

**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 1496

**INTRODUCER:** Judiciary Committee and Senator Thrasher

**SUBJECT:** Public Records/Complaint and Information Requirement/Department of Legal Affairs

**DATE:** April 2, 2013                      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Eichin/Munroe</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Naf</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorable</b>
3.	_____	_____	<u>RC</u>	_____
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 1496 creates a public records exemption for a complaint of a Florida False Claims Act (FFCA) violation and other information held by the Department of Legal Affairs pursuant to an investigation of the alleged violation. The exemption expires when the investigation is complete, unless the complaint and other information are otherwise protected by law.

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

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

This bill is linked to SB 1494,<sup>1</sup> which substantially revises the authority of the Department of Legal Affairs to pursue fraud and other acts of misconduct under the FFCA.

<sup>1</sup> See Senate Staff Analysis and Economic Impact Statement for SB 1494 (2013 Reg. Sess.) by the Senate Committee on Judiciary (Mar. 15, 2013).

This bill substantially amends section 68.083 of the Florida Statutes.

## II. Present Situation:

### Public Records 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>2</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>3</sup>

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act<sup>4</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>5</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>6</sup>

Only the Legislature may create an exemption to public records requirements.<sup>7</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>8</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>9</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>10</sup>

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<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> *Id.*

<sup>4</sup> Chapter 119, F.S.

<sup>5</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 as "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>6</sup> Section 119.07(1)(a), F.S.

<sup>7</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>8</sup> FLA. CONST., art. I, s. 24(c).

<sup>9</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>11</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>12</sup> The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.<sup>13</sup>

### **Florida False Claims Act**

The Florida False Claims Act (FFCA)<sup>14</sup> authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. The Florida Legislature enacted the FFCA in 1994 and the FFCA is modeled after the Federal Civil False Claims Act.<sup>15</sup> Actions that violate the FFCA include:

- Submitting a false claim for payment or approval;<sup>16</sup>
- Making or using a false record to get a false or fraudulent claim paid or approved;<sup>17</sup>
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid;<sup>18</sup> or
- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.<sup>19</sup>

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state government for FFCA violations.<sup>20</sup> The Department of Financial Services or the Department of Legal Affairs (DLA) may bring an action for a false claim or may join a private action brought on the grounds outlined in the statute.<sup>21</sup>

### **SB 1494**

Under current law, the DLA may investigate false claims against the state but does not have subpoena powers. The DLA reports that the lack of subpoena authority can make it difficult for the department to determine if it is appropriate to intervene in a FFCA case.

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<sup>11</sup> Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

<sup>12</sup> Section 119.15(3), F.S.

<sup>13</sup> Section 119.15(6)(b), F.S.

<sup>14</sup> Section 68.081, F.S., *supra* note 1.

<sup>15</sup> See House Staff Analysis and Economic Impact Statement for SB 1185 (1994 Reg. Sess.) by the House Committee on Judiciary (Mar. 15, 1994) and *see also*, Federal False Claims Act, currently codified at 31 U.S.C. ss. 3729-3733 (Supp IV. 2010).

<sup>16</sup> Section 68.082(2)(a), F.S.

<sup>17</sup> Section 68.082(2)(b), F.S.

<sup>18</sup> Section 68.082(2)(c), F.S.

<sup>19</sup> Section 68.082(2)(g), F.S.

<sup>20</sup> Section 68.082(2), F.S.

<sup>21</sup> See Section 68.083, F.S.

The bill creates s. 68.0831, F.S., to grant the DLA discovery capabilities before the institution of a civil proceeding, if it has reason to believe that any person has testimony or evidence relevant to the investigation.<sup>22</sup>

### III. Effect of Proposed Changes:

The bill creates a public records exemption for a complaint of a violation of the FFCA and other information held by the DLA pursuant to an investigation of the alleged violation. Such complaint and information is confidential and exempt from public records requirements until the investigation is completed, unless the information is otherwise protected by law.

The bill provides that an investigation is completed when:

- The Department of Legal Affairs files its own action or closes its investigation without filing an action; or
- The *qui tam* action<sup>23</sup> is unsealed or voluntarily dismissed before unsealing.

In addition, the DLA may disclose the complaint and other information at any time to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature. It provides a statement of public necessity as required by the Florida Constitution.

This bill takes effect on the same date as SB 1494 or similar legislation, which is July 1, 2013.

### IV. Constitutional Issues:

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

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

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<sup>22</sup> See Senate Staff Analysis and Economic Impact Statement for SB 1494 (2013 Reg. Sess.) supra note.

<sup>23</sup> “*Qui tam* action” means “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.” BLACK’S LAW DICTIONARY (9th ed. 2009). See also s. 68.083(2), F.S. *Qui tam* cases usually arise from an employee of an institution such as a health care provider who discovers that violations of the FFCA are occurring. This is a type of whistleblower action. In a *qui tam* action under the FFCA, the employee will sue on behalf of the state to collect money that was illegally defrauded from the state. A private entity that brings a successful FFCA action on behalf of the state will receive an amount that the court decides is reasonable for collecting the civil penalty and damages. See ss. 68.085 and 68.086, F.S. The amount must not be less than 25 percent and not more than 30 percent of the proceeds recovered under a judgment. Section 68.085(3), F.S.

**B. Public Records/Open Meetings Issues:****Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public records or open meetings exemption to pass by a two-thirds vote of the members present and voting in each house. This bill creates a public records exemption; therefore, a two-thirds vote is required.

**Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain a public necessity statement. This bill creates a public records exemption; therefore, this bill includes a public necessity statement.

**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:**

The Department of Financial Services (DFS) or the Department of Legal Affairs (DLA) may bring an action for a false claim, or may join a private action brought on the grounds outlined in the statute.<sup>24</sup> The public records exemption created by this bill applies only to information held by the DLA; however, the DFS states that it currently uses the public records exemption in s. 17.0401, F.S.,<sup>25</sup> when investigating false claim allegations<sup>26</sup>

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<sup>24</sup> See Section 68.083, F.S.

<sup>25</sup> Section 17.0401, F.S., provides a public records exemption for information relative to an investigation conducted by the DFS's Division of Accounting and Auditing pursuant to s. 17.04, F.S., including any consumer complaint. Section 17.04,

**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 Judiciary on March 18, 2013:**

The committee substitute revises the point in time at which the complaint and other information, which relate to an investigation under the Florida False Claims Act, are subject to disclosure under the public records laws. Under the committee substitute, the records are subject to the disclosure requirements under the public records laws once an investigation is complete. Other criteria that may have authorized the Department of Legal Affairs to maintain the confidential and exempt status of the records beyond the completion of the investigation were removed from the bill.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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F.S., authorizes the Division of Accounting and Auditing to conduct investigations as it deems necessary to aid in the enforcement of the Chief Financial Officer's auditing duties.

<sup>26</sup> Email correspondence, dated April 1, 2013 (on file with the Senate Governmental Oversight and Accountability Committee).