

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: SB 274
 SPONSOR: Governmental Oversight and Productivity Committee
 SUBJECT: Public Records
 DATE: November 27, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable
2.			AGG	
3.			AP	
4.			RC	
5.				
6.				

I. Summary:

Chapter 119, F.S., the Public Records Act, contains policy statements regarding public records, maintenance and custody requirements, inspection, copying and fee standards, an exemption review process, and exemptions. Since the chapter was first enacted in 1967, it has been amended numerous times but it has not undergone a comprehensive review and revision. As a result, it has become somewhat disorganized.

The bill reorganizes the act so that similar topics are grouped topically. No changes are made to definitions or standards in the bill unless required by Art. I, s. 24 of the State Constitution. Changes resulting from that provision are limited to substitution of the phrase “inspect and copy” instead of the older statutory phrase “inspect and examine” and elimination of the phrase “by general or special law” for the creation of exemptions.

This bill substantially amends the following sections of the Florida Statutes: 119.01; 119.011; 119.021; 119.07; 119.084; and 119.05.

This bill repeals the following sections of the Florida Statutes: 119.0115; 119.012; 119.02; 119.031; 119.041; 119.05; 119.06; 119.08; 119.083; 119.085; 119.09; and 119.10.

II. Present Situation:

The Senate President assigned the Committee on Governmental Oversight and Productivity an interim project to review ch. 119, F.S., to make the multiple exemptions to public records requirements easier to locate. The project, which is *Interim Project Report 2002-135*, was conceived as a multi-year, multi-stage project with the first phase including a comprehensive review and reorganization of the Public Records Act. Later stages were proposed to include a

review of various exemptions, and to include proposals for the creation of a section in ch. 119, F.S., for general exemptions that apply across agencies, as well as agency-specific sections for exemptions that apply solely to a particular agency.

Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.¹ Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.² The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

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.³

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment "grandfathered" exemptions that were in effect on July 1, 1993, until they are repealed.⁴

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Article I, s. 24 (c) of the State Constitution authorizes the Legislature to provide exemptions from the public access provisions of the law and constitution by general law. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption. An exemption may be no broader than necessary to comport with the stated public necessity. Further, a law that creates a public record exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.

¹ Section 1, ch. 5942, 1909; RGS 424; CGL 490.

² Chapter 67-125 (1967 L.O.F.).

³ Article I, s. 24 of the State Constitution.

⁴ Article I, s. 24(d) of the State Constitution.

The Open Government Sunset Review Act of 1995⁵ provides for the systematic repeal of exemptions to the Public Records Law and Public Meetings Law five years after the creation of, or substantial modification to, an exemption. The repeal cycle began in 2001. The 1995 act also specifies the conditions under which a public records or public meetings exemption may be created.

By law, an exemption may be created or expanded only if the exemption:

- 1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) 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
- 3) 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. (See s. 119.15(4)(b), F.S.)

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

Interim Project 2002-135 notes that ch. 119, F.S., currently contains a definition section, but definitions of terms that are used in the act are also dispersed throughout it.⁶ As a result, it is sometimes difficult to locate definitions.⁷ Further, the terms that are in the definition section are not alphabetized. If definitions of all terms that are used in the Public Records Act were placed in the definition section and alphabetized, the average user could find definitions more easily. Further, some definitions in ch. 119, F.S., are specifically tied to definitions that are contained in other chapters. Given that ch. 119, F.S., provides general requirements for public records, it would be appropriate for that chapter to contain all general standards and definitions for public records and that cross-references be made to definitions in ch. 119, F.S., and not the reverse.

The Public Records Act contains a specific section for general state policy on public records,⁸ but additional policy statements are contained in other sections of the chapter. The report notes, for example, s. 119.084, F.S., which relates specifically to requirements for the copyright of public records, also contains policy statements regarding common format of electronic records,⁹

⁵ Sections 119.15 and 286.0111, F.S.

⁶ Page 3 of Interim Project Report 2002-135; section 119.011, F.S.

