



# The Florida Senate

*Interim Report 2010-216*

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Committee on Ethics and Elections

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## **OPEN GOVERNMENT SUNSET REVIEW OF SECTION 112.324(2)(A), F.S., COMMISSION ON ETHICS CONFIDENTIALITY OF RECORDS**

### **Issue Description**

Section 112.324(2)(a), F.S., makes confidential and exempt from the public record requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution, a complaint and any records relating to a complaint or to a preliminary investigation held by the Florida Commission on Ethics or by a Commission on Ethics and Public Trust established by a county or municipality. Any proceedings conducted by a commission relating to a complaint or preliminary investigation are also exempt from the public meeting requirements of ss. 120.525 and 286.011, F.S., and s. 24(b), Art. I of the Florida Constitution until the complaint is dismissed as legally insufficient, the alleged violator requests that such proceedings be made public, or the commission determines that probable cause exists that a violation occurred.

Section 119.15(6)(b), F.S., provides that an exemption may be maintained only if the exemption: protects information of a sensitive, personal nature concerning individuals; allows the state or its political subdivisions to effectively and efficiently administer a governmental program; or protects confidential information concerning an entity. The purpose of this report is to examine s. 112.324(2)(a), F.S., in light of these requirements, in order to determine if this section should be reenacted by the Legislature. For the reasons expressed herein, staff recommends reenactment of the exemptions in s. 112.324(2)(a), F.S.

### **Background**

#### **Public Records**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Article I, s. 24 of the State Constitution.

<sup>3</sup> Chapter 119, F.S.

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection. The term “public record” is broadly defined 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2, of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

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<sup>4</sup> The word “agency” is defined in s. 119.011(2), F.S., 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 Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the State Constitution.

<sup>5</sup> Section 119.011(12), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>8</sup> Article I, s. 24(c) of the State Constitution.

<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>14</sup> Section 119.15, F.S.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>15</sup>

The act also requires consideration of the following:

- 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?<sup>16</sup>

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

[N]otwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

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<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> Section 119.15(6)(a), F.S.

<sup>17</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

## Findings

### *History of the Exemptions Located in s. 112.324, Florida Statutes*

The Commission on Ethics was created in 1974. Its purpose is to:

serve as guardian of the standards of conduct for officers and employees of the state, and of a county, city, or other political subdivision of the state . . . and to serve as the independent commission provided for in s. 8(f), Art. II of the State Constitution.<sup>18</sup>

In 1974, the law provided that the state Commission on Ethics could receive and investigate complaints involving the Code of Ethics for Public Officers and Employees. If the commission found that a violation had occurred, the findings were distributed to the violator and the disciplinary official. The findings became public when this occurred.<sup>19</sup>

In 1975, the Legislature revised the procedures on complaints of violations and provided that

all proceedings, the complaint and other records relating to the preliminary investigation as provided herein, including a dismissal of the complaint, shall be *confidential* either until the alleged violator requests in writing that such investigation and records be made public records or the preliminary investigation is completed.<sup>20</sup>

The specific exemption to the public records law did not actually appear in statute until 1990. At that time, while already confidential, the proceedings, complaint, and any records relating to the preliminary investigation were made exempt from the provisions of s. 119.07(1), F.S. The exemption continued until the alleged violator requesting in writing that the investigation and records be made public or the commission determined that probable cause of a violation existed based on an investigation.<sup>21</sup>

In 1997, the provision was substantially amended and the exemption was expanded to include complaints, proceedings, and records of a Commission on Ethics and Public Trust established by a county.<sup>22</sup> This change triggered the repeal and review required by the Open Government Sunset Review Act of 1995. Pursuant to this 2002 review, the statute was reworded into essentially the statute that we have today.<sup>23</sup> Thus, the statute was saved from repeal.

In 2005, the statute was expanded to cover complaints, proceedings, and records of a Commission on Ethics and Public Trust established by a municipality.<sup>24</sup> This has been the only change to the statute since its last review in 2002 pursuant to the Open Government Sunset Review Act. The 2005 amendment triggered the repeal and review required by the Open Government Sunset Act; thus, this report focuses on that change.

Currently, the statute provides:

*(2)(a) The complaint and records relating to the complaint or to any preliminary investigation held by the commission or its agents or by a Commission on Ethics and Public Trust established by any county defined in s. 125.011(1) or by any municipality defined in s. 165.031 are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and any proceeding conducted by the commission or a Commission on Ethics and Public Trust, pursuant to a complaint or preliminary investigation, is exempt from the provisions*

<sup>18</sup> § 112.320, F.S., Chapter 74-176, L.O.F., Art. II, Section 8(f), Florida Constitution.

