

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2124

SPONSOR: Comprehensive Planning, Local and Military Affairs Committee and Senator Garcia

SUBJECT: Public Records

DATE: April 13, 2001

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cooper</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This Committee Substitute provides an exemption from the public records law for information contained in site files or other records maintained by the Division of Historical Resources of the Department of State concerning location of archaeological sites, if the division finds that release of such information creates a substantial risk of the sites being harmed or destroyed. The exemption is to expire on October 2, 2006, unless reviewed and reenacted by the Legislature.

This bill creates unspecified sections of Florida Law.

## II. Present Situation:

**Constitutional Access to Public Records and Meetings** - Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies.

In November 1992, the public affirmed its approval of Florida's tradition of "government in the sunshine" by enacting a constitutional amendment to guarantee the practice. Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business that are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

**The Open Government Sunset Review Act of 1995** - Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, and 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:

- 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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The act also establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially

amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

### **Law Governing Archaeological Sites -- Department of State, Division of Historical Resources**

In the area of historic preservation, which includes archaeological sites, the responsibilities, duties and policies of the state, Department of State, and its Division of Historical Resources, are primarily governed by chapter 267, F.S., and the National Historic Preservation Act of 1966, as amended.

Although there are specific provisions relating to only archaeological sites and the activities engaged in and the objects found at those sites, most of the law refers to terms such as "historic property or resource" and "preservation or historic preservation." Florida law includes the language of the federal law but is more descriptive. The definitions in s. 267.021, F.S., are included below so that when these terms are used, the broad context is understood.

- "Historic property" or "historic resource" means any prehistoric or historic district, site, building, object, or other real or personal property of historical, architectural, or archaeological value, and folk life resources. These properties or resources may include, but are not limited to, monuments, memorials, Indian habitations, ceremonial sites, abandoned settlements, sunken or abandoned ships, engineering works, treasure trove, artifacts, or other objects with intrinsic historical or archaeological value, or any part thereof, relating to the history, government, and culture of the state.
- "Preservation" or "historic preservation" means the identification, evaluation, recordation, documentation, analysis, recovery, interpretation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, or reconstruction of historic properties.

Under chapter 267, F.S., the Division of Historical Resource of the Department of State is charged with encouraging identification, evaluation, protection, preservation, collection, conservation and interpretation of and public access to information about Florida's historic sites, properties and objects related to Florida history and to archaeological and folk cultural heritage. The division administers public information programs, the statewide historic preservation plan, the operation of historic sites and properties, and state and federal grants for historic preservation. Its duties also include the maintenance and operation of Florida's state historic museums, promotion and administration of the Florida Folk life Program, and administration of various archaeological research and preservation programs. To accomplish this the division is

divided into three major categories: Archaeological Research, Historic Museums, and Historic Preservation.

Many of the division's responsibilities regarding the area of archaeology are included in s. 267.061, F.S., including specific requirements to do the following:

- Cooperate with federal and state agencies, local governments, and private organizations and individuals to direct and conduct a comprehensive statewide survey of historic resources and to maintain an inventory of such resources;
- Advise and assist, as appropriate, federal and state agencies and local governments in carrying out their historic preservation responsibilities and programs;
- Carry out on behalf of the state the programs of the National Historic Preservation Act of 1966, as amended, and to establish, maintain, and administer a state historic preservation program meeting the requirements of an approved program and fulfilling the responsibilities of state historic preservation programs as provided in subsection 101(b) of that act;
- Take such other actions necessary or appropriate to locate, acquire, protect, preserve, operate, interpret, and promote the location, acquisition, protection, preservation, operation, and interpretation of historic resources to foster an appreciation of Florida history and culture;
- Acquire, maintain, preserve, interpret, exhibit, and make available for study objects that have intrinsic historical or archaeological value relating to the history, government, or culture of the state. Such objects may include tangible personal property of historical or archaeological value. Objects acquired under this paragraph belong to the state, and title to such objects is vested in the division; and
- Establish and maintain a central inventory of historic properties for the state which shall consist of all such properties as may be reported to the division. This inventory shall be known as the Florida Master Site File.

Sections 267.11, 267.12, 267.13, and 267.14, F.S., set forth requirements for designation for archaeological sites, for issuance of permits for excavation and surface reconnaissance and for procedures to be followed in such activities, prohibited acts and penalties, and legislative intent regarding field investigations on private property.

To assist in the division in its responsibilities in the area of archeology, s. 267.061(4), F.S., requires the division director to hire a State Archaeologist and other archaeologists as needed to fulfill the requirements of the state and federal laws. Additionally, one of the division's three bureaus is dedicated to the area of archaeology, the Bureau of Archeological Research. The bureau plans, directs, and coordinates research and surveys of archaeological sites throughout Florida and underwater sites on the state-owned submerged lands; issues permits for excavations and surveys on public land; and maintains a computerized inventory of reported archaeological and historical sites.

**Florida Master Site File** - The Florida Master Site File (File) is a central inventory of historic properties reported to the Division of Historical Resources. This includes paper and computer records as well as a geographic information system. The File currently contains about 120,000 sites and increases by several thousand each year. About 80% of the sites are historical and

20 percent are archaeological. Most of the sites are in private ownership. The File provides entities with essential information for providing historic preservation services and ensuring the protection of threatened historic properties. Authorization for the File is found in ss. 261.061(3)-(5) and 267.031(2) and (3), F.S. The File also fulfills federal requirements of the National Historic Preservation Act of 1966, as amended.

