

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: SB 4

INTRODUCER: Ethics and Elections Committee

SUBJECT: Public Records and Meetings of the Commission on Ethics

DATE: February 5, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts		ee SPB 7008 as introduced
2.	Naf	McVaney	GO	Pre-meeting
3.			RC	
4.				
5.				
6.				

I. Summary:

SB 4 is a public records and meetings bill linked to SB 2, which, in part, authorizes specified public officers to refer cases of possible ethics violations to the Florida Commission on Ethics (state commission). This bill adds to existing public records and meetings exemptions related to complaints of possible ethics violations received by the state commission.

This bill creates a temporary public records exemption for:

- Written referrals of possible ethics violations and records relating to such referrals that are held by the state commission, its agents, or a public officer authorized to make such a referral; and
- Records relating to any preliminary investigation of such referrals that are held by the state commission or its agents.

This bill also creates a temporary public meetings exemption for any proceeding of the state commission in which a determination regarding a referral is discussed or acted upon. The bill subjects the newly created public records and meetings exemptions to the conditions upon which the existing public records and meetings exemptions expire and adds a new condition.

This bill extends an existing prohibition against filing or disclosing intent to file a complaint against a candidate from within 5 days of an election to within 30 days of an election, and subjects referrals to such restrictions. It also creates exceptions to such filing and disclosure requirements.

This bill extends the existing Open Government Sunset Review repeal date from October 2, 2015 to October 2, 2018. It provides a public necessity statement as required by the Florida Constitution.

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

This bill substantially amends section 112.324, Florida Statutes.

II. Present Situation:

Public Records and 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.¹ The records of the legislative, executive, and judicial branches are specifically included.² 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.³

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 Act⁴ guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶ The Sunshine Law⁷ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ 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)).

⁶ Section 119.07(1)(a), F.S.

⁷ Section 286.011, F.S.

⁸ 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

Only the Legislature may create an exemption to public records or public meetings requirements.⁹ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ 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 provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

Exemptions are subject to the Open Government Sunset Review Act,¹³ which prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵

Entities that may Investigate Possible Ethics Violations

The Florida Commission on Ethics (state commission) serves as a guardian of the standards of conduct for officers and employees of the state and its political subdivisions.¹⁶ It is an independent commission responsible for investigating and issuing public reports on complaints of breaches of the public trust¹⁷ by public officers and employees.¹⁸ The state commission must investigate sworn complaints of violation of the Code of Ethics for Public Officers and Employees (Code of Ethics)¹⁹ or of any other law over which it has jurisdiction.²⁰ It may only

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- 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.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c).

¹³ Section 119.15, F.S.

¹⁴ 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.).

¹⁵ Section 119.15(3), F.S.

¹⁶ See FLA. CONST. art. II, s. 8; and s. 112.320, F.S.

¹⁷ Section 112.312(3), F.S., defines “breach of the public trust” to mean a violation of a provision of the Florida Constitution or the Code of Ethics that establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests, including, without limitation, a violation of Art. II, s. 8 of the Florida Constitution, or of the Code of Ethics.

¹⁸ See FLA. CONST. art. II, s. 8

¹⁹ The Code of Ethics is comprised of part III of ch. 112, F.S.

²⁰ Section 112.322(1), F.S. The state commission is authorized to enforce the following ethics laws: the Code of Ethics in ch. 112, F.S.; Art. II, s. 8 of the Florida Constitution; standards of conduct specific to members and employees of the Public Service Commission and to members of the Public Service Commission Nominating Council (s. 350.043, F.S.); standards governing the use of state motor vehicles or aircraft (s. 287.175, F.S.); and standards governing agency use of public funds to retain lobbyists (s. 11.062(2)(e), F.S.).

initiate an ethics investigation if it receives such a sworn complaint.²¹ There is no process by which another public officer may refer a possible ethics violation.

Additionally, current law provides that the Code of Ethics does not prohibit the governing body of a political subdivision or an agency from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in the Code of Ethics, so long as those standards and requirements do not otherwise conflict with the Code of Ethics.²²

Neither the Florida Constitution nor the Code of Ethics specifically addresses the creation of a county or municipality “Commission on Ethics and Public Trust.” The existing public records and meetings exemptions relating to complaints and investigations of possible ethics violations, however, include such local commissions in the categories of entities to whom the exemptions apply.²³

Public Records and Meetings Exemptions Relating to Possible Ethics Violations

Current law provides that a complaint of an ethics violation or any records relating to the complaint or to any preliminary investigation that are held by the state commission, a local Commission on Ethics and Public Trust, or any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements²⁴ are temporarily confidential and exempt²⁵ from public records requirements.²⁶

Current law also temporarily exempts any proceeding conducted pursuant to a complaint or preliminary investigation by the state commission, a local Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process from public meetings requirements.²⁷

Both the public records and public meetings exemption expire when:

- The complaint is dismissed as legally insufficient;
- The alleged violator requests in writing that the records and proceedings be made public; or

²¹ Section 112.324(1), F.S.