<sup>19</sup> § 112.322, F.S. (1974).

<sup>20</sup> § 112.324, F.S. (1975), (emphasis added).

<sup>21</sup> § 30, Chapter 90-360, L.O.F.

<sup>22</sup> § 3, Chapter 97-293, L.O.F.

<sup>23</sup> § 1, Chapter 2002-186, L.O.F.

<sup>24</sup> § 1, Chapter 2005-185, L.O.F.

*of s. 286.011, s. 24(b), Art. I of the State Constitution, and s. 120.525, until the complaint is dismissed as legally insufficient, until the alleged violator requests in writing that such records and proceedings be made public, or until the commission or a Commission on Ethics and Public Trust determines, based on such investigation, whether probable cause exists to believe that a violation has occurred. In no event shall a complaint under this part against a candidate in any general, special, or primary election be filed or any intention of filing such a complaint be disclosed on the day of any such election or within the 5 days immediately preceding the date of the election.*

*(b) Paragraph (a) is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.<sup>25</sup>*

For the purposes of the Open Government Sunset Review, it is clear that the records and meetings affected by the exemptions are the ethics complaint, records relating to the complaint or any preliminary investigation, or any proceedings involving the complaint or preliminary investigation held by a Commission on Ethics and Public Trust established by a municipality. The exemptions uniquely affect the commission and the alleged violator. In 2005, the Legislature determined that the expansion of the exemptions to complaints, proceedings, and records of a municipal Commission on Ethics and Public Trust was necessary because:

the release of such information could potentially be defamatory to an individual under investigation or cause unwarranted damage to the good name or reputation of such individual. In addition, the Legislature finds it a public necessity that any proceeding conducted by a municipal Commission on Ethics and Public Trust pursuant to a complaint or preliminary investigation of such alleged violation be exempt from section 286.011, Florida Statutes, Section 24(b), Article I of the State Constitution, and section 120.525, Florida Statutes, so that the administration of such proceeding by a municipal commission on ethics is not otherwise significantly impaired. The exemption of these proceedings from public meetings requirements minimizes the possibility of unnecessary scrutiny by the public or media of individuals under investigation and their families, and creates a secure environment in which a municipal commission on ethics may conduct its business. Furthermore, the Legislature has already recognized the importance of the aforementioned public records and meeting exemptions by exempting the records of the State Commission on Ethics and those of a Commission on Ethics and Public Trust formed by a county.<sup>26</sup>

There have been no significant changes during the past five years that would alter the public purpose of the exemptions as stated above. Furthermore, there is no means of obtaining most of the information protected by the exemptions other than through the commission itself. However, the complaint could be obtained from the complainant, if he or she wanted to make it available.<sup>27</sup> It does not appear that any other exemption protects the information exempted in s. 112.324, F.S., nor does it appear that there are multiple exemptions covering the same type of information.<sup>28</sup>

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<sup>25</sup> § 112.324(2), F.S., (emphasis added).

<sup>26</sup> § 2, Chapter 2005-185, L.O.F.

<sup>27</sup> Section 112.317(6), F.S. (2006), prohibited the complainant from disclosing his or her intent to file a complaint, the existence or contents of a filed complaint, or any other information pertaining to the investigation of the commission before the information becomes public. However, the United States District Court for the Southern District of Florida declared this provision facially unconstitutional. *Doe v. Gonzalez*, 723 F.Supp. 690 (S.D. Fla. 1988). Thus, this provision was removed from law in 2006. § 8, Chapter 2006-275, L.O.F.

<sup>28</sup> The Florida League of Cities, in conjunction with the Legislative Committee on Intergovernmental Relations (LCIR), assisted staff in distributing a survey to state municipalities to obtain information regarding the exemptions at issue. Eighty-seven survey responses were received. Six respondents indicated that their municipality had an ethics commission. However, only two respondents actually recorded contact information identifying a Florida municipality. The other four responses did not reveal any identifying information. Thus, it could not be confirmed that those responses actually represented municipalities. Of the two responses from verifiable cities, no information was attained beyond confirming those cities have an ethics commission.

## **Recommendations**

Senate professional staff has reviewed the exemptions in s. 112.324, F.S., pursuant to the Open Government Sunset Review Act of 1995, and finds that the exemptions meet the requirements for reenactment. Section 112.324, F.S., meets at least one of the three criteria for an identifiable public purpose by “protecting information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals.” Accordingly, professional staff recommends that the exemptions in s. 112.324, F.S., be reenacted and thereby saved from repeal.