

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 Ethics and Elections Committee

BILL: CS/SB 1054

INTRODUCER: Ethics and Elections Committee and Senator Altman

SUBJECT: Public Records

DATE: March 18, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Howes	Yeatman	CA	Favorable
2.	Kruse	Rubinas	EE	Fav/CS
3.			GO	
4.			RC	
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:

Committee Substitute for Senate Bill 1054 expands the scope of s. 112.324, F.S., by extending its current exemptions to any county or municipality that has established a local investigatory process that enforces more stringent standards of conduct and disclosure requirements than what is currently provided in the Code of Ethics for Public Officers and Employees, Chapter 112, Part III, F. S. The bill provides a statement of public necessity for the expansion of the exemptions as required by the Florida Constitution. The expansion of the exemptions in s. 112.324, F.S., subjects the statute to the Open Government Sunset Review Act. The bill provides for repeal of the exemptions on October 2, 2015, unless reviewed and saved from repeal by the Legislature. This bill requires a two-thirds vote of the members present for passage.

The committee substitute takes effect on July 1, 2010.

This committee substitute substantially amends s. 112.324 of the Florida Statutes.

II. Present Situation:

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 1892.¹ 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.² Article I, s. 24(a), of the Florida 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.

In addition to the State Constitution, the Public Records Act³ 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ 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.⁵

¹ §§ 1390, 1391 F.S. (Rev. 1892).

² FLA CONST. Art. I, § 24.

³ Chapter 119, F.S.

⁴ 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.”

⁵ § 119.011(12), F.S.

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.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ 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.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.¹¹ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹²

Public Meetings

Article I, s. 24(b), of the Florida 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. 286.011, 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.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ FLA CONST. art. I, § 24(c).

⁸ *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567, 569-570 (Fla. 1999).

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ FLA CONST. Art. I, § 24(c).

¹¹ Attorney General Opinion 85-62.

¹² *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).

“The purpose of the Sunshine Law is ‘to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.’”¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁷ 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 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.¹⁸

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?¹⁹

¹³ *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998) (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)); See also *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994).

¹⁴ *Wood v. Marston*, 442 So. 2d 934, 938, 940 (Fla. 1983).

¹⁵ *City of Sunrise v. News and Sun-Sentinel Co.*, 542 So. 2d 1354 (Fla. 4th DCA 1989); See also *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978); *Bennett v. Warden*, 333 So. 2d 97, 99-100 (Fla. 2d DCA 1976); and *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222, 224-225 (Fla. 5th DCA 1985).

¹⁶ *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978).

¹⁷ § 119.15, F.S.

¹⁸ § 119.15(6)(b), F.S.

Pursuant to 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.

Section 112.324, F.S.

Currently, s. 112.324, F.S., provides an exemption for a complaint and records relating to a complaint or to any preliminary investigation by the Commission on Ethics or a Commission on Ethics and Public Trust established by a county or municipality. In addition, any proceedings regarding a complaint or a preliminary investigation are exempt from public meetings requirements. The exemptions expire when the:

- complaint is dismissed as legally insufficient;
- alleged violator requests in writing that the records and proceedings be made public; or
- Commission on Ethics or a Commission on Ethics and Public Trust established by a county or municipality determines whether probable cause exists to believe that a violation has occurred.²⁰

The exemptions are currently subject to the Open Government Sunset Review Act and are scheduled to be repealed on October 2, 2010, unless saved from repeal by the Legislature.²¹ Senate Bill 2170 has been introduced and provides for reenactment of the exemptions.

Section 112.326, F.S.

This statute provides that nothing in the Code of Ethics will prevent a local government from imposing on its own officers and employees additional or more stringent standards of conduct and disclosure requirements than what is specified in the Code of Ethics. However, those standards and requirements must not conflict with the Code of Ethics.²²

III. Effect of Proposed Changes:

Section 1 expands the current exemptions located in s. 112.324, F.S., to protect a complaint and records relating to a complaint or preliminary investigation, as well as any proceedings regarding a complaint or preliminary investigation held by a county or municipality 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.

¹⁹ § 119.15(6)(a), F.S.

²⁰ § 112.324(2)(a), F.S.

²¹ § 112.324(2)(b), F.S.

²² § 112.326, F.S.

The exemptions expire when the alleged violator requests in writing that the records and proceedings be made public or a county or municipality that has established a local investigatory process to enforce more stringent standards:

- dismisses the complaint as legally insufficient; or
- determines whether probable cause exists to believe that a violation has occurred.

This committee substitute makes s. 112.324(2), F.S., subject to the Open Government Sunset Review Act and provides that the exemptions 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, 2010.²³

Section 2 states that the 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.²⁴ This committee substitute expands the current exemptions in s. 112.324, F.S.; thus, it includes a statement of public necessity and requires a two-thirds vote of the members present for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

²³ § 112.324, F.S.

²⁴ FLA CONST. art. I, § 24(c).

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 Ethics and Elections Committee on March 18, 2010:

Committee Substitute for Senate Bill 1054 expands the scope of the original bill by extending the current exemptions in s. 112.324, F.S., to any municipality that has established a local investigatory process that enforces more stringent standards of conduct and disclosure requirements than what is currently provided in the Code of Ethics for Public Officers and Employees, Chapter 112, Part III, F. S.

- B. Amendments:

None.