

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 Regulated Industries Committee

BILL: SB 906

INTRODUCER: Senator Hays

SUBJECT: Public Records

DATE: January 26, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Favorable
2.			GO	
3.				
4.				
5.				
6.				

I. Summary:

The bill expands the public records exemption for agency personnel information to include the home addresses, telephone numbers, and photographs of current or former investigators and inspectors of the Department of Business and Professional Regulation. The bill also exempts the home addresses, telephone numbers, and places of employment of the spouses and children of current or former investigators and inspectors of the Department of Business and Professional Regulation, as well as the names and locations of schools and day care facilities attended by their children. The bill requires investigators and inspectors of the Department of Business and Professional Regulation to have made reasonable efforts to protect their personal information from being accessible from alternate means.

The bill specifies that the exemptions are subject to the Open Government Sunset Review Act and provides a statement of public necessity for the exemptions.

This bill creates a new exemption and is subject to a two-thirds vote of each house of the Legislature pursuant to Article I, s. 24(c) of the State Constitution.

This bill amends section 119.071, Florida Statutes.

II. Present Situation:

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 1892.¹ One hundred years later,

¹ Section 1390, 1391 F.S. (Rev. 1892).

Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(a) 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,³ which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ 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 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.⁵

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.

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,

² Article I, s. 24 of the State Constitution.

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 Section 119.011(11), F.S.

communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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

The Open Government Sunset Review Act¹⁴ provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.¹⁵

The act states that an exemption may be created, revised 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:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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

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

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

⁸ Article I, s. 24(c), Florida Constitution.

⁹ *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, 569 (Fla. 1999).

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

¹¹ Article I, s. 24(c), Florida Constitution.

¹² Fla. AGO 85-62 (August 1, 1985).

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

¹⁴ Section 119.15, F.S.

¹⁵ Section 286.011, F.S.

who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁶

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁷ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8)(e), F.S., makes explicit that:

notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 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 s. 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. 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.

Agency Personnel Information

Currently, under s. 119.071(4), F.S., specified personal information relating to the employees of agencies is protected from disclosure. For example, for current or former code enforcement officers, s. 119.071(4)5., F.S., provides a public records exemption for:

- their home addresses, telephone numbers, and photographs;

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

- the home addresses, telephone numbers, and places of employment of their spouses and children; and
- the names and locations of schools and day care facilities attended by their children are exempt from disclosure.

Section 119.071(4), F.S., provides similar records exemptions for the following agency personnel:

- Active or former law enforcement personnel;
- Department of Children and Family Services;
- Department of Health;
- Department of Revenue;
- Florida Supreme Court justices;
- Former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors;
- General magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support hearing officers;
- Current or former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers of any local government agency;
- Current or former United States attorneys and assistant United States attorneys;
- Former judges of the United States of Appeal, United States district judges, and United States magistrate judges;
- Current or former code enforcement officers;
- Current or former guardians ad litem;
- Current or former juvenile probation officers; and
- Supervisors, group treatment leaders, group treatment leader supervisors, rehabilitation therapists, and social service counselors of the Department of Juvenile Justice.

Department of Business and Professional Regulation

The Department of Business and Professional Regulation (department) is delegated responsibility for both professional regulation and business regulation. The department's division of regulation monitors more than twenty professions and related businesses to ensure that those professions and businesses comply with the rules and standards set by the Legislature, professional boards, and the department. Department inspectors and investigators are required to investigate any complaint that is received in writing, to determine if it is legally sufficient, to review whether it is either signed by the complainant or if not signed, to determine if it is believed to be true after an initial inquiry by the agency.¹⁸ In addition, department inspectors and investigators are required to complete other routine inspections by the department.¹⁹ In many instances the inspectors and investigators have the authority to immediately issue a citation to the offending party.²⁰ The department not only conducts and prosecutes violations of offending

¹⁸ Section 455.225(1)(a), F.S.

¹⁹ See Rule 61G5-30.001, F.A.C.

