

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7041 PCB OTA 18-05 OGSR/Ethics Complaints and Investigations
SPONSOR(S): Oversight, Transparency & Administration Subcommittee, Williamson
TIED BILLS: **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| Orig. Comm.: Oversight, Transparency & Administration Subcommittee | 14 Y, 0 N | Toliver | Harrington |
| 1) Government Accountability Committee | 20 Y, 0 N | Toliver | Williamson |

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides that the complaint and records relating to the complaint or to any preliminary investigation held by the Commission on Ethics (commission) or its agents, by a Commission on Ethics and Public Trust established by any county or by any municipality, or by any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics are confidential and exempt from public records requirements. Additionally, written referrals and records relating thereto, held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, as well as records relating to any preliminary investigation of such referrals held by the commission, are confidential and exempt from public records requirements.

A proceeding, or any portion thereof, conducted by the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process, pursuant to a complaint or preliminary investigation, is exempt from public meeting requirements. Moreover, any proceeding of the commission in which a determination regarding a referral is discussed or acted upon is exempt from public meeting requirements.

The above records and meetings are exempt until:

- The complaint is dismissed;
- The alleged violator requests in writing that such records or proceedings be made public;
- The commission determines it will not investigate the referral; or
- The commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process determines, based on such investigation, whether probable cause exists to believe that a violation has occurred.

The bill reenacts the public record and public meeting exemptions, which will repeal on October 2, 2018, if this bill does not become law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or 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.
- 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.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

Florida Commission on Ethics

The Florida Commission on Ethics (commission) serves as guardian of the standards of conduct for the officers and employees of the state and its political subdivisions.⁵ It is an independent commission, created by the Florida Constitution,⁶ responsible for investigating and issuing public reports on complaints of breaches of the public trust⁷ by public officers and employees. The commission must investigate sworn complaints of violations of the Code of Ethics for Public Officers and Employees (Code of Ethics)⁸ or of any other law over which it has jurisdiction.⁹ The commission may only initiate an investigation if it receives a sworn complaint.¹⁰

Complaints or referrals against a candidate in any election may not be filed, nor may any intention of filing such a complaint or referral be disclosed, on the day of any such election or within the 30 days

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I, FLA. CONST.

⁵ Section 112.320, F.S.

⁶ Article II, s. 8(f), FLA. CONST.

⁷ Section 112.312, F.S., defined "breach of the public trust" to mean a violation of a provision of the State Constitution or the Code of Ethics which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests, including, without limitation, a violation of s. 8, Art. II of the State Constitution or of the Code of Ethics.

⁸ Chapter 112, Part III, F.S.

⁹ See s. 112.322(1), F.S.

¹⁰ Section 112.324(1), F.S.

immediately preceding the date of the election, unless the complaint or referral is based upon personal information or information other than hearsay.

Current law provides that the Code of Ethics does not prohibit the governing body of a political subdivision or an agency from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in the Code of Ethics, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of the Code of Ethics.¹¹

Public Record and Public Meeting Exemptions under Review

Current law provides that the complaint and records relating to the complaint or to any preliminary investigation held by the commission or its agents, by a Commission on Ethics and Public Trust established by any county¹² or by any municipality,¹³ or by any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics are confidential and exempt¹⁴ public records requirements.¹⁵

Written referrals, and records relating thereto, held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, as well as records relating to any preliminary investigation of such referrals held by the commission, are confidential and exempt from public records requirements.¹⁶

A proceeding, or any portion thereof, conducted by the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process, pursuant to a complaint or preliminary investigation, is exempt from public meetings requirements.¹⁷ Additionally, any proceeding of the commission in which a determination regarding a referral is discussed or acted upon is exempt from public meetings requirements.¹⁸

The above records and meetings are exempt until:

- The complaint is dismissed;
- The alleged violator requests in writing that such records or proceeding be made public;
- The commission determines it will not investigate the referral; or
- The commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process determines, based on such investigation, whether probable cause exists to believe that a violation has occurred.¹⁹

¹¹ Section 112.326, F.S.

¹² Section 125.011(1), F.S., defines “county” to mean a county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred.

¹³ Section 165.031(3), F.S., defines “municipality” to mean a municipality created pursuant to general or special law authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution.

¹⁴ 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).

¹⁵ Section 112.324(2)(a), F.S.

¹⁶ Section 112.324(2)(b), F.S.

¹⁷ Section 112.324(2)(c), F.S.

¹⁸ Section 112.324(2)(d), F.S.

¹⁹ Section 112.324(2)(e), F.S.

The public necessity statements for the exemptions provide the following policy rationale for their enactment:

Complaints and related records held by a Commission on Ethics and Public Trust:

The release of such information could potentially be defamatory to ... individuals [under investigation for alleged violations of ethical standards] or cause unwarranted damage to the good name or reputation...The exemption of this information would minimize the possibility of unnecessary scrutiny by the public or media of individuals under investigation and their families and will create a secure environment in which the Commission on Ethics and Public Trust may conduct its business.²⁰

Complaints and related records held by a county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those required by law:

The exemption is necessary because the release of such information could potentially be defamatory to an individual under investigation, cause unwarranted damage to the good name or reputation of such individual, or significantly impair the investigation. The exemption creates a secure environment in which a county or municipality may conduct its investigation.²¹

Written referrals and records relating to such referrals held by the commission, its agents, the Governor, the Department of Law Enforcement, or a State Attorney and records relating to any preliminary investigation of such referrals:

The exemption is necessary because the release of such information could potentially be defamatory to an individual under investigation cause unwarranted damage to the reputation of such individual, or significantly impair the integrity of the investigation.²²

Portions of proceedings of the commission at which a determination regarding a referral is discussed or acted upon:

The exemption is necessary because the release of such information could potentially be defamatory to an individual under investigation, cause unwarranted damage to the reputation of such individual, or significantly impair the integrity of the investigation.²³

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

Open Government Sunset Review

During the 2017 interim, subcommittee staff sent a questionnaire to the commission and to every county and city in the state. In all, 43 responses were received.²⁴ The commission stated it has received approximately five or six public record requests for the confidential and exempt information, however, the commission has not taken a position on whether the exemptions should be reenacted.

Of those received from the counties and cities, only three attested that they either had a Commission on Ethics and Public Trust or had established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics. Those

²⁰ Chapter 97-293, L.O.F.

²¹ Chapter 2010-130, L.O.F.

²² Chapter 2013-38, L.O.F.

²³ Chapter 2013-38, L.O.F.

²⁴ The questionnaire and responses are on file with the House Oversight, Transparency & Administration Subcommittee.

respondents stated they have received public record requests for the confidential and exempt records and each recommended reenactment of the exemptions.

B. SECTION DIRECTORY:

Section 1 amends s. 112.324, F.S., to save from repeal the public records and meetings exemptions for certain complaints, referrals, and meetings of the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics.

Section 2 provides an effective date of October 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

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. 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.