

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 1536

INTRODUCER: Criminal Justice Committee and Senator Flores

SUBJECT: Public Records/Florida RICO Act Investigations

DATE: April 6, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1536 makes confidential and exempt from public disclosure information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. Because the bill creates a new public record exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

This confidential and exempt information may be disclosed by the investigative agency to a governmental entity in the performance of its official duties and to a court or tribunal.

The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.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

II. Present Situation:

Florida RICO Act

The “Florida RICO Act” is the short title for ss. 895.01-895.06, F.S. “Racketeering activity” means committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any of a number of offenses listed in the definition.¹

Section 895.04, F.S., punishes as a first degree felony:

- With criminal intent, receiving any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt² to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise;³
- Through a pattern of racketeering activity or through the collection of an unlawful debt, acquiring or maintaining, directly or indirectly, any interest in or control of any enterprise or real property;
- If employed by, or associated with, any enterprise, conducting or participating, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt; and
- Conspiring or endeavoring to violate any of the aforementioned unlawful acts.⁴

In addition to criminal penalties under s. 895.04, F.S., s. 895.05, F.S., imposes civil liability for violations of the Florida RICO Act, including forfeiture to the state of all property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the act.⁵

Investigative Subpoenas

Under s. 895.06, F.S., an investigative agency⁶ may, during the course of an investigation into civil violations of the act, subpoena witnesses and material if the agency has reason to believe that a person or other enterprise has engaged in conduct that violates the RICO Act. “The purpose of the subpoena power under section 895.06 is to allow an investigative agency to investigate, collect evidence and determine if a RICO violation has occurred.”⁷ An investigative

¹ Section 895.02(1), F.S. These offenses include violations of specified Florida laws (e.g., Medicaid fraud, kidnapping, human trafficking, and drug offenses) as well as any conduct defined as “racketeering activity” under 18 U.S.C. § 1961(1).

² Section 895.02(2), F.S., defines an “unlawful debt” as any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of specified Florida laws (e.g., various gambling offenses) as well as any gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

³ Section 895.02(3), F.S., defines “enterprise” as any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal gang as defined in s. 874.03, F.S., constitutes an enterprise.

⁴ Section 895.03(4), F.S.

⁵ Section 895.05(2), F.S.

⁶ Section 895.02(7), F.S., defines “investigative agency” as the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

⁷ *Check 'N Go of Florida, Inc. v. State*, 790 So.2d 454, 457 (Fla. 5th DCA 2001), *review denied* 817 So.2d 845 (Fla. 2002).

agency may apply ex parte to a circuit court for an order directing that a person or entity who has been subpoenaed not disclose the existence of the subpoena for a period of 90 days to anyone except for the attorney for the subpoenaed person or entity.⁸ The 90-day time limit may be extended by the court for good cause shown by the investigative agency.⁹

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.¹⁰ The records of the legislative, executive, and judicial branches are specifically included.¹¹

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act¹² guarantees every person's right to inspect and copy any state or local government public record¹³ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.¹⁴

Only the Legislature may create an exemption to public records requirements.¹⁵ This exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁶ Relevant to the bill, there is a difference between records the Legislature designates 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.¹⁷ 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.¹⁸ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill

⁸ Section 895.06(3), F.S.

⁹ *Id.*

¹⁰ FLA. CONST., art. I, s. 24(a).

¹¹ *Id.*

¹² Chapter 119, F.S.

¹³ 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 "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 section 11.0431, F.S.

¹⁴ Section 119.07(1)(a), F.S.

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ *Id.*

¹⁷ 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 1994), *review denied* 651 So.2d 1192 (Fla. 1995); and *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991). See also Attorney General Opinion 85-62 (August 1, 1985).

¹⁸ See *WFTV, Inc. v. The School Board of Seminole*, *supra*, and *Wait v. Florida Power and Light Co.*, 372 So.2d 420 (Fla. 1979).

enacting an exemption may not contain other substantive provisions¹⁹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.²⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²¹ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.²²

The OGSR 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 necessary.²³ 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:

- Allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁴
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals;²⁵ or
- Protects trade or business secrets.²⁶

The OGSR also requires specified questions to be considered during the review process. In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. The specified questions are:²⁷

- 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. However, the bill may contain multiple exemptions that relate to one subject.

²⁰ FLA. CONST., art. I, s. 24(c).

²¹ 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 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.

²² Section 119.15(3), F.S.

²³ Section 119.15(6)(b), F.S.

²⁴ Section 119.15(6)(b)1., F.S.

²⁵ Section 119.15(6)(b)2., F.S. If this public purpose is cited as the basis of an exemption, only personal identifying information is exempt. *Id.*

²⁶ Section 119.15(6)(b)3., F.S.

²⁷ Section 119.15(6)(a)1.-6., F.S.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁸ 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.²⁹

III. Effect of Proposed Changes:

The bill makes confidential and exempt from public disclosure information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act. Because the bill creates a new public record exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

This confidential and exempt information may be disclosed by the investigative agency to a governmental entity in the performance of its official duties and to a court or tribunal.

The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law. An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.

The 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. The bill also provides a statement of public necessity for the exemption.

This bill is linked to SB 1514, which makes substantial changes to civil enforcement provisions of the Florida RICO Act. Relevant to SB 1536, SB 1514 amends s. 895.06, F.S., to make an investigative subpoena issued pursuant to the Florida RICO Act automatically confidential for 120 days after the date of its issuance, unless this period is extended by the court upon a showing of good cause by the investigating agency. SB 1514 also prohibits a subpoenaed person or entity from disclosing the existence of the subpoena to any person or entity other than the attorney of the subpoenaed person or entity during the period in which the subpoena is confidential.

CS/SB 1536 provides a statement of public necessity for the exemption, which includes the following findings:

- Because a Florida RICO Act investigation conducted by an investigative agency may lead to the filing of a civil action, the premature release of the information held by such investigative agency could frustrate or thwart the investigation and impair the ability of the investigative agency to effectively and efficiently administer its duties under the act;
- The exemption protects the reputation of the potential defendant in the event the investigation is closed without the filing of a civil action; and

²⁸ FLA. CONST., art. I, s. 24(c).

²⁹ Section 119.15(7), F.S.

- Without the exemption, a potential defendant under the Florida RICO Act may learn of the investigation and dissipate his or her assets and thwart any future enforcement action under the act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption. The bill includes a public necessity statement.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law.

The bill makes confidential and exempt from public disclosure information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act. However, the information only remains confidential and exempt until all investigations to which the information pertains are completed, unless the information is otherwise protected by law. An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government (the Department of Legal Affairs and law enforcement agencies). Staff responsible for complying with public record requests may require training related to the expansion of the public record exemption, and court and clerk offices may incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, should be absorbed, as they are part of the day-to-day responsibilities of the agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 895.06 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 30, 2015:

Rewords and restructures the bill but does not make any substantive changes except for deleting a finding in the statement of public necessity and correcting a deficient effective date.

B. Amendments:

None.