

**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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 1318

INTRODUCER: Ethics and Elections Committee and Senator Soto

SUBJECT: Public Records/Complaint of Misconduct Against Public Employee

DATE: April 15, 2013 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Roberts	Roberts	EE	<b>Fav/CS</b>
2.	Naf	McVaney	GO	<b>Pre-meeting</b>
3.			RC	
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:**

CS/SB 1318 creates a public record exemption for a complaint of misconduct filed with an agency against an agency employee and all information obtained pursuant to the investigation by the agency of the complaint of misconduct. The information is confidential and exempt from public record disclosure requirements until the investigation ceases to be active, or until the agency provides written notice to the employee who is the subject of the complaint that the agency concluded the investigation and either will or will not proceed with disciplinary action or file charges.

The bill provides for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature. In addition, the bill provides a statement of public necessity as required by the State Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting

exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

This bill substantially amends section 119.071, Florida Statutes.

## II. Present Situation:

### Public Record Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.<sup>1</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>2</sup>

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act<sup>3</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>4</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>5</sup>

Only the Legislature may create an exemption to public record disclosure requirements.<sup>6</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>7</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>8</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>9</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

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

<sup>4</sup> Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" 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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

<sup>5</sup> Section 119.07(1)(a), F.S.

<sup>6</sup> FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *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 (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 2004); and *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).

<sup>7</sup> FLA. CONST., art. I, s. 24(c).

<sup>8</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

The Open Government Sunset Review Act<sup>10</sup> requires a newly created or expanded public record exemption to be repealed on October 2 of the fifth year after enactment, unless reviewed and reenacted by the Legislature.<sup>11</sup> It further provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet the public purpose it serves.<sup>12</sup>

### **Public Record Exemptions Relating to Complaints of Misconduct and Investigations**

State law provides limited exemptions from public record disclosure requirements for information relating to complaints of misconduct and investigations carried out by agencies in certain contexts. For example, a complaint filed against a law enforcement officer and all information obtained pursuant to the investigation of the complaint by the agency is confidential and exempt from s. 119.07(1), F.S., until the investigation ceases to be active or until the agency head or designee informs the subject of the complaint that the agency will or will not proceed with disciplinary action or the filing of charges.<sup>13</sup> Similarly, a complaint filed against an individual certified by the Department of Education, and all information obtained pursuant to the investigation of the complaint by the agency, is confidential and exempt from s. 119.07(1), F.S., until the conclusion of the preliminary investigation of the complaint, until such time as the preliminary investigation ceases to be active, or until such time as otherwise provided by s. 1012.798(6), F.S.<sup>14</sup> However, there is no general exemption for information obtained pursuant to an investigation following a complaint of misconduct filed against a public employee.

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

This bill creates a public record exemption for certain information pertaining to a complaint of misconduct filed against an agency employee. Specifically, the complaint and all information obtained pursuant to the investigation of the complaint by the agency<sup>15</sup> are confidential and exempt<sup>16</sup> from public record disclosure requirements until the:

- Investigation ceases to be active;

<sup>10</sup> Section 119.15, F.S.

<sup>11</sup> Section 119.15(3), F.S.

<sup>12</sup> Section 119.15(5)(b), F.S.

<sup>13</sup> Section 112.533(2), F.S.

<sup>14</sup> Section 1012.796(4), F.S. Section 1012.798(6), F.S. does not provide any additional limit on the duration of the exemption.

<sup>15</sup> Section 119.011(2), F.S., defines the term “agency” 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 chapter 119, F.S., 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>16</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).

- Agency provides written notice to the employee who is the subject of the complaint that the agency concluded the investigation with a finding not to proceed with disciplinary action or file charges; or
- Agency provides written notice to the employee who is the subject of the complaint that the agency concluded the investigation with a finding to proceed with disciplinary action or file charges.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and reenacted by the Legislature.

In addition, the bill provides a statement of public necessity as required by the State Constitution.

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

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

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

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

###### **Vote Requirement**

Section 24(c), Art. I of the State Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly created public record exemption. Because this bill creates a new public record exemption, it requires a two-thirds vote for passage.

###### **Public Necessity Statement**

Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly created public record exemption. Because this bill creates a new public record exemption, it includes a public necessity statement.

###### **Single Subject**

Article I, s. 24(c) of the State Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption of limited duration for a complaint of misconduct filed with a state agency or political subdivision of the state against an agency employee, and all information obtained pursuant to the investigation of the complaint by the agency. The purpose of the exemption is to facilitate the investigation of such complaints, and the exemption does not extend past the duration of such an investigation. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

##### **C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill could create a minimal fiscal impact on agencies because staff responsible for complying with public record requests could require training related to the expansion of the public records exemption. In addition, those agencies could incur costs associated with redacting confidential and exempt information prior to releasing a record. Such costs would be absorbed, however, as they are part of the day-to-day responsibilities of the agencies.

**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.)

**CS by Ethics and Elections on April 1, 2013:**

The CS differs from the original bill in that it:

- Replaces the term “state agency or political subdivision of the state” with the term “agency” to simplify the exemption and ensure consistency with other public records exemptions created in chapter 119, F.S.; and
- Corrects a technical deficiency with the date for the automatic repeal of the exemption under the Open Government Sunset Review Act to read “October 2, 2018,” instead of “July 1, 2018.”

**B. Amendments:**

None.