

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 2056

INTRODUCER: Rules Subcommittee on Ethics and Elections

SUBJECT: OGSR/Commission on Ethics

DATE: April 12, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts	EE	Favorable
2.	Carlton	Phelps	RC	Favorable
3.	Naf	Roberts	GO	Pre-meeting
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review of the public-records and public-meetings exemptions for records and meetings relating to an audit or investigation of a lobbying firm lobbying the executive branch or the Constitution Revision Commission. Records relating to an audit of the lobbying firm or relating to an investigation of violations of the lobbying compensation reporting laws are confidential and exempt from public-records requirements. Meetings of the Commission on Ethics that are held pursuant to such investigation or at which such audit is discussed are exempt from public-meetings requirements.

The exemptions expire if the lobbying firm provides a written request for such investigation and associated records and meetings to be made public, or if the commission determines there is probable cause that an audit reflects a violation of the reporting laws.

This bill reenacts the public-records and public-meetings exemptions, which will repeal on October 2, 2011, if this bill does not become law.

This bill does not expand the scope of the exemptions; therefore, a two-thirds vote of each house of the Legislature is not required for passage.

This bill substantially amends section 112.3215(8)(d), 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.⁴ 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-records or public-meetings 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?

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.

- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?¹⁹

Commission on Ethics

Article II, s. (8)(f) of the State Constitution provides for “an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission. As such, the Commission on Ethics (commission) was created to serve as guardian of the standards of conduct for officers and employees of the state, county, city, or other political subdivision of the state.”²⁰

The commission is composed of nine members; no more than five members may be from the same political party at any one time, and no member may hold any public employment or qualify as a lobbyist. A member of the commission may not lobby any state or local governmental entity.²¹

Lobbying Before the Executive Branch or the Constitution Revision Commission

A person may not lobby an agency until he or she has registered as a lobbyist with the commission. Registration is due upon initially being retained to lobby and is renewable on a calendar year basis thereafter.²² A lobbyist must promptly send a written statement to the commission canceling the registration for a principal upon termination of the lobbyist’s representation.²³

Each lobbying firm must file a compensation report with the commission for each calendar quarter during which one or more of the firm’s lobbyists were registered to represent a principal.²⁴ The reporting statements must be electronically filed no later than 45 days after the end of each reporting period.²⁵

The commission must investigate:

- Every sworn complaint filed with it that alleges a person has failed to register, has failed to submit a compensation report, or has knowingly submitted false information in any required report or registration.²⁶
- Any lobbying firm, agency, officer, or employee upon receipt of information from a sworn complaint or from a random audit of lobbying reports indicating a possible violation other than a late-filed report.²⁷

¹⁹ § 119.15(6)(a), F.S.

²⁰ Section 112.320, F.S.

²¹ Section 112.321(1), F.S.

²² Section 112.3215(3), F.S.

²³ Section 112.3215(7), F.S.

²⁴ Section 112.3215(5)(a)1., F.S.

²⁵ The reporting periods are as follows: January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31. Section 112.3215(5)(c), F.S.

²⁶ Section 112.3215(8)(a), F.S.

²⁷ Section 112.3215(8)(c), F.S.

Public-Records and Public-Meetings Exemptions Under Review

In 2005, the Legislature created a public-records exemption for records relating to an audit or investigation of a lobbying firm lobbying the executive branch or the Constitution Revision Commission.²⁸

Records relating to an audit of the lobbying firm or relating to an investigation of violations of the lobbying compensation reporting laws are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. In addition, commission meetings held pursuant to such investigation or at which such audit is discussed are exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.²⁹

The exemptions expire if the lobbying firm provides a written request for such investigation and associated records and meetings to be made public, or if the commission determines there is probably cause that an audit reflects a violation of the reporting laws.³⁰

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.

Open Government Sunset Review of the Exemptions

Professional staff of the Rules Subcommittee on Ethics and Elections reviewed the exemptions and recommended that they may be maintained, as the public necessity that warranted the original 2005 legislation continues to exist. Requiring the disclosure of compensation audit reports of lobbyists through public-records requests or public meetings could irreparably injure lobbying firms by providing competitors with detailed information about a firm's financial status. As a result, disclosure would create an economic disadvantage for such firms and possibly hinder a firm's reputation if no violations were found. Additionally, public disclosure of records and meetings could jeopardize the commission's ability to conduct investigations. No other exemption protects records or meetings of this nature; and there is no other existing exemption where it would be appropriate to merge with the exemptions found in this bill. Due to the still-existing public necessity, the benefits of maintaining the exemption outweigh any public benefit that may be received by requiring disclosure.

III. Effect of Proposed Changes:

The bill removes the repeal date, thereby reenacting the public-records and public-meetings exemptions for records and meetings relating to an audit or investigation of a lobbying firm lobbying the executive branch or the Constitution Revision Commission.

The bill specifies an effective date of October 1, 2011.

²⁸ Chapter 2005-361, L.O.F., codified as s. 112.3215(8)(d), F.S.

²⁹ *Id.*

³⁰ Section 112.3215(8)(d), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill does not expand the scope of the exemptions; therefore, a two-thirds vote of each house of the Legislature is not required for passage.

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.