**State Policy Relative to Historic Properties** - In s. 267.061(1), F.S., the public policy of the state regarding historic preservation is outlined to include the following:

- Provide leadership in the preservation of the state's historic resources;
- Administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship;
- Contribute to the preservation of non-state-owned historic resources and to give encouragement to organizations and individuals undertaking preservation by private means;
- Foster conditions, using measures that include financial and technical assistance, for a harmonious coexistence of society and state historic resources;
- Encourage the public and private preservation and utilization of elements of the state's historically built environment;
- Assist local governments to expand and accelerate their historic preservation programs and activities; and
- Require that all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Historical Resources of the Department of State for the purposes of administration and protection.

**Federal Law Requirements** - Not only are Florida's historic preservation initiatives governed by state law but also by the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470). The federal law sets forth the requirements for state historic preservation programs, both structure and responsibilities. It also provides for both direct grants and for matching grants to the states with funds appropriated annually by Congress. A state historic preservation program must be approved by the Secretary of the Interior. One requirement of the program is the designation of a State Historic Preservation Officer by the Governor to administer the programs for the state.

Section 101 of the Act sets forth the responsibilities of the State Historic Preservation Officer that are mirrored in s. 267.061(3), F.S., as well as other sections of ch. 267, F.S. One of the requirements is the maintenance of historical and archaeological databases. In section 101(3)(I)(ii) and (ii), federal law specifically states that the State Historic Preservation Officer is required to consult with the appropriate federal agencies in accordance with this Act on federal undertakings that may affect historical properties and the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties.

Also, section 106 of the Act requires site-specific information sharing between federal agencies and the State Historic Preservation Officer.

Finally, section 304 of the Act authorizes the head of a federal agency or other public official receiving grant assistance pursuant to the Act, after consultation with the Secretary of the Interior, to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may cause a significant invasion of privacy, risk harm to the historic resource, or impede the use of a traditional religious site by practitioners. Provisions are outlined for what persons may access the information and for what purposes.

**Problems Identified by Archaeological Law Enforcement Task Force** - In 2000, the Florida Secretary of State established the Archaeological Law Enforcement Task Force to examine the preservation protection needs in the area of archaeological sites, including the protection of objects found at such sites and determine how best to address looting and vandalism of such sites.

During these discussions, it was determined that thirty-five states have protective clauses or exemptions relating to cultural resource site locations. Florida and Alabama are the only two states in the Southeast not providing such an exemption. According to counsel of the Department of State, who participates on the Task Force, it is not known how many other states have rules or regulations providing or have court decisions requiring such an exemption.

One of the issues identified for action by the Task Force is outlined by Ms. Marsha Kearney, Forest Supervisor, US Forest Service in Florida, Task Force member, in a letter to Secretary Harris in which she expressed her office's desire to better protect sites from vandalism and looting. She stated that her agency is concerned with the lack of "protective clauses or exemptions for sensitive archaeological site location information in the Florida Sunshine Law." The lack of such puts them in a precarious situation regarding compliance with the National Historic Preservation Act which both requires them to share information concerning historic and archaeological sites with the State Historic Information Officer and to protect specific information when sharing that information could place the sites in jeopardy.

According to Ms. Kearney, the Task Force, and the Department of State, two recent developments accentuate the urgency of this issue:

- The development of GIS databases listing sites located in the Florida Master Site File which is a valuable tool for recording site location and survey data for valid researchers, land use planning, and site stewardship by land managers and law enforcement but which provides quick dissemination of information to the general public over the internet if protections are not provided for the sharing of the information.
- The new implementation guidelines for the National Historic Preservation Act require increased consultation with federally recognized Tribes. Managing information about Native American sacred sites and sites of cultural patrimony comes with a responsibility of confidentiality. Credibility of stewards of these areas is crucial and relies upon the ability to protect sensitive information from public dissemination.

### III. Effect of Proposed Changes:

**Section 1** provides an exemption from the public records law for information contained in site files or other records maintained by the Division of Historical Resources concerning location of archaeological sites, if the division finds that release of such information creates a substantial risk of the sites being harmed or destroyed. The exemption is to expire on October 2, 2006, unless reviewed and reenacted by the Legislature.

**Section 2** contains a statement of public necessity, stating:

- The state has a serious problem with archaeological looting; therefore, archaeological site location information should be exempt unless the Division of Historical Resources determines that disclosure will not create a substantial risk of harm, theft, or destruction at the site.
- The lack of protection for sensitive sites puts the federal government in a difficult position since federal law requires them to share site-specific information with the state but also requires the protection of information if such sites would be placed at risk.
- The development of Geographic Information System databases listing sites located in the Florida Master Site File maintained by the Department of State places sensitive data on sites on the internet and easily accessible by the public at large and, therefore, at greater risk of harm.
- Credible stewardship in managing information concerning Native American sacred sites and sites of cultural patrimony requires the ability to protect sensitive information from public dissemination. This is heightened by new implementation guidelines for the National Historic Preservation Act of 1966, as amended.

**Section 3** provides that the bill will take effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

This bill creates an exemption from public records requirements of s. 24(a), Art. I of the State Constitution. The bill contains a statement of public necessity. The bill contains a single exemption to the public records law.

#### C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State will incur costs associated with keeping the records exempt.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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