

**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:** PCS/SB 844 (114708)

**INTRODUCER:** Governmental Oversight and Accountability Committee

**SUBJECT:** OGSR/Sunshine State One-Call of Florida, Inc.

**DATE:** February 3, 2012      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Carter	CU	<b>Favorable</b>
2.	Seay	Roberts	GO	<b>Pre-meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This bill is the result of the Communications, Energy, and Public Utilities Committee’s Open Government Sunset Review of the public records exemption for proprietary confidential business information held by Sunshine State One-Call of Florida, Inc. The exemption expires on October 2, 2012, unless reenacted and saved from repeal by the Legislature. This bill reenacts the public records exemption. This PCS also changes the effective date to October 1, 2012.

This bill substantially amends section 556.113 of the Florida Statutes.

**II. Present Situation:**

**Public Records Law**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of

<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

(a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency 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>5</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>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<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>2</sup> Article I, s. 24, Fla. Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

<sup>5</sup> Section 119.011(11), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>8</sup> Article I, s. 24(c), Fla. Constitution.

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 then an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

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

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. 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.<sup>15</sup>

The Act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- Protects information of a sensitive, personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>16</sup>

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<sup>9</sup> *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).

<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> Art. I, s. 24(c), Fla. Constitution.

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

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

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(5)(a), F.S.

<sup>16</sup> Section 119.15(4)(b), F.S.

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?

### **Sunshine State One-Call of Florida, Inc.**

Chapter 556, F.S., is the Underground Facility Damage Prevention and Safety Act (Act).<sup>17</sup> The intent of the Act is to provide access for excavating contractors and the public to provide notification to the system of their intent to engage in excavation or demolition.<sup>18</sup>

The Act provides for creation of the Sunshine State One-Call Of Florida, Inc. (One-Call), as a not-for-profit corporation.<sup>19</sup> Each operator of an underground facility<sup>20</sup> is a member.<sup>21</sup> The membership elects a board of directors to administer the system,<sup>22</sup> which is a free-access notification system established by One-Call. The board of directors is subject to public records and public meetings laws.<sup>23</sup>

The notification system must provide a single toll-free telephone number within Florida that excavators can use to notify member operators of planned excavation or demolition activities.<sup>24</sup> When notice of intent to engage in excavation or demolition is filed, the systems managed by One-Call provide notice to the member operators of proposed excavation and give the opportunity for member operators to locate and identify their underground facilities.<sup>25</sup>

One-Call is not required or permitted to locate or mark underground facilities.<sup>26</sup> However, those member operators who are provided notice of an excavation must locate and mark underground

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<sup>17</sup> Section 556.101(1), F.S.

<sup>18</sup> Section 556.101(2), F.S.

<sup>19</sup> Section 556.103(1), F.S.

<sup>20</sup> Section 556.102(13), F.S., defines “underground facility” as any public or private personal property which is buried, placed below ground, or submerged on any member operators right-of-way, easement, or permitted use which is being used or will be used in connection with the storage or conveyance of water; sewage, electronic, telephonic, or telegraphic communication; electric energy; oil; petroleum products; natural gas; optical signals; or other substances, and includes, but is not limited to pipelines, pipes, sewers, conduits, cables, valves, and lines.

<sup>21</sup> Section 556.103(1), F.S.

<sup>22</sup> Section 556.103(2), F.S.

<sup>23</sup> Attorney General Opinion 94-35 provides in sum, “[m]eetings of the Board of Directors of Sunshine State One-Call of Florida, Inc., are subject to the requirements of the Government in the Sunshine Law and records of the corporation and its board of directors come within the scope of the Public Records Law.” (April 21, 1994)

<sup>24</sup> Section 556.104, F.S.

<sup>25</sup> See s. 556.105, F.S.

<sup>26</sup> Section 556.101(2), F.S.

facilities not less than two business days after notification,<sup>27</sup> or not less than 10 business days after notification for facilities located beneath the waters of the state.<sup>28</sup>

To initiate an excavation or demolition, an excavator must contact One-Call by phone or electronically to file a “ticket” that provides specific information about the proposed excavation, such as the name of the company or person, intended depth of the excavation, and the location of the intended excavation.<sup>29</sup>

In 2002, One-Call invested in a member ticket management software system that allows all excavators the opportunity to file tickets electronically and eliminates the cost of purchasing these systems for individual companies. Prior to this investment, electronic ticket filing was accessible only to member operators who bought ticket management systems.<sup>30</sup>

### **Public Records Exemption Under Review**

Current law provides a public record exemption for Sunshine State One-Call of Florida, Inc. (One Call). Proprietary confidential business information held by One-Call, for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system, is exempt<sup>31</sup> from public records requirements.<sup>32</sup>

“Proprietary confidential business information” is defined as information provided by:

- A member operator that is a map, plan, facility location diagram, internal damage investigation report or analysis, dispatch methodology, trade secret, or that describes the exact location of a utility underground facility or the protection, repair, or restoration thereof.<sup>33</sup>
- An excavator that is an internal damage investigation report or analysis relating to underground utility facilities damages.<sup>34</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2012, unless reenacted and saved from repeal by the Legislature.

### **Communications, Energy and Public Utilities Committee’s Open Government Sunset Review**

Based on an Open Government Sunset Review of this exemption, Senate professional staff of the Communications, Energy and Public Utilities Committee recommended that the Legislature retain the public records exemption for proprietary confidential business information held by

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<sup>27</sup> Section 556.105(5)(a), F.S.

<sup>28</sup> Section 556.105(5)(b), F.S.

<sup>29</sup> See s. 556.105(1)(a), F.S.

<sup>30</sup> Professional Staff Analysis and Economic Impact Statement for SB 1510, Senate Communications and Public Utilities Committee, March 19, 2007 (at pg. 2), available at <http://archive.flstate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s1510.cu.pdf>.

<sup>31</sup> See *supra* note 13.

<sup>32</sup> Section 556.113(2), F.S.

<sup>33</sup> See section 556.113(1)(a), F.S.

<sup>34</sup> See section 556.113(1)(b), F.S.

One-Call for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.

This recommendation was made in light of the information gathered for the Open Government Sunset Review, which indicated that a public necessity continues to exist to exempt proprietary confidential business information held by One-Call. Reenactment of the exemption helps allow the state to effectively and efficiently administer a governmental program which would be significantly impaired without the exemption. Reenacting the exemption would also serve the purpose of protecting information of a confidential nature concerning One-Call's members that can be used to protect or further a business advantage over those who do not know or use it and the disclosure of which would injure them in the marketplace.

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

**Section 1** amends s. 556.113, F.S., reenacting and saving from repeal the public records exemption for proprietary confidential business information held by One-Call for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.

**Section 2** provides an effective date of October 1, 2012.

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

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

None.

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

Because this bill does not create or expand a public records exemption, it is not subject to the constitutional requirement of passage by a two-thirds vote of both houses of the Legislature.

#### **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.)

**PCS (114708) by Governmental Oversight and Accountability on February 7, 2012:**

The PCS changes the effective date from July 1, 2012 to October 1, 2012 to coincide with the sunset date. The PCS makes no substantive changes to the exemption.

B. Amendments:

None.