

**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.)

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Prepared By: The Professional Staff of the Rules Subcommittee on Ethics and Elections

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BILL: SPB 7074

INTRODUCER: For consideration by the Rules Subcommittee on Ethics and Elections

SUBJECT: Public Records; OGSR

DATE: March 16, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts		<b>Pre-meeting</b>
2.				
3.				
4.				
5.				
6.				

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**I. Summary:**

The bill saves from repeal the exemption to the Florida Public Records Act<sup>1</sup> and the Florida Sunshine Law currently found in Section 112.3215(8)(d), F.S., relating to the confidentiality of certain records and meetings before the Commission on Ethics (“Commission”). Specifically, the provision subject to repeal exempts certain records relating to an audit or an investigation until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the Commission determines whether probable cause exists that a violation has occurred. Also, that Section exempts proceedings from the open meetings and notice requirements of the Sunshine Law found in Section 286.011, F.S.

Section 112.3215(8)(d), F.S., is scheduled for repeal on October 2, 2011, unless saved from repeal by the Legislature; pursuant to the requirements of the Open Government Sunset Review Act.

This bill amends Section 112.3215(8)(d), F.S., by removing the scheduled repeal date from the statute.

**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.<sup>2</sup>

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<sup>1</sup> §119.07(1), F.S.; FLA. CONST. art. I., § 24(a).

<sup>2</sup> §§ 1390, 1391 F.S. (Rev. 1892).

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.<sup>3</sup> 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 Act<sup>4</sup> 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 agency<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law and such law must specifically state the public

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<sup>3</sup> FLA. CONST. art. I, § 24.

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> 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.”

<sup>6</sup> § 119.011(12), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> FLA. CONST. art. I, § 24(c).

necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

### **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.

“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.’”<sup>14</sup> 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.<sup>15</sup> The law has been held to apply only to a meeting of two or more public officials at which decision

<sup>9</sup> *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567, 569-570 (Fla. 1999).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> FLA. CONST. art. I, § 24(c).

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).

<sup>14</sup> *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).

<sup>15</sup> *Wood v. Marston*, 442 So. 2d 934, 938, 940 (Fla. 1983).

making of significance, as opposed to fact finding or information gathering, will occur.<sup>16</sup> 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.<sup>17</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>18</sup> 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.<sup>19</sup>

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?<sup>20</sup>

Pursuant to Section 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 Section 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.

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<sup>16</sup> *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).

<sup>17</sup> *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978).

<sup>18</sup> § 119.15, F.S.

<sup>19</sup> § 119.15(6)(b), F.S.

<sup>20</sup> § 119.15(6)(a), F.S.

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 112.3215(8)(d), F.S.**

The Florida Public Records Act provides that “all exemptions from disclosure [be] construed narrowly and [be] limited to their designated purpose.”<sup>21</sup> Exemptions to the open public meeting requirement under Florida’s Sunshine Law<sup>22</sup> must also be narrowly construed.<sup>23</sup> Section 112.3215(8)(d), F.S., exempts from the Florida Public Records Act records that pertain to an audit of a lobbying firm’s or principal’s compensation report or records. Generally, compensation-reporting audits consist of a review of a lobbying firm’s compensation report filed with the Commission in order to ensure their accuracy.<sup>24</sup> Section 112.3215(8)(d), F.S., also exempts records relating to an investigation of a complaint alleging that a lobbyist, lobbying firm, or principal of a lobbyist has failed to register, has failed to submit a compensation report, or has knowingly submitted false information in any report or registration required by Section 112.3215, F.S., or Section 112.32155, F.S. The information protected by the exemption may be released to the public when either the affected lobbying firm requests that the records and meetings be made public or the Commission finds probable cause that “the audit reflects a violation of the reporting laws.”<sup>25</sup>

Section 112.3215(8)(d), F.S., also provides that meetings held pursuant to such an investigation or at which such an audit is discussed are exempt from Florida’s Sunshine Law found in Section 286.011, F.S., and s. 24(b), Art. I of the State Constitution. Thus, a meeting wherein the Commission is considering an audit or investigation conducted pursuant to Section 112.3215, F.S., is not open to the public and no notice to the public is required.

In conjunction with Section 112.3215(8)(d), F.S., Rule 34-12.760, F.A.C., provides further guidelines for the Commission on what matters must remain confidential and exempt from public records requirements. Pursuant to the requirements of Rule 34-12.760(2), F.A.C., the Commission must also release the complaint, the report of the investigation, and the Commission’s order if there was no finding of probable cause that a violation occurred but the rest of the file and the investigative file remain confidential. If the Commission does determine probable cause exists that a violation has occurred, all of the documents pertaining to the complaint – including the investigative file – become public record upon the filing of the Commission’s order.<sup>26</sup> The complaint along with the recommendation of the Commission’s executive director and the Commission’s order become public record if a complaint is dismissed without an investigation.<sup>27</sup>

<sup>21</sup> *Barfield v. City of Fort Lauderdale Police Dept.*, 639 So. 2d 1012, 1014 (Fla. 4th DCA 1994).

<sup>22</sup> §286.011, F.S.

<sup>23</sup> See *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 170 (Fla. 4th DCA 2002); see also *Zorc*, *supra* note 14, at 897.

<sup>24</sup> See §112.3215(5)(a)1 (requiring lobbying firms to file a compensation report with the commission for each quarter in which one or more of the firm’s lobbyists were registered to represent a principal).

<sup>25</sup> §112.3215(8)(d), F.S.; see also Rule 34-12.760(2), F.A.C.

<sup>26</sup> Rule 34-12.760(3), F.A.C.

<sup>27</sup> Rule 34-12.760(1), F.A.C.

The exemption in Section 112.3215(8)(d), F.S., is subject to the Open Government Sunset Review Act and is scheduled to be repealed on October 2, 2011, unless the Legislature reenacts the exemption pursuant to the requirements of Section 119.15, F.S.

### **III. Effect of Proposed Changes:**

The bill saves from repeal the exemption found in Section 112.3215(8)(d), F.S. Section 1 of the bill reenacts the current public records and public meeting exemption found in Section 112.3215(8)(d), F.S.

The current exemption 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 open 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.

As precedent establishes, all public records and public meetings exemptions must be narrowly construed.<sup>28</sup> With the exemptions in section 112.3215(8)(d), F.S., being narrowly constructed as Florida law provides, it does not compromise the goals of the Florida Public Records Act or the Florida Sunshine Law. While the current language of the statute exempts an entire meeting at which an investigation or audit is discussed, any exemptions are construed narrowly. In narrowly construing the exemptions to the Public Records Act and the Sunshine Law, it is the practice of the Commission to take up a confidential matter on the executive session agenda with other confidential matters only. Section 112.3215(8)(d), F.S., does not impede the Public Records Act's or Sunshine Law's goals of preventing the "crystallization of secret decisions."<sup>29</sup> With the public necessity, the narrow construction of the exemptions, and the additional requirements established Rule 34-12.760, F.A.C., adequate public oversight is provided so that it does not contravene the public policy goals of the Public Records Act or the Sunshine Law.

Section 2 provides an effective date of October 1, 2011.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>28</sup> See *supra* notes 21 and 23.

<sup>29</sup> *Zorc, supra* note 14, at 896.

**B. Public Records/Open Meetings Issues:**

As the bill does not create or expand a public records or public meetings exemption, a two-thirds vote for passage is not required.<sup>30</sup>

**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.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>30</sup> FLA. CONST. art. I, § 24(c).