

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 754

INTRODUCER: Commerce and Tourism Committee and Senator Richter

SUBJECT: Public Records/Department of Agriculture and Consumer Services Criminal or Civil Intelligence or Investigative Information

DATE: February 8, 2016 REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 754 creates a new public records exemption for the Department of Agriculture and Consumer Services (DACS). The exemption provides that criminal or civil intelligence, investigative information, or any other information held by the DACS as part of a joint or multiagency examination with another state or federal agency will be confidential and exempt from public disclosure.

This exemption does not apply to information held by the DACS that that would otherwise be available for public inspection if the 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The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

This bill requires a two-thirds vote from each chamber for passage.

This bill goes into effect when SB 772 or similar legislation is adopted.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access governmental meetings and to inspect or copy government records. The public may inspect or copy any records 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, counties, municipalities, school districts, or special districts at which public business is transacted or discussed.² The Legislature's meetings must be open and noticed to the public, unless there is an exception provided by the constitution.³

The Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., the "Public Records Act," constitutes the main body of public records laws, and states that:

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme Court interprets "public records" as "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: The rules of procedure of each house shall further provide that all 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 formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.

⁴ Section 119.01(1), 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 *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are penalties for violations of those laws.

Section 286.011, F.S., the “Sunshine Law,”⁸ 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.⁹

The Legislature may, by a two-thirds vote of the House and the Senate,¹⁰ create an exemption to public records or open meetings requirements.¹¹ An exemption must explicitly state the public necessity of the exemption¹² and must be tailored to accomplish the stated purpose of the law.¹³ A statutory exemption which does not meet these two criteria may be found unconstitutional, and efforts may not be made by the court to preserve the exemption.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of public records and public meeting exemptions, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (act).

The act prescribes a legislative review process for newly created or substantially amended public records and open meetings exemptions.¹⁵ The act 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.¹⁶ In practice, many exemptions are continued by repeal of the sunset date rather than reenactment of the exemption.

⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

⁹ 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.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ 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).

¹² FLA. CONST., art. I, s. 24(c).

¹³ FLA. CONST., art. I, s. 24(c).

¹⁴ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. In *Baker County Press*, the court found that since the law did not contain a public necessity statement, it was unconstitutional.

¹⁵ Sections 286.0111 and 119.15, F.S. Section 286.0111, F.S., provides that the act’s provisions found in s. 119.15, F.S., apply to s. 286.011, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered substantially amended if it is expanded to include more information or to include meetings. The 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. While the OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one Legislature cannot bind a future Legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

Under the act, the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following specific questions in such a review:¹⁷

- 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?

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.¹⁸ 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;¹⁹
- 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;²⁰ or
- It protects trade or business secrets.²¹

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.²²

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²³ 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.²⁴

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 loss practices, telephone solicitations, pawnshops, health studios, sellers of travel, and telemarketing.²⁵

¹⁷ Section 119.15(6)(a), F.S.

¹⁸ Section 119.15(6)(b), F.S.

¹⁹ Section 119.15(6)(b)1., F.S.

²⁰ Section 119.15(6)(b)2., F.S.

²¹ Section 119.15(6)(b)3., F.S.

²² Section 119.15(6)(b), F.S.

²³ FLA. CONST., art. I, s. 24(c).

²⁴ Section 119.15(7), F.S.

²⁵ See <http://www.freshfromflorida.com/Divisions-Offices/Consumer-Services>, (last visited Jan. 22, 2016.)

The DACS investigates and regulates several professions in Florida. Most recently the 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.²⁶

Florida's public record laws currently make any information obtained by the DACS in administrative and civil investigations open to the public. According to the 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 the DACS cannot maintain the same level of privacy adopted and required by those federal and other state agencies.²⁷ As a result, investigations by the DACS 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.²⁸ 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 the DACS be able to prevent disclosure of the information beyond the DACS.²⁹ The IRS has access to tax filing information that might be valuable to the DACS when investigating whether an organization is compliant with Florida law.

III. Effect of Proposed Changes:

Section 1 creates s. 570.077, F.S., to make certain information received from another state or federal regulatory, administrative, or criminal justice agency confidential and exempt from public inspection and copying requirements.

²⁶ See ch. 2014-122, L.O.F.

