

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 439 Public Meetings and Records
SPONSOR(S): Oversight, Transparency & Administration Subcommittee; Donalds
TIED BILLS: IDEN./SIM. **BILLS:** SB 560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	13 Y, 0 N, As CS	Moore	Harrington
2) Government Accountability Committee			

SUMMARY ANALYSIS

Current law provides an exemption from public meeting requirements when the board or commission of a governmental entity meets in private with the entity's attorney to discuss pending litigation to which the entity is currently a party before a court or administrative agency.

The bill creates an exemption from public meeting requirements when the board or commission of a governmental entity meets in private with the entity's attorney to discuss imminent litigation to which the entity may in the foreseeable future be a party before a court or administrative agency. The bill specifies that litigation is considered imminent when the entity has received notice of a claim or demand by a party threatening litigation before a court or administrative agency.

The bill requires the same conditions to be met that are currently in law for discussions regarding pending litigation. The bill additionally requires an entity's attorney to identify the name of the potential claimant or litigant at the public meeting at which the attorney advises the entity that he or she desires advice concerning the imminent litigation.

The bill also creates a public record exemption for the transcript of a meeting at which imminent litigation is discussed. The bill specifies that if imminent litigation does not commence, the transcript of the meeting must be made a public record within a reasonable time after the matter underlying the imminent litigation is resolved or upon the expiration of the statute of limitations applicable to such matter, whichever occurs first.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the State Constitution.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments section.

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 or expanded public record or public meeting exemption. The bill creates a new public meeting exemption and a new public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record.

Public Meetings Law

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. It requires all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed to be open and noticed to the public.

Public policy regarding access to government meetings is also addressed in the Florida Statutes. Section 286.011, F.S., known as the "Government in the Sunshine Law" or "Sunshine Law," further requires all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision at which official acts are to be taken to be open to the public at all times. The board or commission must provide reasonable notice of all public meetings.¹ Minutes of a public meeting must be promptly recorded and be open to public inspection.²

No resolution, rule, or formal action is considered binding unless action is taken or made at a public meeting.³ Acts taken by a board or commission in violation of this requirement are considered void,⁴ though a failure to comply with open meeting requirements may be cured by independent final action by the board or commission fully in compliance with public meeting requirements.⁵

Public Record and Public Meeting Exemptions

Art. I, s. 24(c) of the State Constitution authorizes the Legislature to provide by general law for the exemption of records and meetings from the requirements of Art. I, s. 24(a) and (b) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

The Open Government Sunset Review Act⁶ further provides that a public record or a public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.

¹ Section 286.011(1), F.S.

² Section 286.011(2), F.S.

³ Section 286.011(1), F.S.

⁴ *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010).

⁵ *Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5th DCA 2008).

⁶ See s. 119.15, F.S.

- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.⁷

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁸

Exemption for Meetings to Discuss Pending Litigation

Current law provides an exemption from public meeting requirements when the board or commission of an entity meets in private with the entity's attorney to discuss pending litigation to which the entity is currently a party before a court or administrative agency.⁹ In order for the exemption to apply, the following conditions must be met:

- The entity's attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- The entire session must be recorded by a certified court reporter. The reporter must record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session may be off the record. The court reporter's notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- The entity must give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session must commence at an open meeting at which the persons chairing the meeting must announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting must be reopened, and the person chairing the meeting must announce the termination of the session.
- The transcript must be made part of the public record upon conclusion of the litigation.¹⁰

Effect of Proposed Changes

The bill creates an exemption from public meeting requirements when the board or commission of a governmental entity meets in private with the entity's attorney to discuss imminent litigation to which the entity may in the foreseeable future be a party before a court or administrative agency. The bill specifies that litigation is considered imminent when the entity has received notice of a claim or demand by a party threatening litigation before a court or administrative agency.

The bill requires the same conditions to be met that are currently in law for discussions regarding pending litigation. The bill additionally requires an entity's attorney to identify the name of the potential claimant or litigant at the public meeting at which the attorney advises the entity that he or she desires advice concerning the imminent litigation.

The bill also creates a public record exemption for the transcript of a meeting at which imminent litigation is discussed. The bill specifies that if imminent litigation does not commence, the transcript of the meeting must be made a public record within a reasonable time after the matter underlying the imminent litigation is resolved or upon the expiration of the statute of limitations applicable to such matter, whichever occurs first.

⁷ Section 119.15(6)(b), F.S.

⁸ Section 119.15(3), F.S.

⁹ Section 286.011(8), F.S.

¹⁰ *Id.*

The bill provides a public necessity statement as required by the State Constitution, specifying that the public meeting and public record exemptions are necessary to allow a governmental entity to privately prepare for threatened litigation by obtaining legal advice, exploring and developing relevant facts, and considering an early settlement or discussing other possible resolutions in order to make better-informed decisions.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

B. SECTION DIRECTORY:

Section 1 amends s. 286.011, F.S., relating to public meetings and records; public inspection; criminal and civil penalties.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state government revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

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 public record or public meeting exemption. The bill creates a new public record exemption and a new public meeting exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created 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 meeting exemption for meetings at which a board or commission of a governmental entity meets in private with the entity's attorney to discuss imminent litigation to which the entity may in the foreseeable future be a party before a court or administrative agency. The bill also creates a public record exemption for transcripts of such meetings. As such, 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 17, 2018, the Oversight, Transparency & Administration Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment revised the public necessity statement to specify that the public record exemption created in the bill for the transcript of an exempt meeting is necessary to allow a governmental entity to privately prepare for threatened litigation.

This analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Administration Subcommittee.