

**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 Judiciary

BILL: CS/SB 1496

INTRODUCER: Judiciary Committee and Senator Thrasher

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

DATE: March 19, 2013      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Eichin/Munroe	Cibula	JU	<b>Fav/CS</b>
2.	_____	_____	GO	_____
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 1496 creates an additional exemption from requirements to disclose public records. The bill exempts records held by the Department of Legal Affairs pursuant to an investigation of a false claim against the state under the Florida False Claims Act (FFCA).<sup>1</sup> The specific records include complaints and other information relating to the investigation. Once an investigation is complete, the records will no longer be confidential and exempt, unless the records are otherwise protected by law. For purposes of the public records exemption created in the bill, an investigation is complete when:

- The Department of Legal Affairs files its own action or closes its investigation without filing an action; or
- The *qui tam* action<sup>2</sup> is unsealed or voluntarily dismissed before unsealing.

<sup>1</sup> Section 68.081, F.S., states that ss. 68.081 - 68.09, F.S., may be cited as the "Florida False Claims Act."

<sup>2</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

This bill is linked to SB 1494,<sup>3</sup> which substantially revises the authority of the Department of Legal Affairs to pursue fraud and other acts of misconduct under the FFCA.

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.

This bill substantially amends section 68.083, Florida Statutes.

## II. Present Situation:

### Public Records and Open Meetings Requirements

The Florida Constitution specifies requirements for public access to government records and meetings. It 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>4</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>5</sup> The Florida Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.<sup>6</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>7</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>8</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>9</sup> The Sunshine Law<sup>10</sup> requires all meetings of any board or commission of any

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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.

<sup>3</sup> *See* Senate Staff Analysis and Economic Impact Statement for SB 1494 (2013 Reg. Sess.) by the Senate Committee on Judiciary (Mar. 15, 2013).

<sup>4</sup> FLA. CONST., Art. I, s. 24(a).

<sup>5</sup> *Id.*

<sup>6</sup> FLA. CONST., Art. I, s. 24(b).

<sup>7</sup> Chapter 119, F.S.

<sup>8</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>9</sup> Section 119.07(1)(a), F.S.

<sup>10</sup> Section 286.011, F.S.

state or local agency or authority at which official acts are to be taken to be noticed and open to the public.<sup>11</sup>

Only the Legislature may create an exemption to public records or open meetings requirements.<sup>12</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>13</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>14</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>15</sup>

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

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>16</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>17</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>18</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

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<sup>11</sup> Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Art. III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

<sup>12</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>13</sup> FLA. CONST., Art. I, s. 24(c).

<sup>14</sup> The bill, however, may contain multiple exemptions that relate to one subject.

<sup>15</sup> FLA. CONST., Art. I, s. 24(c).

<sup>16</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>17</sup> Section 119.15(3), F.S.

<sup>18</sup> Section 119.15(6)(b), F.S.

- It allows the state or its political subdivision to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- It protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- It protects trade or business secrets.<sup>19</sup>

The Act also requires specified questions to be considered during the review process.<sup>20</sup>

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is expanded.<sup>21</sup> A public necessity statement and a two-thirds vote for passage are not required if the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception<sup>22</sup> to the exemption is created.<sup>23</sup>

### Florida False Claims Act

The Florida False Claims Act (FFCA)<sup>24</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>25</sup> Actions that violate the FFCA include:

- Submitting a false claim for payment or approval;<sup>26</sup>
- Making or using a false record to get a false or fraudulent claim paid or approved;<sup>27</sup>
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid;<sup>28</sup> or

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<sup>19</sup> *Id.*

<sup>20</sup> Section 119.15(6)(a), F.S. The specified questions are:

- 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?

<sup>21</sup> An exemption is expanded when it is amended to include more records, information, or meetings or to include meetings as well as records, or records as well as meetings.

<sup>22</sup> An example of an exception to a public records exemption would be allowing an additional agency access to confidential and exempt records.

<sup>23</sup> *See State of Florida v. Ronald Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995) (holding that nothing in s. 24, Art. I of the Florida Constitution require exceptions to a public records exemption to contain a public necessity statement).

<sup>24</sup> Section 68.081, F.S., *supra* note 1.

<sup>25</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>26</sup> Section 68.082(2)(a), F.S.

<sup>27</sup> Section 68.082(2)(b), F.S.

<sup>28</sup> Section 68.082(2)(c), F.S.

- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.<sup>29</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>30</sup> The Department of Financial Services or the Department of Legal Affairs may bring an action for a false claim, or may join a private action brought on the grounds outlined in the statute.<sup>31</sup>

### **SB 1494**

Under current law, the Attorney General's office may investigate false claims against the state but does not have subpoena powers. The Department of Legal Affairs 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.

The bill creates s. 68.0831, F.S., to grant the Department of Legal Affairs 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>32</sup>

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

The bill amends s. 68.083, F.S., to create a public records exemption for information held by the Department of Legal Affairs about an investigation involving false claims against the state under the Florida False Claims Act.

This exemption prevents the premature disclosure of the complaint and related information from compromising the ability of the Department of Legal Affairs to investigate false claims against the state before filing a complaint.

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:**

None.

#### **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.

<sup>29</sup> Section 68.082(2)(g), F.S.

<sup>30</sup> Section 68.082(2), F.S.

<sup>31</sup> See Section 68.083, F.S.

<sup>32</sup> See Senate Staff Analysis and Economic Impact Statement for SB 1494 (2013 Reg. Sess.) supra note.

**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 or the Department of Legal Affairs may bring an action for a false claim, or may join a private action brought on the grounds outlined in the statute.<sup>33</sup> As such, the Legislature may wish to consider whether the public records exemption created by the bill should also apply to information held by the Department of Financial Services.

**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

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<sup>33</sup> See Section 68.083, F.S.

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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