

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 7005 PCB OTM 20-01 OGSR/RICO Act Investigations
SPONSOR(S): Oversight, Transparency & Public Management Subcommittee; Grall
TIED BILLS: **IDEN./SIM. BILLS:** SB 7038

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 7005 passed the House on February 5, 2020, and subsequently passed the Senate on March 11, 2020.

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.

In the 1970s, the Florida Legislature, to combat the rising threat posed by the infiltration and corruption of legitimate businesses by organized crime, enacted the Florida Racketeer Influenced and Corrupt Organization (RICO) Act. The Florida RICO Act imposes criminal and civil liability on any person who engages in a pattern of racketeering activity. Racketeering activity is the commission, attempted commission, conspiracy to commit, or the solicitation, coercion, or intimidation of another person to commit a broad range of state and federal criminal offenses, including burglary, extortion, perjury, bribery, forgery, homicide, and sexual battery, as well as various forms of fraud. Specifically, the Florida RICO Act criminalizes the following acts:

- Investing any proceeds received through a pattern of racketeering or the collection of unlawful debt in the acquisition of any interest in real property or in the establishment or operation of any enterprise;
- Acquiring any interest in, or control of any enterprise or real property through a pattern of racketeering or through the collection of unlawful debt;
- Conducting or participating in an enterprise through a pattern of racketeering activity or the collection of unlawful debt if the person is an employee of, or associated with the enterprise; or
- Conspiring or endeavoring to violate any of the above provisions.

Current law provides a public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act. The information may be disclosed to a government entity in the performance of its official duties or to a court or tribunal. The information ceases to be confidential and exempt from public records requirements once the investigation to which the information pertains is complete.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2020, if this bill does not become law.

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

The bill was approved by the Governor on June 23, 2020, ch. 2020-90, L.O.F., and will become effective on October 1, 2020.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 administer effectively and efficiently 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 Racketeer Influenced and Corrupt Organization (RICO) Act

In 1970, Congress found "that organized crime, particularly La Cosa Nostra..., had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States."⁵ In response, Congress enacted the Organized Crime Control Act of 1970 (OCCA),⁶ to "create new, enhanced remedies to combat the corrupt influence of organized crime."⁷ Title IX of the OCCA, concerning Racketeer Influenced and Corrupt Organizations (RICO),⁸ created new legal mechanisms to legally separate from an organization acquired or run by criminal means, the persons involved in the illegal activity "either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity."⁹

By 1977, it was reported that 17 of the nation's 21 publicly identified organized crime "families" operated in Florida.¹⁰ The Florida Legislature, to combat the rising threat posed by the infiltration and

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Art. I, s. 24(c), FLA. CONST.

⁵ *CRIMINAL RICO: 18 U.S.C. §§1961-1968 A Manual For Federal Prosecutors*, U.S. DEPARTMENT OF JUSTICE, pg. 4, available at <https://www.justice.gov/archives/usam/file/870856/download> (last visited Jan. 19, 2020).

⁶ Pub. L. No. 91-452 (1970).

⁷ *Id.*

⁸ *Id.* at ss. 901-902.

⁹ *CRIMINAL RICO: 18 U.S.C. §§1961-1968 A Manual For Federal Prosecutors*, U.S. DEPARTMENT OF JUSTICE, pgs. 5-6, available at <https://www.justice.gov/archives/usam/file/870856/download> (last visited Jan. 19, 2020).

¹⁰ Chapter 77-334, L.O.F.

corruption of legitimate businesses by organized crime in the state, enacted the Florida RICO Act.¹¹ The Florida RICO Act¹² makes it a first-degree felony for any person to engage in, or conspire to engage in, a pattern of racketeering activity or activities associated with, or stemming from such a pattern of activity.¹³

The term “racketeering activity” encompasses a broad range of state and federal criminal offenses identified in current law, including burglary, extortion, perjury, bribery, forgery, homicide, and sexual battery, as well as various forms of fraud.¹⁴ Specifically, the Florida RICO Act criminalizes the following acts:

- Investing, whether directly or indirectly, any part of proceeds received through a pattern of racketeering or the collection of unlawful debt in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise;¹⁵
- Acquiring any interest in, or control of any enterprise or real property through a pattern of racketeering or through the collection of unlawful debt;
- Conducting or participating, directly or indirectly, in an enterprise through a pattern of racketeering activity or the collection of unlawful debt if the person is an employee of, or associated with the enterprise; or
- Conspiring or endeavoring to violate any of the above provisions.¹⁶

