

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 997 Pub. Rec./Department of Agriculture and Consumer Services
SPONSOR(S): Regulatory Affairs Committee; Government Operations Subcommittee; Trumbull
TIED BILLS: CS/CS/HB 995 **IDEN./SIM. BILLS:** CS/CS/SB 1446

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	13 Y, 0 N	Butler	Luczynski
2) Government Operations Subcommittee	12 Y, 0 N, As CS	Williamson	Williamson
3) Regulatory Affairs Committee	18 Y, 0 N, As CS	Butler	Hamon

SUMMARY ANALYSIS

The Department of Agriculture and Consumer Services (Department) collaborates with state and federal investigative agencies when pursuing remedies for administrative and civil investigations, most specifically as it relates to the Department's regulation of charitable organizations. Many charitable organizations operate both inside and outside of Florida.

Florida's public records laws do not allow the Department to keep information used in administrative and civil investigations non-public after it has been provided from another state or federal agency, such as the Federal Trade Commission (FTC) or Internal Revenue Service (IRS). Due to the Department's inability to agree to maintain the confidentiality of investigative data, they are unable to participate in data sharing with several state and federal agencies.

In 2014, Chapter 2014-122, Laws of Florida, increased oversight of charitable organizations and sponsors, professional fundraising consultants, and professional solicitors and charged the Department with the enforcement and regulation of these entities.

This bill, which is contingent upon the passage of House Bill 995, creates a public record exemption for criminal or civil intelligence or investigative information or any other information held by the Department as part of a joint or multi-agency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency when the information that is shared is confidential or exempt under the laws or regulations of that state or federal agency. The bill authorizes the Department to release the information in certain instances.

The public record exemption does not apply to information held by the Department as part of an independent examination or investigation conducted by the Department.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.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 State Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Public Records Laws

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution provides that:

(a) Every person has 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., provides that every person who has custody of a public record must permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined 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."⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities

¹ s. 1390, 1391 F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

³ ch. 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., 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 Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the State Constitution.

⁵ s. 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

designated in the statute.⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁹

Only the Legislature is authorized to create exemptions to open government requirements.¹⁰ Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹¹ A bill enacting an exemption¹² may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁴ provides for the systematic review, through a five-year cycle ending October 2 of the fifth year following enactment, of an exemption from public records requirements.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁵ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of the individual under this provision is exempted.
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁶

The Department of Agriculture and Consumer Services

The mission of the Florida Department of Agriculture and Consumer Services (Department) is to safeguard the public and support Florida's agricultural economy by:

- Ensuring the safety and wholesomeness of food and other consumer products through inspection and testing programs;
- Protecting consumers from unfair and deceptive business practices and providing consumer information;
- Assisting Florida's farmers and agricultural industries with the production and promotion of agricultural products; and
- Conserving and protecting the state's agricultural and natural resources by reducing wildfires, promoting environmentally safe agricultural practices, and managing public lands.

⁸ 85-62 Fla. Op. Att'y Gen. (1985).

⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So.2d 289 (Fla. 1991).

¹⁰ FLA. CONST. art. I, s. 24.

¹¹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So.2d 567, 569 (Fla. 1999).

¹² Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹³ FLA. CONST. art. I, s. 24.

¹⁴ s. 119.15, F.S.

¹⁵ s. 119.15(6)(b), F.S.

¹⁶ *Id.*

The Department investigates and regulates several professions in the State of Florida, and most recently the Department's oversight and regulation of charitable organizations was significantly expanded. In 2014, Chapter 2014-122, Laws of Florida, increased oversight of charitable organizations and sponsors, professional fundraising consultants, and professional solicitors and charged the Department with the enforcement and regulation of these entities.

Florida's public records laws do not allow the Department to keep information used in administrative and civil investigations non-public after it has been provided from another state or federal agency, such as the Federal Trade Commission (FTC) or Internal Revenue Service (IRS). Due to the Department's inability to agree to maintain the confidentiality of investigative data, it is unable to participate in data sharing with several state and federal agencies.

The FTC operates a Consumer Sentinel database that is protected from public record disclosure and can only be provided to a state agency that agrees to not disseminate the information. This database contains information on subjects related 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
- Debt Collection, Credit Reports, and Financial Matters

The IRS has expressed a willingness to share certain information, on a case by case basis, with the understanding that such information is not disseminated beyond the agency requesting the data. The IRS has access to tax filing information that would be very valuable to the Department when investigating whether an organization is observing Florida's laws.

Effect of the Bill

This bill, which is contingent upon the passage of House Bill 995, creates a public record exemption for criminal or civil intelligence or investigative information or any other information held by the Department as part of a joint or multi-agency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency when the information that is shared is confidential or exempt under the laws or regulations of that state or federal agency. The Department may obtain, use, and release the information in accordance with the conditions imposed by the joint or multi-agency agreement.

The public record exemption does not apply to information held by the Department as part of an independent examination or investigation conducted by the Department.

The Department may release the confidential and exempt information in the furtherance of its official duties and responsibilities, or to another governmental agency in the furtherance of its official duties and responsibilities.

The bill provides that the section 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 public necessity statement as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1 creates s. 570.077, F.S., relating to confidentiality of intelligence or investigative information.

Section 2 provides a public necessity statement.

Section 3 provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may create a minimal fiscal impact on the Department because staff responsible for complying with public records requests could require training related to the creation of the public records exemption. In addition, the Department could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the Department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, s. 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 or public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded 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 records exemption for information held by the Department as part of a joint or multiagency examination or investigation. The exemption does not appear to be in conflict with the constitutional requirement that it be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Department of Agriculture and Consumer Services

According to the Department, adopting this public records exemption will increase efficiency in investigations by saving time on developing leads, witness data, and victim data. Further the Department believes that it will be able to field consumer complaints related to information from subjects available in the FTC's Consumer Sentinel database.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 24, 2015, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Combines the public record exemptions provided in the original bill in order to remove any redundancy.
- Removes the provision requiring the public record exemption to be applied retroactively, because the Department currently does not collect the information being protected by the bill.
- Authorizes the Department to share the confidential and exempt information with another governmental agency as part of its lawful duties and responsibilities.

On April 9, 2015, the Regulatory Affairs Committee adopted one amendment. The amendment clarifies that only information that is confidential or exempt under the laws or regulations of that state or federal agency sharing the information with the Department is confidential and exempt under this public records exemption. The bill was reported favorably as a committee substitute.

The staff analysis is drafted to reflect the committee substitute.