

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 1446

INTRODUCER: Senator Richter

SUBJECT: Public Records/Department of Agriculture and Consumer Services

DATE: March 20, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Favorable
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1446 creates a new exemption from the public records inspection and access requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S., for:

- Criminal or civil intelligence, investigative information, or any other information received from another state or federal regulatory, administrative, or criminal justice agency which is confidential or exempt pursuant to the laws of that state or federal law held by the Department of Agriculture and Consumer Services (DACS); and
- Information received or developed by DACS and another state or federal regulatory, administrative, or criminal justice agency as part of a joint or multiagency examination or investigation.

This exemption does not apply to information obtained or developed by DACS that would otherwise be available for public inspection if DACS performed an independent investigation.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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 public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided by the Florida Constitution.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 record.⁵ The Sunshine Law⁶ 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.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act ("OGSR Act") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The OGSR Act provides that an exemption automatically repeals on October 2nd of the fifth year

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public record" 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. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ 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 the Florida Constitution. Article III, s. 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, 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.

⁸ 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. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR Act does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹²

The OGSR 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.¹³ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁴
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁵ or
- It protects trade or business secrets.¹⁶

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.¹⁷

The OGSR Act also requires specified questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁰

The Department of Agriculture and Consumer Services

The Department of Agriculture and Consumer Services (DACS) safeguards the public from unsafe or defective products and deceptive business practices. The Division of Consumer Services within the DACS regulates specific business activities, including commercial weight

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ 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?

¹⁹ FLA. CONST., art. I, s. 24(c).

²⁰ Section 119.15(7), F.S.

loss practices, telephone solicitations, pawnshops, health studios, sellers of travel, and telemarketing.²¹

DACS investigates and regulates several professions in Florida. Most recently DACS's oversight and regulation of charitable organizations was significantly expanded to include oversight of charitable organizations and sponsors, professional fundraising consultants, and professional solicitors.²²

Florida's public record laws currently make any information obtained by DACS in administrative and civil investigations of charitable organizations open to the public. According to DACS, this presents a hurdle to partnering with other state and federal agencies, such as the Federal Trade Commission (FTC) or Internal Revenue Service (IRS), because DACS cannot maintain the same level of privacy adopted and required by those federal and other state agencies.²³ As a result, DACS's investigations are hindered because it is often unable to gather pertinent information from, enter into confidentiality agreements with, or participate in multi-jurisdiction task forces with other state and federal agencies.

The FTC operates a Consumer Sentinel database that is protected from public record disclosure. Information from this database can only be provided to a state agency that agrees not to disseminate the information.²⁴ This database contains information on subjects relating to:

- Identity Theft,
- Do-Not-Call Registry Violations,
- Computers, the Internet, and Online Auctions,
- Telemarketing Scams,
- Advance-fee loans and credit scams,
- Immigration services,
- Sweepstakes, Lotteries, and Prizes,
- Business Opportunities and Work-at-home Schemes,
- Health and Weight Loss Products, and
- Debt Collection, Credit Reports, and Financial Matters.

Additionally, the Internal Revenue Service (IRS) has expressed a willingness to share information on a case-by-case basis should DACS be able to prevent disclosure of the information beyond DACS.²⁵ The IRS has access to tax filing information that might be valuable to DACS when investigating whether an organization is compliant with Florida law.

III. Effect of Proposed Changes:

The bill makes confidential and exempt information that is held for:

²¹ See <http://www.freshfromflorida.com/Divisions-Offices/Consumer-Services>, last accessed March 11, 2015.

²² See chapter 2014-122, L.O.F.

²³ Florida Department of Agriculture and Consumer Services, *HB 997 Agency Analysis*, (March 3, 2015) (on file with the Senate Committee on Commerce and Tourism).

²⁴ *Id.*

²⁵ *Id.*

- Criminal or civil intelligence or investigative information from another state or federal regulatory, administrative, or criminal justice agency which is already deemed confidential or exempt pursuant to the law of other states or the federal government; and
- Information received or developed in a joint or multi-agency investigation from another state or federal regulatory, administrative, or criminal justice agency. Such information may be obtained and used in accordance with the conditions imposed by a joint multi-agency agreement.

This exemption permits DACS to receive intelligence information from local, state and federal agencies who would otherwise be unable to share data with DACS. This change will strengthen relations between DACS and other local, state, and federal agencies that will be able to share confidential investigatory information with DACS.

This bill does not provide for the information obtained from other state or federal agencies to be released. Florida case law states that confidential and exempt records can be released only as provided for by statute;²⁶ or by a court order. Unless DACS gets a court order, it will be unable to release any of confidential and exempt information. This may become problematic if DACS needs to release confidential and exempt information in the course of exercising its regulatory and enforcement duties, such as prosecuting administrative cases or when it refers a case to another agency for civil or criminal prosecution.

The bill provides that this exemption does not apply to all departmental investigations and regulatory functions.²⁷ Currently, information from most department investigations are public records, and this exemption will not apply to information obtained or developed by DACS if DACS obtained the information through an investigation that it conducts independently of any confidential information shared by other local, state or federal governmental sources. However, the language in the bill is ambiguous as it could be interpreted to mean that DACS could use confidential and exempt information in an investigation and then release some parts of an investigation that DACS would have discovered on its own had it conducted an independent investigation.

The bill's exemption will expire on October 2, 2020, pursuant to the OGSR Act, unless saved by the Legislature through reenactment.

This bill goes into effect on the same date as SB 1444 or similar legislation takes effect if such legislation is adopted in the same legislative session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁶ See footnote 8.

²⁷ Senate Bill #1446- Public Records/Department of Agriculture and Consumer Services Bill Analysis, Dated March 3, 2015, on line at ABARS website.

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 for passage of a newly created or expanded public-records or public-meetings exemption. Therefore, this bill 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 or expanded public-records or public-meetings exemption. Therefore, this bill includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to confidential criminal or civil intelligence or investigative information obtained from another state or federal regulatory agency pursuant to the law of other states or the federal government agency. This bill does not exempt any information that DACS develops from its own investigations. 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:

Aggrieved members of the public may see a quicker resolution, including payment of restitution, to their complaints against fraudulent or unlicensed activity regulated by DACS,

C. Government Sector Impact:

The bill may make DACS's execution of its regulatory duties more efficient and thus less costly.

VI. Technical Deficiencies:

The bill does not include the bill number of linked bill SB 1444 in the effective date.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 570.077 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of 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.
