

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

**BILL #:** HB 643

**FINAL HOUSE FLOOR ACTION:**

**SPONSOR(S):** Trumbull

116 Y's                      0 N's

**COMPANION** CS/HB 754; CS/CS/CS/HB 641  
**BILLS:**

**GOVERNOR'S ACTION:** Approved

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**SUMMARY ANALYSIS**

HB 643 passed the House on March 8, 2016, as CS/SB 754. 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 received from other state or federal agencies, such as the Federal Trade Commission (FTC) or Internal Revenue Service (IRS) confidential and exempt from public record laws. Because of this, the Department is unable to participate in data sharing with several state and federal agencies.

This bill, which is contingent upon the passage of SB 772, 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 shared is confidential or exempt under the laws or regulations of that state or federal agency.

However, the public records 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The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.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 was approved by the Governor on March 30, 2016, ch. 2016-161, L.O.F., and became effective on that date.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF 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.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the Florida Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> 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 Florida Constitution, the Public Records Act,<sup>3</sup> which pre-dates the Florida Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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 records" 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."<sup>5</sup>

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.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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

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<sup>1</sup> ss. 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> FLA. CONST. art. I, s. 24.

<sup>3</sup> ch. 119, F.S.

<sup>4</sup> 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.

<sup>5</sup> s. 119.011(12), F.S.

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

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

information may not be released by an agency to anyone other than to the persons or entities designated in statute.<sup>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> Exemptions must be created by general law, must specifically state the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the law.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

### The Department of Agriculture and Consumer Services

The mission of the 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;

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<sup>8</sup> 85-62 Fla. Op. Att'y Gen. (1985).

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

<sup>10</sup> FLA. CONST. art. I, s. 24.

<sup>11</sup> *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).

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

<sup>13</sup> FLA. CONST. art. I, s. 24.

<sup>14</sup> s. 119.15, F.S.

<sup>15</sup> s. 119.15(3), F.S.

<sup>16</sup> s. 119.15(6)(b), F.S.

<sup>17</sup> *Id.*

- 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.

The Department investigates and regulates several professions in the State of Florida. The Department's oversight and regulation of charitable organizations was significantly expanded in 2014.<sup>18</sup> The Department is particularly interested in the state and federal resources available to assist with the enforcement and regulation of these entities.

These resources are unavailable to the Department currently because Florida's public records laws do not allow the Department to keep information private when received from another state or federal agency, such as the FTC or the IRS. Due to the Department's inability to agree to maintain the confidentiality of such investigative data, the Department is unable to participate in data sharing with several state and federal agencies.

It would be of significant assistance to the Department to be able to receive data from other 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 not to 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.

Similarly, the IRS would be willing to share certain information, on a case by case basis, if the Department could agree that such information would not be disseminated. The IRS has access to tax filing information that would be very valuable to the Department when investigating whether an organization is observing, especially a charitable organization, Florida's laws.

### **Effect of the Bill**

The bill, which is contingent upon the passage of SB 772, creates a public records 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 records exemption does not apply to information held by the Department as part of an independent examination or investigation conducted by the Department.

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<sup>18</sup> ch. 2014-122, L.O. F.

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, 2021, 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.

## 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.