⁷ Some additional definitions are contained in ss. 119.07(1)(a) and (b); 119.07(3)(n)(n)(y), 119.083(1)(a)(b)(c), 119.15(3)(c), F.S.

⁸ Section 119.01, F.S.

⁹ Section 119.083(4), F.S.

the type of copy that must be provided to the public on request,¹⁰ and a prohibition against entering into contracts which impair public access.¹¹ These policy statements are general in nature and should be placed in the general policy section.

In addition to public policy statements, the report notes that fee requirements are also dispersed.¹² Fees for copies of public records are contained in ss. 119.07(1)(a) and (b), 119.083(5), and 119.085, F.S. The report notes that these requirements could be located in one section for ease of use and clarity. Once fee requirements are placed in one section, comparative analysis of the current fee structures will be facilitated. Additionally, the report notes that co-locating fee requirements may help to establish fee consistency among agencies and encourage compliance.

Records maintenance, retention schedules, and records destruction requirements are also contained in different sections of the act. Currently, the Division of Library and Information Services of the Department of State is assigned a number of duties in these areas. The provisions that assign the division responsibilities sometimes appear to overlap with other provisions which place duties on agencies. Clarification of duties and responsibilities, as well as reorganization of specific requirements for maintenance and preservation of public records, would improve the act.

Finally, the report notes that there does not appear to be a consistent method for the location of exemptions to public records requirements. The Public Records Act contains a subsection that contains a litany of exemptions. These exemptions are not organized in any particular fashion, such as by agency or type. Other sections of the act also contain exemptions. Section 119.0115, F.S., for example, exempts certain videotapes or signals from the chapter. Further, there are many exemptions that are not located in the Public Records Act, but are instead found within the statutory chapters to which they relate.

From an organizational perspective, the report notes that it may be appropriate to create a specific section within the Public Records Act for general exemptions that apply to all agencies. For example, currently, a number of agencies have exemptions for credit card numbers that they receive. There is also a general exemption for credit card numbers. A general exemption should suffice for all agencies and could be placed within a general exemption section in the Public Records Act. Eventually, specific but redundant exemptions could be repealed. Another example of a potential general exemption could be social security numbers that are in the possession of state agencies. There are likely numerous exemptions that could be enacted as general exemptions, though additional study will be necessary to identify them.

The report notes that another option would be to reorganize those exemptions that are currently in the Public Records Act according to agency or topic. This method was used in the revision of ch. 120, F.S. Section 120.80, F.S., is subdivided so that requirements that are specific to a particular agency are listed under a subsection devoted to that agency. For example, subsection (2) of the section is entitled, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES. Exceptions and special requirements that apply only to that department are listed

¹⁰ Section 119.083(5), F.S.

¹¹ Section 119.093(6), F.S.

¹² *Interim Project Report 2002-135*, page 3.

under that subsection. Other agencies with exceptions and special requirements have their own subsections within the section.

Alternatively, specific exemptions that apply to a single agency or under a specific circumstance could be removed from the Public Records Act and placed in specific statutes that relate topically. The vast majority of exemptions to public records requirements are currently dispersed throughout the Florida Statutes, in just this fashion. There are, however, numerous specific exemptions listed in s. 119.07(3), F.S., which could be relocated.

Ultimately, it may be determined that all three methods for organizing exemptions to public records requirements serve a purpose. In such a scenario, the Public Records Act could contain a section for general exemptions that apply to all agencies and another section that is broken down into subsections by agency. Finally, specific exemptions that relate to a particular statute could be contained in substantive law.