²² Section 112.326, F.S.

²³ Section 112.324(2)(a)-(c), F.S.

²⁴ Pursuant to s. 112.326, F.S.

²⁵ 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).

²⁶ Section 112.324(2)(a), F.S. Such records are temporarily confidential and exempt from s. 119.07(1), F.S., and constitutional public records requirements.

²⁷ Section 112.324(2)(b), F.S. Such proceedings are temporarily exempt from the Sunshine Law, constitutional public meetings requirements, and s. 120.525, F.S., which sets forth timing and content requirements for notices and agendas of public meetings, workshops, and hearings of agencies subject to ch. 120, F.S.

- The state commission, local Commission on Ethics and Public Trust, or county or municipality that has established such local investigatory process determines whether probable cause exists to believe that a violation has occurred.²⁸

Timing Restrictions on Filing and Disclosing Intent to File Ethics Complaints

Current law prohibits the filing of a complaint against a candidate in any general, special, or primary election on the day of any such election or within the 5 days immediately preceding the date of the election.²⁹ Additionally, current law prohibits disclosure of *intent* to file such a complaint within 5 days of an election.³⁰ Current law provides no exceptions to such filing and disclosure restrictions.

III. Effect of Proposed Changes:

Linked Bill

This bill is linked to SB 2, which, in part, authorizes the Governor, the Department of Law Enforcement, a state attorney, or a United States Attorney to submit a written referral of a possible violation of the Code of Ethics or other possible breach of the public trust to the Florida Commission on Ethics (state commission).³¹ SB 2 authorizes the state commission to investigate such referral if it determines by a supermajority vote that the referral is sufficient to indicate a violation.³²

Public Records and Meetings Exemptions Relating to Possible Ethics Violations

This bill amends subsection (2) of s. 112.324, F.S., to add new public records and meetings exemptions required by changes proposed in SB 2 to the existing public records and meetings exemptions related to complaints of possible ethics violations submitted to the state commission.

It makes the following records temporarily confidential and exempt from s. 119.071(1), F.S., and s. 24(a), Art. I of the Florida Constitution:

- Written referrals of possible ethics violations and records relating to such referrals that are held by the state commission or its agents, the Governor, the Department of Law Enforcement, or state attorneys,³³ and
- Records relating to any preliminary investigation of such referrals that are held by the state commission or its agents.

The bill also makes any proceeding conducted by the state commission in which a determination regarding a referral is discussed or acted upon temporarily exempt from s. 286.011, F.S.; s. 24(b), Art. I of the Florida Constitution; and s. 120.525, F.S.

²⁸ Section 112.324(2)(c), F.S.

²⁹ *Id.*

³⁰ *Id.*

³¹ Lines 1314-1319 of the bill.

³² The state commission consists of nine unpaid, appointed members (s. 112.321(1) and (3), F.S.). SB 2 requires a yes vote of six members to initiate an investigation based upon a referral.

³³ United States Attorneys are not included in the exemption because a United States Attorney is a federal, not state, agency.

The bill subjects the new exemptions to the statutory conditions upon which the existing exemptions expire. It also adds “the commission determines that it will not investigate the referral” to such existing statutory conditions.

The bill extends the Open Government Sunset Review repeal date for s. 112.324(2), F.S., from October 2, 2015 to October 2, 2018.

The bill provides a public necessity statement as required by the Florida Constitution.

Timing Restrictions on Filing and Disclosing Intent to File Ethics Complaints

The bill extends an existing prohibition against filing or disclosing intent to file a complaint against a candidate from within 5 days of an election to within 30 days of an election and subjects referrals to such restrictions. It also creates an exception from such filing and disclosure restrictions for a complaint or referral that is based upon personal knowledge or information other than hearsay. In practical application, this exception means that if a person has personal knowledge or information other than hearsay regarding a possible ethics violation, he or she may disclose intent to file an ethics complaint based upon such knowledge or information at any time. It is only if such person has no such knowledge or information that the 30 day restriction applies.

The bill takes effect on the same date that SB 2 takes effect. SB 2 is to take effect upon becoming a law.

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 Florida 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 records or public meetings exemption. Because this bill creates new public records and meetings exemptions, it requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), Art. I of the Florida Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates new public records and meetings exemptions, it includes a public necessity statement.

Single Subject

Section 24(c), Art. I of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain only exemptions from

constitutional public records and open meetings requirements and provisions governing the enforcement of the section; other substantive provisions may not be included. This bill creates new public records and open meetings exemptions.

Lines 75-77 of the bill extend an existing prohibition against filing or disclosing intent to file a complaint against a candidate within 5 days of an election to within 30 days of an election and create exceptions to the filing and disclosure restrictions. It is unclear whether these changes constitute a substantive provision.

