

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1059 Pub. Rec./Examination Techniques and Procedures/DFS
SPONSOR(S): Governmental Affairs Policy Committee and Domino
TIED BILLS: IDEN./SIM. BILLS: SB 2230

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Governmental Affairs Policy Committee, 10 Y, 0 N, As CS, Williamson, Williamson. Row 2: Insurance, Business & Financial Affairs Policy Committee, Barnum, Cooper. Row 3: Economic Development & Community Affairs Policy Council. Row 4: Empty. Row 5: Empty.

SUMMARY ANALYSIS

The Florida Securities and Investor Protection Act (Act) governs the regulation of securities transactions in Florida. The Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act. OFR may make investigations and examinations within our outside of Florida as it deems necessary.

Current law provides a public record exemption for certain information related to investigations and examinations conducted by OFR pursuant to the Act. The exemption expires once the investigation or examination is completed or ceases to be active; however, certain information remains confidential and exempt, including information that would disclose investigative techniques or procedures. Protection is not provided for information that would reveal examination techniques or procedures.

The bill creates a public record exemption for information that would reveal examination techniques or procedures used by OFR pursuant to the Act. It provides for retroactive application of the exemption. Information that would reveal such examination techniques or procedures may be provided by OFR to another governmental entity having oversight or regulatory or law enforcement authority.

The bill provides for repeal of the exemption on October 2, 2015, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it requires a two-thirds vote for final passage.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> 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.

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> Section 119.15, F.S.

- Protects trade or business secrets.

### Florida Securities and Investor Protection Act<sup>3</sup>

The Florida Securities and Investor Protection Act (Act) governs the regulation of securities transactions in Florida. The Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act. OFR may make investigations and examinations within or outside of Florida as it deems necessary to:

- Determine whether a person has violated or is about to violate any provision of the Act or a rule or order under the Act; or
- Aid in the enforcement of the Act.<sup>4</sup>

### Investigations and Examinations

Current law provides a public record exemption for certain information related to investigations and examinations conducted by OFR pursuant to the Act.<sup>5</sup> Information relative to an investigation or examination by OFR, including any consumer complaint, is confidential and exempt<sup>6</sup> from public records requirements until the investigation or examination is completed or ceases to be active. However, the information remains confidential and exempt if OFR submits it to any law enforcement or administrative agency or regulatory organization for further investigation.<sup>7</sup> In addition, certain information remains confidential and exempt after the investigation or examination is completed or ceases to be active,<sup>8</sup> including information that would disclose investigative techniques or procedures.<sup>9</sup> Protection is not provided for information that would reveal examination techniques or procedures.

### **Effect of the Bill**

The bill creates a public record exemption for information that would reveal examination techniques or procedures<sup>10</sup> used by OFR pursuant to the Act. It provides for retroactive application of the exemption.<sup>11</sup> Information that would reveal such examination techniques or procedures may be provided by OFR to another governmental entity having oversight or regulatory or law enforcement authority.

The bill provides for repeal of the exemption on October 2, 2015, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.<sup>12</sup>

## **B. SECTION DIRECTORY:**

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<sup>3</sup> The Florida Securities and Investor Protection Act is codified at chapter 517, F.S.

<sup>4</sup> Section 517.207(1)(a), F.S.

<sup>5</sup> Section 517.2015, F.S.

<sup>6</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See Attorney General Opinion 85-62*, August 1, 1985).

<sup>7</sup> Section 517.2015(1)(a), F.S.

<sup>8</sup> For purposes of the exemption, an investigation or examination is considered “active” so long as OFR or any law enforcement or administrative agency or regulatory organization is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation or examination may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license, registration, or permit. Section 517.2015(1)(a), F.S.

<sup>9</sup> Section 517.2015(1)(b), F.S.

<sup>10</sup> The bill defines “examination techniques and procedures” to mean the methods, processes, and guidelines used to evaluate regulatory compliance and to collect and analyze data, records, and testimony for the purpose of documenting violations of the Act and rules promulgated under the Act.

<sup>11</sup> In 2001, the Supreme Court of Florida ruled that a public record exemption does not apply retroactively unless the legislation clearly expresses such intent. *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).

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

Section 1 creates s. 517.2016, F.S., to create a public record exemption for information that would reveal examination techniques or procedures used by the Office of Financial Regulation.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill likely could create a minimal fiscal impact on the Office of Financial Regulation, because staff responsible for complying with public records requests could require training related to creation of the public record exemption. In addition, the office could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the office.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 17, 2010, the Governmental Affairs Policy Committee reported HB 1059 favorably with committee substitute. The committee substitute relocates to a new section of law the public record exemption proposed in the bill as filed. The committee substitute also clarifies that the exemption applies retroactively to information that would reveal examination techniques or procedures. Finally, the committee substitute creates a definition for "examination techniques and procedures."