Once the Public Records Act has been organized topically, the report notes that a review of specific issues and exemptions would be appropriate in a future interim. One of the most difficult issues facing the Legislature will be striking a balance between open government and personal privacy. Due to the rapid improvement of technology, this issue has been at the forefront during recent years. Technologies that permit more efficiency in governmental operations can, in an environment of open government, also be utilized by criminal elements. Internet access to public records can facilitate identity theft and fraud, as well as undermine exemptions to public records requirements, if protective steps are not taken, such as the redaction of exempt information. The issue is, however, far more complex than the redaction of exempt information from electronic databases. The Legislature and executive agencies must carefully consider what types of information should be collected to begin with, what the purpose for that information is, and whether that information should be available to the public. Further, as was dramatically demonstrated during the interim, public and private security issues must be considered within the context of open government, as well.¹³

Further, the report notes that it would be appropriate to begin distinguishing between information that is public and information that should be made available to the public through Internet access. For example, divorce decrees are official court documents and are recorded. As such, they are public records. They may, however, contain credit card numbers, locations where minors attend school, and other personal information. Posting documents of this sort on the Internet facilitates 24-hour a day, worldwide access to information that could be used inappropriately by third parties. As a result, it may be appropriate to begin distinguishing between the types of records that are made available electronically and those that should remain in paper form.

The report recommends that these, and other significant issues, should be reviewed by the Legislature in upcoming sessions.

¹³ The destruction of the World Trade Center and the attack on the Pentagon on September 11, 2001.

III. Effect of Proposed Changes:

The bill reorganizes the Public Records Act in a comprehensive fashion.

Section 1. General state policy on public records. The bill transfers existing policy statements from other areas of the act into an existing general state policy section.

The following existing subsections have been transferred into 119.01, F.S.:

- **Section 119.083(4), F.S.**, currently requires an agency to consider when designing or acquiring an electronic recordkeeping system that it is capable of providing data in a common format. This requirement is maintained, though it is renumbered as s. 119.01(3)(b) of the bill.
- **Section 119.083(6), F.S.**, currently prohibits an agency from entering into a contract for the creation or maintenance of a public records database if that contract would impair the ability of the public to inspect or copy public records. This requirement is maintained, though it is renumbered as s. 119.01(3)(c) of the bill.
- **Section 119.083(3), F.S.**, currently prohibits agency use of proprietary software from diminishing the right of the public to inspect and copy a public record, subject to restrictions of copyright and trade secrets laws and public records exemptions. This requirement is maintained, though it is renumbered as s. 119.01(3)(d) of the bill.
- **Section 119.083(5), F.S.**, currently requires an agency to provide a copy of any public record stored in an electronic system, if not exempt. If the agency maintains the record in a particular medium requested by a person, it must provide it in that medium. An additional fee is authorized if the record is not kept in the medium requested and the agency elects to provide it in the requested medium. This requirement is maintained, though it is renumbered as s. 119.01(3)(f) of the bill.
- **Section 119.012, F.S.**, currently provides that if public funds are expended in payment of dues or membership contributions, all financial, business, and membership records of that organization that pertain to the agency are public records. This requirement is maintained, though it is renumbered as s. 119.01(4) of the bill.

Subsection (4) of s. 119.01, F.S., relates to the disposal of public records that do not have sufficient value to retain. This provision is removed from s. 119.01, F.S., and moved to s. 119.021(3) of the bill.

Section 2. Definitions. There are a number of definitions that are distributed throughout the act. The bill transfers those definitions into the existing definition section and alphabetizes the list of definitions. The following definitions are transferred into the section:

- **Section 119.07(1)(a), F.S.**, defines the term “actual cost of duplication.” This term becomes s. 119.011(1) of the bill.

- **Section 119.021, F.S.**, defines the term “custodian of public records.” This term becomes s. 119.01(5) of the bill.
- **Section 119.07(3)(o)1., F.S.**, defines the term “data processing software.” This term becomes s. 119.01(6) of the bill.
- **Section 119.07(1)(a), F.S.**, defines the term “duplicated copies.” This term becomes s. 119.01(7) of the bill.
- **Section 119.15(3)(e), F.S.**, defines the term “exemption.” This term becomes s. 119.01(8) of the bill.
- **Section 119.07(1)(b), F.S.**, defines the term “information technology resources.” This term becomes 119.01(9) of the bill.
- **Section 119.084(1)(c), F.S.**, defines the term “proprietary software.” This term becomes s. 119.01(10) of the bill.
- **Section 119.07(3)(o)2., F.S.**, defines the term “sensitive.” This term becomes s. 119.01(12) of the bill.