In addition to criminal penalties, the Florida RICO Act imposes civil liability for violating certain provisions, including forfeiture to the state of all property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the act.¹⁷ Current law requires a court to direct the distribution of the proceeds from a forfeiture in the following priority: the clerk of the court to cover statutory fees; claims by people whose interests in the property are preserved (known as “innocent persons”); claims by the Board of Trustees of the Internal Improvement Trust Fund;¹⁸ and restitution for victims of the racketeering activity.¹⁹

Under the Florida RICO Act, an investigative agency²⁰ may, during the course of an investigation into civil violations of the act, subpoena witnesses and material if the agency has reason to believe that a person or other enterprise has engaged in conduct that violates a provision of the act.²¹ The purpose of the subpoena power is “to allow an investigative agency to investigate, collect evidence and determine if a RICO violation has occurred.”²² All subpoenas issued pursuant to the Florida RICO Act are

¹¹ *Id.*

¹² Sections 895.01-895.06, F.S., are known as the “Florida RICO Act.”

¹³ Sections 895.03 and 895.04, F.S.

¹⁴ Section 895.02(8)(a), F.S. A “pattern of racketeering activity” is the engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents and that the last of such incidents occurred within five years after a prior incident of racketeering conduct. Section 895.02(7), F.S.

¹⁵ An “enterprise” means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal gang, as defined in s. 874.03, F.S., constitutes an enterprise. Section 895.02(5), F.S.

¹⁶ Section 895.03(1)-(4), F.S.

¹⁷ Section 895.05(2), F.S.

¹⁸ Sections 253.01 and 253.02, F.S. Funds deposited in the Internal Improvement Trust Fund (IITF) are used for acquisition, management, administration, protection, and conservation of state-owned lands. The fund was originally created to collect funds from the sale of state lands that had been granted to Florida by Congress in 1845 and 1850. The Board of Trustees of the IITF is composed of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. See Article IV, s. 4, FLA CONST.

¹⁹ Section 895.09(1), F.S.

²⁰ Section 895.02(6), F.S., defines “investigative agency” to mean the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

²¹ Section 895.06, F.S.

²² *Check 'N Go of Fla., Inc. v. State*, 790 So. 2d 454, 457 (Fla. 5th DCA 2001), *review denied* 817 So. 2d 845 (Fla. 2002).

automatically confidential for 120 days.²³ The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period.²⁴ The investigative agency may apply for an extension of the confidentiality period for good cause.²⁵

Public Record Exemption under Review

In 2015, the Legislature created a public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act.²⁶ The information is confidential and exempt²⁷ from public records requirements and may only be disclosed by the investigative agency to a governmental entity in the performance of its official duties and to a court or tribunal.²⁸ The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law.²⁹ An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.³⁰

The 2015 public necessity statement³¹ for the exemption provides that:

Because a Florida RICO Act investigation conducted by an investigative agency may lead to the filing of a civil action, the premature release of the information held by such investigative agency could frustrate or thwart the investigation and impair the ability of the investigative agency to effectively and efficiently administer its duties under the Florida RICO Act . . . This exemption also protects the reputation of the potential defendant in the event that the investigation is closed without the filing of a civil action. Further, without this exemption, a potential defendant under the Florida RICO Act may learn of the investigation and dissipate his or her assets and thwart any future enforcement action under the act.³²

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2020, unless reenacted by the Legislature.³³

During the 2019 interim, subcommittee staff sent a questionnaire to the Department of Legal Affairs (DLA).³⁴ Between July 1, 2015, and August 1, 2019, DLA initiated five civil RICO investigations, of which three have been completed.³⁵ During the same period, DLA received three public record requests for the confidential information; pursuant to the exemption under review, the information was not released.³⁶ DLA believes “the exemption has accomplished its purpose of preventing the frustration

²³ Section 895.06(2), F.S.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Section 895.06(7), F.S.

²⁷ 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, Aug. 1, 1985).

²⁸ Section 895.06(7)(b), F.S.

²⁹ Section 895.06(7)(c), F.S.

³⁰ Section 895.06(7)(d), F.S.

³¹ Article I, s. 24(c), FLA. CONST., requires each public record exemption “state with specificity the public necessity justifying the exemption.”

³² Section 2, ch. 2015-99, L.O.F.

³³ Section 895.06(7)(c), F.S.

³⁴ Open Government Sunset Review Questionnaire, DLA Response, Sept. 19, 2019, on file with the Oversight, Transparency & Public Management Subcommittee.

³⁵ *Id.*

³⁶ *Id.*

or thwarting of a RICO investigation by the premature release of investigative information.”³⁷ DLA recommended that the exemption be reenacted as is.³⁸

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act.

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.

³⁷ *Id.*

³⁸ *Id.*