

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 1408

INTRODUCER: Senator Bogdanoff

SUBJECT: Public Meetings

DATE: March 29, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Pre-meeting
2.	_____	_____	GO	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill expands a public meetings exemption for boards and specified officials to meet with their entity’s attorney to discuss pending litigation to include a public employee or agent who possesses relevant information needed by the entity’s attorney. It also changes the content of the meeting with the attorney to cover “advice” rather than “settlement negotiations or strategy sessions.”

This exemption is subject to legislative review and repeal under the Open Government Sunset Review Act.

Since this bill creates a new public meetings exemption, it requires a two-thirds vote of the membership of each house of the Legislature for passage.

This bill substantially amends section 286.011 of the Florida Statutes.

II. Present Situation:

Public Meetings

Article I, section 24(b) of the Florida Constitution and s. 286.011, F.S., the Sunshine Law, specify the requirements for open meetings. Open meetings are defined as any meeting 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, at which official acts are to be taken. No

resolution, rule, or formal action shall be considered binding unless it is taken or made at an open meeting.¹

Although the Florida Constitution provides that 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. Currently, there are approximately 90 exemptions to the open meetings law and more than 970 exemptions to the public records law.² Article I, section 24(c) of the Florida Constitution governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of public necessity justifying the exemption. Further, the constitution provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Under article I, Section 24(b), 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, is subject to the open meetings law. Section 286.011, F.S., provides that 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 are subject to the open meeting laws.

Open Government Sunset Review Act

The Open Government Sunset Review Act³ provides for the review and repeal of any public records or meetings exemptions that is created or substantially amended in 1996 and subsequently. The act 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.⁴ The law was amended by chapter 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 process.

Under the Open Government Sunset Review Act, an exemption may be created, revised, 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;

¹ Section 286.011, F.S.

² Florida Commission on Open Government Reform, *Reforming Florida's Open Government Laws in the 21st Century*, 3 and 5 (Final Report, January 2009), available at http://www.flgov.com/og_commission_home (last visited Mar. 29, 2010).

³ Section 119.15, F.S.

⁴ Section 119.15(4)(b), F.S.

- 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.⁵

Under s. 119.15, F.S., any exemption to the open meetings law or public records law is automatically repealed five years after it is enacted or substantially amended, unless it is reenacted by the Legislature after the review. If an exemption is reenacted during the five-year review, it is no longer required to be subject to the Open Government Sunset Review Act.

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.

Attorney-Client Meetings

In the absence of a legislative exemption, discussions between a public board and its attorney are subject to s. 286.011, F.S.⁶

Current law provides a public meeting exemption for certain discussions by any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity. Such board or commission and the chief administrative or executive officer may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency. The exemption afforded by this provision for "pending litigation" does not apply when no lawsuit has been filed even though the

⁵ Section 119.15(6)(b), F.S.

⁶ *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, F.S., which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings; application of the Sunshine Law to the discussions of a public commission with its attorney does not usurp the constitutional authority of the Supreme Court to regulate the practice of law, nor is it at odds with Florida Bar rules providing for attorney-client confidentiality). *Cf.*, s. 90.502(6), F.S., stating that a discussion or activity that is not a meeting for purposes of s. 286.011, F.S., shall not be construed to waive the attorney-client privilege. *And see, Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), stating that all decisions taken by legal counsel to a public board need not be made or approved by the board; thus, the decision to appeal made by legal counsel after private discussions with the individual members of the board did not violate s. 286.011, F.S.

parties involved believe litigation is inevitable.⁷ This exception must be strictly construed; "substantial compliance" with the statutorily specified conditions is insufficient.⁸ Additionally, the following conditions are met:

- The attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- The entire closed session must be recorded by a certified court reporter, including the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking.⁹
- The entity must give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session must commence at an open meeting at which the persons chairing the meeting must announce the commencement and estimated length of the attorney-client session and the names of the persons attending.¹⁰
- The transcript must be made part of the public record upon conclusion of the litigation.¹¹

Only the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present.¹² However, because the entity's attorney is permitted to attend the closed session, if the entity hires outside counsel to represent it in pending litigation, both the entity's attorney and the litigation attorney may attend a closed session.¹³

Finally, qualified interpreters for the deaf are treated by the Americans with Disabilities Act as auxiliary aids in the nature of hearing aids and other assistive devices and may attend litigation strategy meetings of a board or commission to interpret for a deaf board member without violating s. 286.011(8), F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 286.011, F.S., to expand a public meetings exemption for boards and specified officials to meet with their entity's attorney to discuss pending litigation to include a public employee or agent who possesses relevant information needed by the entity's attorney. It also changes the content of the meeting with the attorney to cover "advice" rather than

⁷ Op. Att'y Gen. Fla. 98-21 (1998).

⁸ *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995).

⁹ The court reporter's notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

¹⁰ At the conclusion of the attorney-client session, the meeting must be reopened and the person chairing the meeting must announce the termination of the session.

¹¹ Section 286.011(8), F.S.

¹² *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d at 101. *And see, Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999) (city charter provision requiring that city clerk attend all council meetings does not authorize clerk to attend closed attorney-client session; municipality may not authorize what the Legislature has expressly forbidden); and Attorney General Opinion 01-10 (clerk of court not authorized to attend).

¹³ Attorney General Opinion 98-06. *And see, Zorc v. City of Vero Beach*, 722 So. 2d at 898 (attendance of Special Counsel authorized).

“settlement negotiations or strategy sessions.” This subsection is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 presents a statement of public need as required by the Florida Constitution. Specifically, allowing government employees or agents to attend meetings with the government’s attorney will allow the government entity to fully explore the facts of the case, obtain the best possible legal advice, and make better-informed decisions with respect to pending litigation. The Legislature also finds that this measure will ensure fair treatment of a public body as part of the judicial and administrative process.

Section 3 provides an effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Vote Requirement: Section 24(c), Art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Subject Requirement: Section 24(c), Art. I of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement: Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

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.)

None.

B. Amendments:

None.