Lines 54-57 of the bill exempt any proceeding of the state commission in which a determination regarding a referral is discussed or acted upon from s. 286.011, F.S., s. 24(b), Art. I of the Florida Constitution, and s. 120.525, F.S. Section 120.525, F.S., sets forth timing and content requirements for notices and agendas of public meetings, hearings, and workshops of agencies subject to ch. 120, F.S. It is unclear whether the inclusion of s. 120.525, F.S., in the exempted provisions constitutes a substantive provision.

Breadth of Exemption

Section 24(c), Art. I of the Florida Constitution requires a public records or meetings exemption to be no broader than necessary to accomplish the stated purpose in the public necessity statement. The bill temporarily exempts any proceeding of the commission in which a determination regarding a referral is discussed or acted upon from public meetings requirements. The bill's public necessity statement provides that the public meetings exemption is necessary to prevent defamation of an individual under investigation, unwarranted damage to the reputation of such individual, or the significant impairment of the integrity of the investigation. It may be possible to accomplish those stated purposes by exempting only those *portions* of proceedings at which a referral is discussed or acted upon.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment/Freedom of Speech

The First Amendment to the United States Constitution provides, in part, that, "Congress shall make no law ... abridging the freedom of speech ..." In determining whether a government regulation unconstitutionally infringes upon freedom of speech, the United States Supreme Court has distinguished between those regulations that are content-based and those that are content-neutral. A governmental action that burdens expression is content-based if action is intended to regulate the communicative impact of the

expression.³⁴ The action is considered content-neutral if the action is intended to regulate something other than the communicative impact.³⁵

If the regulation is content-based and is not aimed at one of the types of speech generally unprotected by the First Amendment,³⁶ it is subject to strict scrutiny and will be sustained only if it:

- Serves a compelling governmental objective; and
- Is drawn as narrowly as possible to meet that objective.³⁷

If the regulation is content-neutral, however, it will be sustained if:

- It serves a significant governmental interest;
- It is narrowly tailored to serve that interest; and
- The government has left open ample alternative means of communication.³⁸

Current law prohibits the disclosure of an intention to file an ethics complaint on the day of an election or within the 5 days immediately preceding the election. This bill extends the period in which such disclosure may not be made from within 5 days of an election to within 30 days of an election. The bill also creates an exception from the 30 day limitation for complaints and referrals based upon personal knowledge or information other than hearsay. Current law does not provide any exceptions to the disclosure restriction.

A plaintiff must have standing in order to bring a case in federal court. Generally, there are three standing requirements:

- The plaintiff must have suffered, or is likely to suffer, an “injury in fact;”³⁹
- The injury he is suffering must be concrete and individuated;⁴⁰ and
- The action being challenged must be the “cause in fact” of the injury.⁴¹

³⁴ See, for example, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (invalidating a prohibition on the advertisement of prescription drug prices; the prohibition was created because of the government’s fears about consumers’ reactions to the speech’s content).

³⁵ See, for example, *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a ban on the use of sound trucks which emit “loud and raucous noises” while operating on the streets; the harm the government sought to prevent by the ban was independent of the content of the messages being amplified).

³⁶ The main categories of such generally unprotected speech are:

- Obscenity (see, for example, *Roth v. U.S.*, 354 U.S. 476 (1957));
- Fraudulent misrepresentation (see, for example, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980));
- Defamation (see, for example, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992));
- Advocacy of imminent and lawless behavior (see, for example, *Feiner v. New York*, 340 U.S. 315 (1951); and
- Fighting words (see, for example, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)).

³⁷ See, for example, *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

³⁸ See, for example, *Ward, et al. v. Rock Against Racism*, 491 U.S. 781 (1989).

³⁹ To prove “injury in fact,” the plaintiff must show that he has himself been injured in some way by the conduct that he complains of (see, for example, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The United States Supreme Court has not recognized standing on the part of individuals as citizens to object to unlawful or unconstitutional conduct (see, for example, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974)).

⁴⁰ See, for example, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

⁴¹ See, for example, *Warth v. Seldin*, 422 U.S. 490 (1975).

Neither current law nor the bill prescribes a penalty for disclosure of intent to file a complaint or referral made within the prohibited time period.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Commission on Ethics, the Governor, the Department of Law Enforcement, and state attorneys may incur indeterminate administrative costs related to temporary maintenance of the confidentiality of referrals, related records, and records relating to preliminary investigations of referrals. The Commission on Ethics also may incur indeterminate administrative costs related to compliance with the public meetings exemption for proceedings relating to referrals. Any such indeterminate administrative costs would likely be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Linked Bill

This bill is linked to SB 2.

Drafting Comments

Line 37 of the bill provides that referrals and related records are temporarily confidential and exempt from public records requirements if held by state attorneys. For drafting clarity, it is suggested that the line be amended to instead provide that such records are temporarily confidential and exempt if held by *a* state attorney.

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.

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