

## **FINAL BILL ANALYSIS**

**BILL #:** CS/SB 1970

**FINAL HOUSE FLOOR ACTION:**

110 Y's      6 N's

**SPONSOR:** Sen. Thrasher (Rep. Patronis)

**GOVERNOR'S ACTION:** Approved

**COMPANION BILLS:** HB 7099, SB 1204 (Linked)

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### **SUMMARY ANALYSIS**

CS/SB 1970 passed the House on April 14, 2011. The bill was approved by the Governor on May 5, 2011, chapter 2011-35, Laws of Florida, and took effect May 5, 2011.

The bill creates a public record exemption for the Office of Program Policy Analysis and Government Accountability (OPPAGA or office).

The office is a unit within the Office of the Auditor General. It is a staff unit of the Legislature that performs independent examinations, program reviews, and other projects.

Current law provides that audit work papers and notes of the Auditor General are not public records. This exemption also applies to OPPAGA work papers and notes, because OPPAGA is a unit within the Office of the Auditor General.

Senate Bill 1204 (2011) amends current law to provide that the term "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. As such, it deletes provisions relating to the creation and duties of OPPAGA. Removal of OPPAGA from within the Office of the Auditor General appears to remove the public record exemption currently afforded the office.

The bill creates a public record exemption for OPPAGA. Work papers that relate to an authorized project or a research product are exempt from the public records requirements of the State Constitution. The bill provides for retroactive application of the exemption, a statement of public necessity, and an effective date that is contingent upon the passage of Senate Bill 1204.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF 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 chapter 119, F.S., also known as the Public Records Act. 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.
- Protects trade or business secrets.

##### Legislative Records

Article I, s. 24(a) of the State Constitution applies to records of the legislative branch; however, the Public Records Act does not apply to such records. In addition, the Open Government Sunset Review Act does not apply to an exemption that applies solely to the Legislature.<sup>3</sup>

##### Office of Program Policy Analysis and Government Accountability

The Office of Program Policy Analysis and Government Accountability (OPPAGA or office) is a unit within the Office of the Auditor General.<sup>4</sup> It is a staff unit of the Legislature that performs independent examinations, program reviews, and other projects.<sup>5</sup>

The Legislative Auditing Committee appoints the director of OPPAGA by majority vote of the committee, subject to confirmation by a majority vote of the Senate and the House of Representatives.<sup>6</sup> Current law sets forth the qualifications of the director and the process for

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

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

<sup>3</sup> Section 119.15(2)(b), F.S.

<sup>4</sup> OPPAGA is independent of the Auditor General for purposes of general policies established by the Legislative Auditing Committee. Subsections 11.51(1) and (2), F.S.

<sup>5</sup> Section 11.51(1), F.S.

<sup>6</sup> Section 11.511(1)(a), F.S.

reappointment and termination of the director. It also sets forth qualifications for staff of OPPAGA and the duties of the office.<sup>7</sup>

#### Public Record Exemption

Current law provides that audit work papers and notes of the Auditor General are not public records.<sup>8</sup> This exemption also applies to OPPAGA work papers and notes, because OPPAGA is a unit within the Office of the Auditor General.

#### Senate Bill 1204 (2011)

Senate Bill 1204 (2011) amends s. 1.01, F.S., to provide that the term “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. As such, it deletes provisions in s. 11.51, F.S., relating to the creation and duties of OPPAGA. Removal of OPPAGA from within the Office of the Auditor General appears to remove the public record exemption currently afforded the office.

On March 8, 2011, Senate Bill 1204 passed the Senate (37-0). On March 9, 2011, Senate Bill 1204 was substituted for House Bill 7017, and on March 10, 2011, passed the House of Representatives (96-20).

Article III, s. 8(a) of the State Constitution provides that:

Every bill passed by the legislature shall be presented to the governor for approval and shall become a law if the governor approves and signs it, or fails to veto it within seven consecutive days after presentation.

Senate Bill 1204 was approved by the Governor on May 5, 2011.<sup>9</sup>

#### **Effect of Proposed Changes**

The bill creates a public record exemption for OPPAGA. Work papers that relate to an authorized project or a research product are exempt<sup>10</sup> from Article I, s. 24(a) of the State Constitution. In essence, the bill recreates the public record exemption currently afforded OPPAGA as a unit within the Office of the Auditor General.

The records are not made exempt from s. 119.07(1), F.S., and the exemption is not made subject to review and repeal pursuant to the Open Government Sunset Review Act, because the Legislature is not subject to chapter 119, F.S.

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<sup>7</sup> See s. 11.511, F.S.

<sup>8</sup> Section 11.45(4)(c), F.S.

<sup>9</sup> Chapter 2011-34, L.O.F.

<sup>10</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).

The bill provides for retroactive application of the public record exemption.<sup>11</sup> It also provides a public necessity statement, as required by the State Constitution,<sup>12</sup> and an effective date that is contingent upon passage of Senate Bill 1204.

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

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

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

None.

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

None.

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

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

None.

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

None.

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

None.

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

None.

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

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