

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 1212

SPONSOR: Governmental Oversight and Productivity Committee and Agriculture Committee

SUBJECT: Open Government Sunset Review/Agricultural Records

DATE: March 29, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u> Poole </u>	<u> Poole </u>	<u> AG </u>	<u> Fav/CS </u>
2.	<u> Rhea </u>	<u> Wilson </u>	<u> GO </u>	<u> Fav/CS </u>
3.	<u> </u>	<u> </u>	<u> RC </u>	<u> </u>
4.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

This bill is the result of an Open Government Sunset Review for certain agricultural records performed by the Committee on Agriculture. The CS reenacts s. 403.067(7)(c)5, F.S., to continue the public records exemption for certain agricultural records which are reported to the Department of Agriculture and Consumer Services (DACCS) by agricultural producers for the purpose of implementation of Total Maximum Daily Loads (TMDL) through voluntarily participating in a Best Management Practices (BMP) Program. The exemption of those records is also maintained when they are shared from the DACCS to the Department of Environmental Protection (DEP) or a water management district.

This bill amends section 403.067 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ 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. . . .

Unless specifically exempted, all agency⁵ 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.⁶

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.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ 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.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

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

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ 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.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *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).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

The Public Records Act¹⁴ 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:

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

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ The records custodian must state the basis for the exemption, in writing if requested.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ 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.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests. Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute. . . .* Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, *that the focus in determining whether a document has lost its status as a public record must be on the policy behind the*

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So.2d 203 (Fla. 1998).

²¹ 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

*exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation [emphasis added].*²²

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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.

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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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.²⁴

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 yes, 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?

²² *Ibid* at 206.

²³ Section 119.15, F.S.

²⁴ Section 119.15(4) (b), F.S.

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.²⁵ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding 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.

Interim Project 2006-201: *Sunset Review of the Exemption for Agricultural Records* – Senate staff reviewed the public records exemption in s. 403.067, F.S., pursuant to the Open Government Sunset Review Act and determined that the exemption meets the requirements for reenactment. Based on a survey and interviews, there is a reasonable basis to believe that release of the information contained in the exemption could jeopardize the effective administration of governmental programs by enabling agricultural records of an individual producer to become a public record. This information could include processes or methods of production, data relating to costs of production or profits, or other financial information. Release of this information could provide a competitor business with insight into the strategies and operation of those agricultural producers and potentially injure the producers in the market place. Additionally, a repeal of the exemption, would result in the reluctance of agricultural producers to provide information to the DACS pertaining to TMDLs and compliance with BMPs for risk of the information becoming public by doing so.

The overall consensus was that the exemption provides safeguards for agricultural producers and enables governmental staff to carry out their responsibilities more effectively.

Based on the findings of the Open Government Sunset Review, staff recommends that the Legislature retain the public records exemption for individual agricultural records relating to processes or methods of production, or relating to costs of production, profits, or other financial information which are otherwise not public records. This information is reported to the DACS for the purpose of implementation of TMDLs through BMPs or other suitable interim measures as contemplated under s. 403.067, F.S. It is also recommended that the public records exemption for those records be maintained when they have been furnished to the DEP or water management districts, at their request, to carry out the provisions of the section.

III. Effect of Proposed Changes:

This bill amends s. 403.067, F.S., to reenact the public records exemption for certain agricultural records which are reported to the Department of Agriculture and Consumer Services (DACS) by agricultural producers for the purpose of implementation of Total Maximum Daily Loads

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

(TMDL) through voluntarily participating in a Best Management Practices (BMP) Program. The exemption of those records is also maintained when they are shared from the DACS to the Department of Environmental Protection (DEP) or a water management district.

The bill provides for an effective date of October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill reenacts the public records exemption found in s. 403.067(7)(c)5., F.S.

Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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