

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 7010

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Examination Techniques or Procedures/Office of Financial Regulation

DATE: March 4, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Matiyow</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7010 is the result of an Open Government Sunset Review (OGSR) by the Banking and Insurance Committee staff of a public records exemption in s. 517.2016, F.S., for certain information held by the Office of Financial Regulation (OFR).

In 2010, the Florida Legislature enacted s. 517.2016, F.S., to create a public records exemption relating to the regulation of Securities. The Florida Securities and Investor Protection Act (Act) governs the regulation of securities transactions in Florida. The State's Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act in Florida. The OFR may make investigations and examinations within or outside of Florida as it deems necessary. Section 517.2016, F.S., protects information that would reveal examination techniques or procedures used by the OFR pursuant to the Act. Such Information may be provided by the OFR to another governmental entity having oversight or regulatory or law enforcement authority.

The exemption is scheduled to expire on October 2, 2015, unless reenacted by the Legislature. This bill continues the exemption by repealing the scheduled expiration. The bill does not expand the scope of the public records exemption.

The bill takes effect October 1, 2015.

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 for by the 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 (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The OGSR provides that an exemption automatically repeals on October

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 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. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 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, section 4(e) of the Florida Constitution provide 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 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 section 119.15(2), F.S.

2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹²

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 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 also requires specific questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR 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

Regulation of Securities

The securities industry is subject to both federal and state laws and regulations. The primary federal regulator is the Securities and Exchange Commission (SEC), which oversees the key

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.

participants in the securities industry such as securities exchanges, securities brokers and dealers, investment advisors, and mutual funds.²¹ The SEC is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting against fraud.

The Financial Industry Regulatory Authority (FINRA), an independent, not-for-profit organization, also is an important regulatory body.²² FINRA performs a number of functions, including registering and educating securities industry participants. FINRA operates the Central Registration Depository and the Investment Adviser Registration Depository, which are central databases for registering, reporting, and disclosing information within the securities industry.

The state's Office of Financial Regulation (OFR), through the Division of Securities, regulates the sale of securities in, to, or from Florida by firms, branch offices and individuals affiliated with these firms to determine compliance with Florida law. A securities dealer or investment adviser is prohibited from conducting business from a branch office in Florida unless the branch office is registered with the OFR.²³ A "branch office" is "any location in this state of a dealer or investment adviser at which one or more associated persons regularly conduct the business of rendering investment advice or effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security."²⁴ It also includes any location that is held out as a place where such actions occur is also a branch office.

Florida Securities and Investor Protection Act

The Florida Securities and Investor Protection Act (Act)²⁵ governs the regulation of securities transactions in Florida. The Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act. The OFR may make investigations and examinations within or outside of Florida as it deems necessary to:

- determine whether a person has violated or is about to violate any provision of the Act or a rule or order under the Act; or
- aid in the enforcement of the Act.²⁶

Investigations and Examinations

Current law provides a public records exemption for information related to investigations and examinations conducted by the OFR pursuant to the Act.²⁷ Information relevant to an investigation or examination by the OFR, including any consumer complaint, is confidential and exempt from public records requirements until the investigation or examination is completed or ceases to be active.²⁸ However, the information remains confidential and exempt if the OFR submits it to any law enforcement or administrative agency or regulatory organization for further

²¹ See <http://www.sec.gov/about/whatwedo.shtml> (Accessed January 22, 2015).

²² See <http://www.finra.org/AboutFINRA/P125239> (Accessed January 22, 2015).

²³ Section 517.12(5), F.S.

²⁴ Section 517.021(4), F.S.

²⁵ Chapter 517, F.S.

²⁶ Section 517.201(1)(a), F.S.

²⁷ Section 517.2016, F.S.

²⁸ Section 517.2015(1)(a), F.S.

investigation.²⁹ In addition, certain information remains confidential and exempt after the investigation or examination is completed or ceases to be active,³⁰ including information that would disclose investigative techniques or procedures.

The OFR employs various methods, processes and guidelines to examine and evaluate regulatory compliance.³¹ According to the OFR, maintaining the confidentiality of examination techniques and procedures are essential for protecting the integrity of the examination programs that they use to regulate the securities industry. If these investigative tools are made public through open records requests or other means, the securities industry could use them to thwart effective examinations, cover up illegal conduct, and otherwise circumvent the law.³²

III. Effect of Proposed Changes:

This bill removes the scheduled repeal date of October 2, 2015, for s. 517.2016, F.S., the public records exemption for examination techniques and procedures used by the OFR.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill continues a current exemption but does not expand the scope of an existing public records exemption; therefore, a simple majority vote of the members present and voting in each house of the Legislature is required for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

²⁹ Section 517.2015(1)(a), F.S.

³⁰ For purposes of the exemption, an investigation or examination is considered “active” so long as OFR or any law enforcement or administrative agency or regulatory organization is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation or examination may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license, registration, or permit. Section 517.2015(1)(a), F.S.

³¹ Section 517.2016(1) F.S.

³² Email from OFR staff received September 2, 2014 on file with Banking and Insurance staff.

C. Government Sector Impact:

According to the OFR being a member state of NASAA allows the OFR the ability to leverage its limited resources and save on regulatory costs.³³ In order for the OFR to remain a member of NASAA the public record exemption on examinations and techniques of securities may not be permitted to sunset.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 517.2016 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.

³³ Email from OFR staff received September 2, 2014 on file with Banking and Insurance staff.