

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 Ethics and Elections

BILL: SPB 7018

INTRODUCER: For consideration by the Ethics and Elections Committee

SUBJECT: OGSR/Agency Investigations

DATE: January 26, 2018

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Carlton</u>	<u>Ulrich</u>		Pre-meeting

I. Summary:

Current law requires that complaints of misconduct filed with an agency¹ against an agency employee be kept confidential and exempt² from public records requirements.³ If an agency investigates such a complaint, the information obtained from the investigation is also confidential and exempt.⁴ The complaint and the investigative information remain confidential and exempt until either the investigation ceases to be active or the agency provides written notice to the employee who is the subject of the complaint.⁵ The written notice may be delivered personally or by mail and must state that the agency has concluded the investigation with a finding to proceed with disciplinary action or file charges⁶ or not to proceed.⁷

Pursuant to the Open Government Sunset Review Act, the public meeting exemption will repeal on October 2, 2018, unless reenacted by the Legislature.

¹ 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.

² There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. (*See Attorney General Opinion 85-62*, August 1, 1985).

³ Section 119.071(2)(k)1., F.S.

⁴ *Id.*

⁵ *Id.*

⁶ Section 119.071(2)(k)1.b., F.S.

⁷ Section 119.071(2)(k)1.a., F.S.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.⁸ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.⁹

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.¹⁰ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.¹¹ The Public Records Act 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.¹²

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.¹³ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”¹⁴ A violation of the Public Records Act may result in civil or criminal liability.¹⁵

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.¹⁶ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁷ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹⁸

⁸ FLA. CONST., Art. I, s. 24(a).

⁹ FLA. CONST., Art. I, s. 24(a).

¹⁰ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also, see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

¹¹ Public records laws are found throughout the Florida Statutes.

¹² Section 119.01(1), F.S.

¹³ 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” 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.”

¹⁴ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

¹⁵ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁶ FLA. CONST., Art. I, s. 24(c).

¹⁷ FLA. CONST., Art. I, s. 24(c).

¹⁸ *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

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁹ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.²⁰

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.²¹ The OGSR 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.²² In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.²³ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁴
- 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;²⁵ or
- It protects trade or business secrets.²⁶

The OGSR also requires specified questions to be considered during the review process.²⁷ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* 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. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.
¹⁹ 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).

²⁰ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

²¹ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is 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 s. 119.15(2), F.S.

²² Section 119.15(3), F.S.

²³ Section 119.15(6)(b), F.S.

²⁴ Section 119.15(6)(b)1., F.S.

²⁵ Section 119.15(6)(b)2., F.S.

²⁶ Section 119.15(6)(b)3., F.S.

²⁷ Section 119.15(6)(a), F.S. The specified questions are:

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁸ 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.²⁹

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.³⁰ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.³¹ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts or special districts.³²

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”³³ or the “Sunshine Law,”³⁴ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.³⁵ The board or commission must provide the public reasonable notice of such meetings.³⁶ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.³⁷ Minutes of a public meeting must be promptly recorded and open to public inspection.³⁸ Failure to abide by open meetings requirements will invalidate any resolution, rule

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- 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?

²⁸ FLA. CONST. Art. I, s. 24(c).

²⁹ Section 119.15(7), F.S.

³⁰ FLA. CONST., Art. I, s. 24(b).

³¹ FLA. CONST., Art. I, s. 24(b).

³² 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.”

³³ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

³⁴ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

³⁵ Section 286.011(1)-(2), F.S.

³⁶ *Id.*

³⁷ Section 286.011(6), F.S.

³⁸ Section 286.011(2), F.S.

or formal action adopted at a meeting.³⁹ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.⁴⁰

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.⁴¹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.⁴² A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.⁴³

Public Record Exemption under Review

Current law requires that complaints of misconduct filed with an agency⁴⁴ against an agency employee be kept confidential and exempt⁴⁵ from public records requirements.⁴⁶ If an agency investigates such a complaint, the information obtained from the investigation is also confidential and exempt.⁴⁷ The complaint and the investigative information remain confidential and exempt until either the investigation ceases to be active or the agency provides written notice to the employee who is the subject of the complaint.⁴⁸ The written notice may be delivered personally or by mail and must state that the agency has concluded the investigation with a finding to proceed with disciplinary action or file charges⁴⁹ or not to proceed.⁵⁰

The 2013 public necessity statement⁵¹ for the exemption provides the following policy rationale for its enactment:

³⁹ Section 286.011(1), F.S.

⁴⁰ Section 286.011(3), F.S.

⁴¹ FLA. CONST., art. I, s. 24(c).

⁴² FLA. CONST., art. I, s. 24(c).

⁴³ *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. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* 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. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

⁴⁴ 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.

⁴⁵ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. (See Attorney General Opinion 85-62, August 1, 1985).

⁴⁶ Section 119.071(2)(k)1., F.S.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Section 119.071(2)(k)1.b., F.S.

⁵⁰ Section 119.071(2)(k)1.a., F.S.

⁵¹ Article I, s. 24(c), FLA. CONST., requires each public record exemption “state with specificity the public necessity statement justifying” its existence.

The disclosure of information, such as the nature of the complaint against an agency employee and testimony and evidence given in the investigation of the complaint, could injure an individual and deter that person from providing information pertaining to internal investigations, thus impairing the ability of an agency to conduct an investigation that is fair and reasonable. In the performance of its lawful duties and responsibilities, an agency may need to obtain information for the purpose of determining an administrative action. Without an exemption from public record requirements to protect information of a sensitive personal nature provided to an agency in the course of an internal investigation, such information becomes a public record when received and must be divulged upon request. Disclosure of information obtained during an internal investigation conducted by an agency inhibits voluntary participation of individuals during internal investigations and makes it difficult if not impossible to determine the truth.⁵²

Pursuant to the Open Government Sunset Review Act, the public meeting exemption will repeal on October 2, 2018, unless reenacted by the Legislature.

Open Government Sunset Review Results

During the 2017 interim, committee staff sent a questionnaire to every state agency, county, city, sheriff's office, public defender's office, and state attorney's office. In all, 62 questionnaire responses were received.⁵³ A majority of respondents recommended that the exemption be reenacted without changes and no respondents recommended letting the exemption repeal. Many respondents reported that their agency had received public record requests for the exempt information. The most common rationale offered for maintaining the exemption was that the temporary confidentiality it afforded the agency allowed it to maintain the fairness and integrity of the investigation that in turn encouraged all parties involved to be candid and forthcoming.

III. Effect of Proposed Changes:

The bill removes the repeal date thereby reenacting the public records exemption for complaints of misconduct filed with an agency against an agency employee and all information obtained from an investigation by the agency of the complaint of misconduct.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁵² Chapter 2013-248, L.O.F.

⁵³ The questionnaire and responses are on file with the Senate Committee on Ethics and Elections.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071 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.