

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 Governmental Oversight and Accountability Committee

BILL: SB 1970

INTRODUCER: Senator Thrasher

SUBJECT: OPPAGA/Public-Records Exemption

DATE: March 9, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Roberts	GO	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Auditor General, of which the Office of Program Policy Analysis and Government Accountability (OPPAGA) has been a unit, has a public-records exemption for audit workpapers and notes.

Because SB 1204 establishes OPPAGA as an entity separate from the Auditor General, this bill creates a public-records exemption for work papers held by the Office of Program Policy Analysis and Government Accountability which relate to an authorized project or a research product. The exemption applies to workpapers held by OPPAGA before, on, or after the effective date of the exemption.

Because this bill creates a public-records exemption, it contains a public necessity statement and requires a two-thirds vote of each house of the Legislature for passage.

This bill amends s. 11.51, F.S.

II. Present Situation:

Public Records

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

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

raised the statutory right of public access to open meetings and public records to a constitutional level. Section 24(a), Art. I of the Florida Constitution, and the Public Records Act,² specify the conditions under which public access must be provided to governmental records.

Section 24(a), Art. I of the Florida Constitution provides:

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.

Although the Florida Constitution provides that records are 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. Any legislation that creates a new exemption or that substantially amends an existing exemption must contain a statement of public necessity justifying the exemption, requires a two-thirds vote of each house of the Legislature for passage, and may not contain other substantive provisions, although it may contain multiple exemptions.³

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.⁴ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁵

Access to public records is a substantive right and therefore, a statute affecting that right is presumptively prospective in its application.⁶ There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.⁷

Office of Program Policy Analysis and Government Accountability

OPPAGA was created as a unit of the Auditor General. OPPAGA is a staff unit of the Legislature that performs independent examinations, program reviews, and other projects as

² Chapter 119, F.S. The provisions of the Act apply to any “agency,” which is defined in the chapter 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.”

³ Section 24(c), Art. I of the Florida Constitution.

⁴ Op. Att’y Gen. Fla. 85-62 (August 1, 1985).

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

⁶ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).

⁷ *Id.*

directed by the Legislature.⁸ Examples of OPPAGA's work products include, but are not limited to, government program summaries, agency sunset reviews, and policy research on all subjects.⁹

Auditor General Public-Records Exemption

Audit workpapers and notes of the Auditor General are not public records.¹⁰ Because OPPAGA has been a unit of the Auditor General, its workpapers have been exempt from public-records requirements.

III. Effect of Proposed Changes:

This bill exempts work papers held by OPPAGA which relate to an authorized project or research project from the public-records requirements of the Florida Constitution. The protection is effectively the same as that currently afforded to OPPAGA under the Auditor General's exemption for audit workpapers and notes. The exemption applies to work papers held by OPPAGA before, on, or after the effective date of the exemption.¹¹

The bill contains a public necessity statement.

The bill links its effective date to that of SB 1204 or similar legislation.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public-records exemption. It complies with the requirements of s. 24(c), Art. I of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill creates an exemption, it contains a statement of public necessity and is subject to a two-thirds vote of each house of the Legislature for passage as required by s. 24(c), Art. I of the Florida Constitution.

C. Trust Funds Restrictions:

None.

⁸ Section 11.51(1), F.S., currently provides: "There is hereby created the Office of Program Policy Analysis and Government Accountability as a unit of the Office of the Auditor General appointed pursuant to s. 11.42 ..."

⁹ The OPPAGA website, <http://www.oppaga.state.fl.us/Default.aspx>, last viewed March 9, 2011.

¹⁰ Section 11.42(4)(c), F.S.

¹¹ The phrase "before, on, or after the effective date of the exemption provides a clear legislative intent that the law should apply retroactively. As mentioned previously in the analysis, there must be a clear legislative intent for a statute affecting substantive rights to apply retroactively. *See supra* fn. 6, 7.

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:

This bill is linked to SB 1204, which, among other things, removes OPPAGA from the Office of the Auditor General. SB 1204 provides that “OPPAGA” means an entity designated by joint rule of the Legislature or by agreement between the President of the Senate and the Speaker of the House of Representatives.

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.