So. 2d 1244 (Fla. Dist. Ct. App. 3d Dist. 1979); *Wolfson v. State*, 344 So. 2d 611 (Fla. Dist. Ct. App. 2d Dist. 1977).

¹² See generally 2 Fla. Jur 2d Administrative Law § 38 (citing *City of Sunrise v. News and Sun-Sentinel Co.*, 542 So. 2d 1354 (Fla. Dist. Ct. App. 4th Dist. 1989); *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. Dist. Ct. App. 1st Dist. 1978); *Bennett v. Warden*, 333 So. 2d 97 (Fla. Dist. Ct. App. 2d Dist. 1976); *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694 (Fla. Dist. Ct. App. 3d Dist. 1988); *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. Dist. Ct. App. 5th Dist. 1985)).

¹³ *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. Dist. Ct. App. 1st Dist. 1978).

¹⁴ Section 119.15, F.S.

requires an automatic repeal of the exemption on October 2 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.

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 so, 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?

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that subsection, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

III. Effect of Proposed Changes:

Section 1 amends s. 112.324, F.S., to provide that preliminary investigations by any of the following are confidential and will be exempt from public records¹⁵ and public meetings requirements:¹⁶

- The Commission on Ethics;¹⁷
- A Commission on Ethics and Public Trust established by a county;

¹⁵ Section 119.07(1), F.S.; Article I, section 24(a) of the State Constitution.

¹⁶ Section 286.011, F.S.; Article I, section 24(b) of the State Constitution; Section 120.525, F.S.

¹⁷ Section 112.320, F.S.

- A county that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements; or
- Any municipality.

The records or meetings may be made public when the complaint is dismissed, the alleged violator requests in writing that the records and proceedings be made public, or the investigating body determines whether probable cause exists to believe that a violation has occurred.

This Section also makes s. 112.324(2), F.S., subject to the Open Government Sunset Review Act and provides that the subsection will be repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature. This is an extension from the current date of repeal, October 2, 2010.¹⁸

Section 2 states that it is a public necessity that all complaints and related records in the custody of a county that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements as provided in s. 112.326, F.S., be exempt from public-record and public-meeting requirements. This exemption is necessary because the release of such information could potentially be defamatory to an individual under investigation, cause unwarranted damage to the good name or reputation of such individual, or significantly impair the investigation.

Section 3 provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

If a public records or public meetings exemption is created or expanded then a public necessity statement and two-thirds vote for passage are required.¹⁹ This bill broadens exemptions for both public records and public meetings to include records and meetings in connection with an established county investigatory process. The bill includes a statement of public necessity and likely requires a two thirds vote.

C. Trust Funds Restrictions

None.

¹⁸ Section 112.324, F.S.

¹⁹ Article I, section 24(c) of the State Constitution.

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.)

None.

B. Amendments:

None.