²⁰ See Rule 61G5-30.004, F.A.C.

agency rules and regulations, but the agency also has a duty to notify the proper prosecuting authority when there is a criminal violation of any statute related to the practice of a profession by the department.²¹

Presently, the home addresses, telephone numbers, and photographs of current or former investigators and inspectors of the department; the names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are not exempt from public disclosure.²² The department's Alcoholic Beverages and Tobacco division does employ some sworn police officers (agents) to conduct investigations for that division. Agents can complete investigations in cooperation with investigators or inspectors or with other agents. However, only the agents who are sworn law enforcement officer are currently protected under the exemption for law enforcement personnel in s. 119.017(4)(d)1.a., F.S., but not the agency's other inspectors or investigators.

The department's inspectors and investigators have reported incidents of threats and abuse. According to the department, after issuing a citation in an Orlando salon, an investigator received numerous threatening phone calls to her home telephone number. The threats did not cease until the investigator reported the threats to local law enforcement.

In 2006, an Orlando area investigator was verbally abused when a licensee told her that he wished harm upon her before the end of the day.²³ In 2007 and then again in 2008, another Orlando investigator had her state vehicle vandalized while it was parked outside her home at night.²⁴

Two Jacksonville investigators received threatening calls to their home numbers after conducting investigations. In 2008, a Jacksonville inspector had to have his personal cell phone number changed after it had been compromised by a private investigator. Both investigators have since had their telephone numbers changed to be unlisted. In 2007, an inspector in Ft. Myers arrived home to find a subject of one of her investigations sitting on her front doorstep. Another inspector from the same regional office had a convicted felon call her at home in late 2008.

The department's Miami regional office has reported multiple incidents as well in 2008. On one occasion, an investigator noticed one of the subject's of his investigation, an investigation which resulted in the subject's arrest, driving slowly past his house. Another had numerous subjects of investigations knock on their front door after their home address had been posted at the

²¹ Section 455.2277, F.S.

²² The Department of Business and Professional Regulation does not routinely collect the names and locations of the schools and day care facilities attended by the children of department investigators and inspectors. However, the department has expressed an interest in having this information part of the exemption in the event that the information has been made part of the personnel file or case file inadvertently. Otherwise, the department is concerned that this information could be available to the public when completing a public records request.

²³ See Recommended Order in *Dept. Business and Professional Regulation v. Tony's Hair Styling*, DOAH Case No. 05-007711, where the formal hearing found the licensee guilty of interfering with an agency inspection.

²⁴ Information supplied by the Department of Business and Professional Regulation.. Redacted information in on file with the committee.

department. And yet another had numerous threatening phone calls on her cell phone, and threats to both her family and children.²⁵

III. Effect of Proposed Changes:

The bill expands the public records exemption in s. 119.071(4), F.S., for agency personnel information to include the home addresses, telephone numbers, and photographs of current or former investigators and inspectors of the department. The bill also exempts the names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel, as well as the names and locations of schools and day care facilities attended by their children. The exemption applies to information for the investigators and inspectors of the department who have made reasonable efforts to protect their personal information from being accessible from alternate means.

The bill provides that the amendments made by the act are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and provides that the public-records exemptions will stand repealed on October 2, 2014, unless reviewed and saved from repeal through reenactment by the Legislature.

Justification of public necessity for the exemptions is also provided, stating that release of the information might place the investigators, inspectors, or the family members of these investigators or inspectors in harm or a threat of harm by a current or former litigant or person under investigation by the department, and, therefore, the harm that would result from the release of the information outweighs any public benefit that might result from the disclosure.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Only the Legislature is authorized to create exemptions to open government requirements.²⁶

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.²⁷ A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.²⁸ A bill enacting a new public records exemption is

²⁵ *Id.*

²⁶ Article I, s. 24(c), Florida Constitution.

²⁷ *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, 569 (Fla. 1999).

²⁸ *Supra* at n. 26.

subject to a two-thirds vote of each house of the Legislature pursuant to Article I, s. 24(c), Florida Constitution.

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.