

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SPB 7124

INTRODUCER: For consideration by the Committee on Governmental Oversight and Accountability

SUBJECT: OGSR/Employment Discrimination Complaints

DATE: March 21, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	McVaney		<b>Submitted as committee bill</b>
2.				
3.				
4.				
5.				
6.				

**I. Summary:**

SPB 7124 is the result of an Open Government Sunset Review by the Governmental Oversight and Accountability Committee.

Current law provides a temporary public records exemption for all complaints and related records, held by any agency, that relate to a complaint of discrimination relating to race, color, religion, sex, national origin, age, handicap, or marital status in connection with certain hiring and employment practices. This part of the exemption expires when one of specified conditions occurs.

When the alleged victim chooses not to file a complaint and requests that records of the complaint remain confidential, all records relating to an allegation of employment discrimination are confidential and exempt from public disclosure requirements. This part of the exemption does not expire.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2013, unless reenacted by the Legislature. This bill reenacts the exemption and makes clarifying changes.

The bill does not expand the scope of the public records exemption; therefore, a two-thirds vote of the members present and voting in each house of the Legislature is *not* required for passage.

This bill amends section 119.071 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>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 records 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>

### 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>10</sup> It

<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 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>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).

<sup>10</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

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>11</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>12</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:

- 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>13</sup>

The Act also requires specified questions to be considered during the review process.<sup>14</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>15</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>16</sup> to the exemption is created.<sup>17</sup>

### **Employment Discrimination**

State law prohibits employment discrimination on the basis of race, color, religion, national origin, sex, handicap, or marital status.<sup>18</sup> Most of the state and local agencies that responded to

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

<sup>12</sup> Section 119.15(6)(b), F.S.

<sup>13</sup> *Id.*

<sup>14</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>15</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>16</sup> An example of an exception to a public records exemption would be allowing an additional agency access to confidential and exempt records.

<sup>17</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 requires exceptions to a public records exemption to contain a public necessity statement).

<sup>18</sup> Section 760.10, F.S.

questionnaires sent pursuant to the Open Government Sunset Review indicated that they have a process for receiving, processing, and investigating complaints of employment discrimination.<sup>19</sup>

### **Florida Commission on Human Relations**

The Florida Commission on Human Relations (commission) is an independent commission tasked with promoting and encouraging fair treatment and equal opportunity for all persons and mutual understanding and respect among economic, social, racial, religious, and ethnic groups.<sup>20</sup> Among its specified duties is that the commission must receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging a discriminatory practice.<sup>21</sup>

### **Public Records Exemption under Review**

Current law provides a public records exemption for all complaints and other records in the custody of any agency<sup>22</sup> which relate to a complaint of discrimination relating to race, color, religion, sex, national origin, age, handicap, or marital status in connection with hiring practices, position classifications, salary, benefits, discipline, discharge, employee performance, evaluation, or other related activities.<sup>23</sup> The exemption expires when:

- A finding is made relating to probable cause;
- The investigation of the complaint becomes inactive; or
- The complaint or any other records is made part of the official record of any hearing or court proceeding.<sup>24</sup>

The exemption specifies that:

- It shall not affect any function or activity of the Florida Commission on Human Relations; and
- Any state or federal agency that is authorized to have access to such complaints or records by any provision of law shall be granted such access in the furtherance of such agency's statutory duties.<sup>25</sup>

In addition, when the alleged victim chooses not to file a complaint and requests that records of the complaint remain confidential, all records relating to an allegation of employment discrimination are confidential and exempt from public records disclosure requirements.<sup>26</sup> The exemption does not authorize the release of such records.

Professional staff of the Governmental Oversight and Accountability Committee conducted a review of the exemption pursuant to the Open Government Sunset Review Act and sent questionnaires to state and local agencies regarding their use of the exemption. Those agencies responding to the questionnaire indicated that there is a public necessity to continue to protect

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<sup>19</sup> The questionnaire responses are on file with the Senate Governmental Oversight and Accountability Committee.

<sup>20</sup> Section 760.05, F.S.

<sup>21</sup> Section 760.06(5), F.S.

<sup>22</sup> The meaning of "agency" is as defined in s. 119.011(2), F.S. (*see* footnote 4).

<sup>23</sup> Section 119.071(2)(g)1.a., F.S.

<sup>24</sup> *Id.*

<sup>25</sup> Section 119.071(2)(g)1.b. and c., F.S.

<sup>26</sup> Section 119.071(2)(g)2., F.S.

the information, and recommended reenactment of the public records exemption under review. Their responses<sup>27</sup> appear to indicate that the exemption is necessary to preserve the effective and efficient administration of government investigations of employment discrimination complaints.

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

The bill removes the repeal date, thereby reenacting the public records exemption for employment discrimination complaints.

The bill also makes clarifying drafting changes.

The bill's effective date is October 1, 2013.

### **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 an 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:**

This bill reenacts but does not expand the scope of an existing public records exemption; therefore, a two-thirds vote of the members present and voting in each house of the Legislature is *not* required for passage.

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

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

None.

#### **C. Government Sector Impact:**

None.

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<sup>27</sup> On file with the Senate Governmental Oversight and Accountability Committee.

**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.

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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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