²⁷ Florida Department of Agriculture and Consumer Services, *SB 754 Agency Analysis*, (November 12, 2015) (on file with the Senate Committee on Commerce and Tourism).

²⁸ *Id.* See also, Federal Trade Commission, *Consumer Sentinel Network*, available at: <https://www.ftc.gov/enforcement/consumer-sentinel-network>, (last visited Jan. 22, 2016).

²⁹ *Id.*

Specifically, the bill makes confidential and exempt criminal or civil intelligence or investigative information provided to the DACS by another state or federal agency as part of a joint or multiagency examination or investigation if the information is confidential or exempt under the regulations or laws of the state or federal agency that provides the information. The DACS will be able to obtain, use, and release the information that is confidential or exempt under the laws or regulations of the state or federal source in accordance with conditions imposed by agreements the DACS enters into with the other state or governmental entity.

This bill further provides that the DACS may release confidential and exempt information in furtherance of its official duties and may release the information to another governmental agency in furtherance of that agency's official duties.

With this public records exemption DACS will be able to receive intelligence information that is confidential or exempt under a state or federal agency's laws or regulations and maintain it as such in the DACS investigative file. This will allow the DACS to receive and hold data that would otherwise be withheld by state or federal agencies with less open public records laws. This change is intended to strengthen relations between the DACS and other state and federal agencies that will be able to share confidential investigatory information with the DACS.

Currently, most investigative information held by the DACS is a public record, open to inspection and copying. This exemption will continue to maintain information that is obtained or developed by the DACS as part of an independent examination or investigation as a public record. Additionally, information given to the DACS by another federal or state agency that is not confidential or exempt under the source government's laws will be considered a public record.

Section 2 of the bill provides a public necessity statement, as required by the Florida Constitution. The public necessity statement explains that the DACS is currently excluded from sources of information because DACS lacks the authority to maintain confidentiality of the information it receives. The public necessity statement provides that this exemption is necessary for the DACS to be able to perform its regulatory duties more efficiently.

The bill's exemption will expire on October 2, 2021, pursuant to the OGSRA Act, unless saved by the Legislature through reenactment.

Section 3 provides that this bill goes into effect on the same date as CS/SB 772 or similar legislation takes effect if such legislation is adopted in the same legislative session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c) of Article 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) of Article I of the Florida Constitution, requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. The Constitution provides that an exemption must state with specificity the public necessity of the exemption. The bill appears to articulate the public policy necessitating the public records exemption with sufficient specificity.

Breadth of Exemption

Section 24(c) of Article I of the Florida Constitution, requires a public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill is no broader than necessary to accomplish the public policy purposes outlined in the public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The DACS may prove more efficient and therefore more effective in its investigations relating to regulated businesses and organizations. As a result, consumers harmed may see more timely results.

C. Government Sector Impact:

The fiscal impact is indeterminate, but likely minimal. The DACS will be required to train agency staff to exclude relevant information from public disclosure.

The bill may enable the DACS to obtain relevant information, leads, witness data, and victim data relating to unlicensed activity or violations committed by licensees more quickly. This may result in more efficient and less costly execution of the DACS' regulatory duties and may reduce the need for duplicative independent investigations or examinations. Participation in the FTC's Sentinel database is free to law enforcement agencies, including the DACS.

The DACS states that this provision will likely increase coordination between the DACS and various state and federal agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 772 and CS/SB 754 do not appear to be directly related to each other. CS/SB 754 exempts from public records certain types of investigatory information, while CS/SB 772 amends regulatory authority and duties in a manner that does not appear to require any change to public records laws.

After the 2015 Legislative session, Governor Rick Scott vetoed the same legislation (CS/CS/HB 997) because the linked bill (CS/CS/CS/HB 995) did not pass.³⁰

VIII. Statutes Affected:

The 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.)

CS by Commerce and Tourism on January 25, 2016:

Technical amendment to insert the bill number of the linked bill (CS/SB 772), the passage of which the effective date of CS/SB 754 is contingent.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³⁰ Letter from Governor Rick Scott to Secretary of State Kenneth W. Detzner, Dated June 16, 2015.
<http://www.flgov.com/wp-content/uploads/2015/06/Transmittal-Letter-6.16.15-HB-997.pdf>, (last visited February 4, 2016.)