

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 828

INTRODUCER: Senator Bogdanoff

SUBJECT: Public Records

DATE: March 6, 2011

REVISED: _____

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

I. Summary:

This bill creates an exemption from the public records requirements of s. 119.0713(2), F.S., and s. 24(a), Art. I of the State Constitution for information received as part of active investigations of the inspector general on behalf of a unit of local government.

The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.¹

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.²

This bill substantially amends section 119.0713 of the Florida Statutes.

II. Present Situation:

Florida's Public Records Law

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. 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.

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

Section 24(a), Art. I, of the State 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record³ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency⁴ records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “public records” to include 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. 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 “intended to perpetuate, communicate, or formalize knowledge.”⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

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

³ Section 119.011(12), F.S.

⁴ Section 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, 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 *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

⁸ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Section 24(c), Art. I of the State Constitution.

maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Local Government Auditing

Section 218.32 (1), F.S., requires that local governments submit to the Department of Financial Services (DFS) an Annual Financial Report covering their operations for the preceding fiscal year. DFS makes available to local governments an electronic filing system that accumulates the financial information reported on the annual financial reports in a database. Section 218.39, F.S., provides that if a local government will not be audited by the Auditor General, the local government must provide for an annual financial audit to be completed within 12 months after the end of the fiscal year. The audit must be conducted by an independent certified public accountant retained by the entity and paid for from public funds.

Under s. 119.0713, F.S., the audit report of an internal auditor prepared for or on behalf of a unit of government becomes a public record when the audit becomes final. Audit work papers and notes related to the audit are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the Florida Constitution until the audit report becomes final.

Local Government Investigations: Public Records

If certified pursuant to statute, an investigatory record of the Chief Inspector General within the Executive Office of the Governor or of the employee designated by an agency head as the agency inspector general (which would include local government entities)¹² has a public records exemption until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever first occurs. Investigatory records are those records that are related to the investigation of an alleged, specific act or omission or other wrongdoing, with respect to an identifiable person or group of persons, based on information compiled by the Chief Inspector General or by an agency inspector general, as named under the provisions of s. 112.3189, F.S., in the course of an investigation. Under s. 112.31901, F.S., an

¹⁰ Op. Att’y Gen. Fla. 85-62 (1985).

¹¹ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

¹² Section 112.312, F.S., defining “agency” as any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.

investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.¹³ At the local government level there is concern that sixty days is too little time to carry out an investigation, particularly if it is a criminal investigation. Additionally, the Palm Beach County Inspector General is an independent entity responsible for the county, 38 municipalities (by referendum), and the Solid Waste Authority (by interlocal agreement).¹⁴ As a result, there is no single agency head to certify the investigation as exempt.

Section 112.3188, F.S., governs the confidentiality of information given to inspectors general in whistleblower cases. Certain specified information is confidential until the conclusion of an investigation when the investigation is related to whether an employee or agent of an agency or independent contractor:

- Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or
- Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.

Information, other than the name or identity of a person who discloses certain types of incriminating information about a public employee, may be disclosed when the investigation is no longer active. Section 112.3188, F.S., defines what constitutes an active investigation.

Section 112.324(2), F.S., (recently amended by ch. 2010-130, Laws of Florida) provides local governments with a public records exemption for ethics investigations.¹⁵ A recent Florida Attorney General's Opinion responded to the following question, "Do the public records and meeting exemptions provided for in Chapter 2010-130, Laws of Florida, apply to the investigatory process of the Palm Beach County Inspector General?"¹⁶ The opinion concluded that to the extent that the inspector general is investigating complaints involving the violation of ethics codes the provisions of Chapter 2010-130 would apply. Confidentiality under s. 112.324, F.S. does not extend beyond ethics investigations. However, the Attorney General Opinion did note that similar investigations would be covered under s. 112.3188, F.S., discussed above.

III. Effect of Proposed Changes:

Section 1 amends s. 119.0713, F.S., to expand the public records exemptions for audit records (covering records until the audit report becomes final) to include information received, produced, or derived from an investigation until the investigation is complete or when the investigation is no longer active. This exemption for audits and investigations 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 provides a statement of public necessity required by the Florida Constitution. The exemption is necessary because the release of such information could potentially be defamatory to an individual or entity under audit or investigation, causing unwarranted damage to the good

¹³ Section 112.31901, F.S.

¹⁴ Email from the Palm Beach County Inspector General, on record with the Senate Committee on Community Affairs.

¹⁵ See also s. 112.31901, F.S. (related to investigatory records of ethics violations).

¹⁶ Op. Att'y Gen. Fla. 2010-39, September 16, 2010.

name or reputation of an individual or company, or could significantly impair an administrative or criminal investigation.

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.

Breadth: A public records exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁷ This bill does not specify what agencies¹⁸ it applies to or what emergency notification programs it is intended to include. To survive constitutional scrutiny, the bill must be narrowly tailored to protect individuals or entities from the release of defamatory information.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

¹⁸ By default it will apply to “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.” Section 119.011, F.S.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Because of the level of scrutiny afforded to public record exemptions, the Legislature may want to consider defining what constitutes an active investigation or importing the definition of active investigation from s. 112.3188, F.S., or s. 112.31901, F.S.

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.