Other definitions in the section are redesignated as a result of alphabetizing the definitions.

Section 3. This section repeals ss. 119.0115, 119.012, and 119.02, F.S., though the requirements of these sections remain in effect because they have been transferred to other sections of the act. Specifically:

- **Section 119.0115, F.S.**, which exempts certain videotapes and signals, is transferred to s. 119.07(3), F.S., which contains exemptions.
- **Section 119.012, F.S.**, which establishes a policy that private organization records relating to an agency that uses public funds to pay dues or membership contributions are public records, is transferred to s. 119.01, F.S., which establishes general policy requirements.
- **Section 119.02, F.S.**, which establishes a penalty for violation of the chapter, is moved to s. 119.10, F.S., which also contains penalties for violation.

Section 4. Custodial requirements; maintenance, preservation, and retention of public records. This section was substantially re-worded. Existing provisions from other sections were transferred into this section.

Section 5. This section repeals ss. 119.031, 119.041, 119.05, and 119.06, F.S., though the requirements of these sections remain in effect because they have been transferred to other sections of the act. Specifically:

- **Section 119.031, F.S.**, currently establishes safety requirements for the maintenance of vital, permanent, or archival records. This requirement is transferred to s. 119.021(1)(b) of the bill.

- **Section 119.041, F.S.**, currently establishes regulations for the destruction of public records. This requirement is transferred to s. 119.021(3)(c) of the bill.
- **Section 119.05, F.S.**, currently establishes regulations for the disposal of public records at the end of an official's term. This requirement is transferred to s. 119.021(5)(a) of the bill.
- **Section 119.06, F.S.**, currently authorizes a person who is entitled to custody of public records to demand them from any person having illegal possession of them. This provision is transferred to s. 119.021(5)(b) of the bill.

Section 6. Inspection; copying of records; fees; exemptions. This section of the bill makes up the bulk of the bill. Provisions related to public record exemptions that are currently located in various sections of ch. 119, F.S., are transferred to subsection (1) of this section. For example, redaction of information by a custodian; statement of the basis for the redaction of information; when a statement must be made in writing; and the legal process in a civil action.

Subsection (2) includes standards related to access and copying of public records through photographic means.

Subsection (3) includes standards related to remote electronic means.

Subsection (4) includes fee standard provisions.

These modified subsections do not contain any new standards or requirements, but are current requirements that have been co-located topically.

Section 7. This section repeals ss. 119.08 and 119.083, F.S., though the requirements of these sections remain in effect because they have been transferred to other sections of the act. Specifically:

- **Section 119.08, F.S.**, establishes requirements for photographing public records. These requirements are retained, though they are transferred to ss. 119.07(2) of the bill.
- **Section 119.083, F.S.**, establishes general state policy on public records, as well as requirements for copyright of data processing software produced by agencies. The provision was the subject of a mandated review and was re-enacted as s. 119.084, F.S.

Section 8. Section 119.084, F.S. Copyright of data processing software created by governmental agencies; sale price and licensing fees. Policy statements which do not relate to the issue of copyright are removed from this section because they have been transferred to the general policy section of the act. Additionally, definitions are transferred to the definition section.

Section 9. This section repeals ss. 119.085 and 119.09, F.S., though their requirements are transferred to s. 119.01(3)(f) and s. 119.021(3)(d), respectively, of the bill.

Section 10. Violation of chapter; penalties. Section 119.10, F.S., which establishes penalties for violation of the chapter, was clarified.

Section 11. Protection of victims of crimes or accidents. Reference to “general or special law” was removed as, under Article I, s. 24 of the State Constitution, an exemption cannot be enacted in special law.

Section 12. Effective date. This section provides an effective date for the bill. The act would take effect July 1, 2002, if enacted.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

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:

There are costs associated with a complete revision to a statute, including printing costs. It would be expected that over time, as exemptions are consolidated and their number reduced, costs will be reduced. Further, as it becomes less difficult to find exemptions that are applicable, costs will be reduced.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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