

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: Transportation Committee

BILL: SPB 7038

INTRODUCER: For consideration by Transportation Committee

SUBJECT: Review Under the Open Government Sunset Review Act/Crash Reports

DATE: October 31, 2005 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Meyer		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

This Senate Provisional Bill (SPB) reenacts and amends s. 316.066(3)(c), F.S., to continue the public records exemption for motor vehicle crash reports containing personal identifying information of individuals involved in a crash. The crash reports are to remain exempt and confidential for a period of 60 days after the date the report is filed. However, such reports may be immediately available to certain persons or entities. Specifically, the SPB deletes the provision that repeals the exemption.

This SPB substantially amends section 316.066 of the Florida Statutes.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, the electors of Florida approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides:

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.

The Public Records Law¹ specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides every person who has custody of a public record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

Section 119.011(11), F.S., defines the term “public record” 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 official business by any agency.

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 “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸

¹ Chapter 119, F.S.

² 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.

³ *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *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).

⁷ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Art. I, s. 24(c) of the State Constitution.

Open Government Sunset Review Act

The Open Government Sunset Review Act⁹ establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. 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 an exemption may be created, revised, or maintained only if: (1) it serves an identifiable public purpose; and (2) 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 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:

“[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 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.”

[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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of such information would injure the affected entity in the marketplace.”¹⁰

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

- 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?

⁹ Section 119.15, F.S.

¹⁰ Section 119.15(6)(b), F.S.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.¹¹ The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(8), 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.

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, and is subject to suspension and removal from office or impeachment. Section 119.10(2)(a), F.S., provides 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.

Records Exemption for Motor Vehicle Crash Reports

Section 316.066(3)(a), F.S., requires law enforcement officers to file written reports of motor vehicle crashes. Those reports are public records except as otherwise made exempt or confidential.¹² However, s. 316.066(3)(c), F.S., provides crash reports revealing the identity, the home or employment telephone number, the home or employment address, or other personal information concerning parties involved in a crash, received or prepared by any agency which regularly receives or prepares information concerning the parties to motor vehicle crashes is confidential and exempt from public disclosure. This information is to remain confidential and exempt for 60 days after the date the report is filed.

The primary policy reason for closing access to these crash reports for 60 days to persons or entities not specifically listed appears to be protection for crash victims and their families from illegal solicitation by attorneys. In September 2000, the Fifteenth Statewide Grand Jury, in a report on insurance fraud related to personal injury protection (PIP) benefits, found a strong correlation between the utilization of crash reports through illegal solicitations and the commission of a variety of frauds, including insurance fraud.

In the statement of public necessity accompanying the creation of the public records exemption found in s. 316.066(3)(c), F.S., the 2001 Legislature identified as justification for the public records exemption: (1) to protect the privacy of persons that have been the subject of a motor vehicle crash and (2) to protect the public from unscrupulous individuals who promote the filing

¹¹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

¹² Section 119.105, F.S.

of fraudulent insurance claims by obtaining such information immediately after a crash and exploiting the individual at a time of emotional distress. This exemption expires October 2, 2006, unless it is reviewed and reenacted by the Legislature.

Interim Project 2006-225: *Sunset Review of the Exemption for Motor Vehicle Crash Reports*

Senate staff reviewed the public records exemption in s. 316.066(3)(c), F.S., pursuant to the Open Government Sunset Review Act and determined the exemption meets the requirements for reenactment, as it protects information of a sensitive personal nature concerning individuals involved in a crash.

However, the First Amendment Foundation provided a written opinion, which indicated “the exemption is simply unworkable” based on numerous complaints over the past five years from the public, reporters and records custodians. Specifically, the Foundation expressed concerns as a result of its experience that occasionally legitimate requests were denied “due to the excessive penalty provision” for records custodians. Section 316.066(d), F.S., clearly provides a state or local agency employee who *knowingly* discloses such information is guilty of a third degree felony. The Foundation’s assumption is records custodians would rather deny access to the crash reports and commit a first degree misdemeanor, punishable by a fine not to exceed \$1,000 or imprisonment not to exceed one year¹³ rather “than risk being penalized with a third degree felony” for mistakenly furnishing a crash report to persons or entities not covered by the exemption. Based on the above, it is the recommendation of the Foundation to allow the exemption to sunset.

In addition, the Department of Financial Services’ Division of Insurance Fraud supports the reenactment of this exemption. As indicated during discussions, it is the opinion of the division that PIP fraud begins with solicitation. In a recent study by the Department of Financial Services, “the original purpose of the prohibition on solicitation was to combat the practice of some providers who paid runners to obtain information about accident victims and invite them to be serviced by those providers, who in turn charge high prices and/or over treat the victim to exhaust the PIP coverage and promote filing of a motor vehicle tort claim. While there has been some deterrent value, many cases of apparent runner activity have continued to take place...”¹⁴ However, the restriction on the availability of crash reports continues to aid in deterring illegal commercial solicitation of accident victims.

III. Effect of Proposed Changes:

This SPB reenacts and amends s. 316.066(3)(c), F.S., to continue the public records exemption for motor vehicle crash reports containing personal identifying information of individuals involved in a crash. The crash reports are to remain exempt and confidential for a period of 60 days after the date the report is filed. Although, such reports may be immediately available to certain persons or entities. Specifically, the SPB deletes the provision that repeals the exemption.

This SPB provides for an effective date of October 1, 2006.

¹³ Section 119.10(1)(b), F.S.

¹⁴ Study of PIP Insurance Changes, *Effect of Changes Pursuant to the Florida Motor Vehicle Insurance Affordability Reform Act of 2003*, January 2005, by the Florida Department of Financial Services.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

The SPB reenacts the public records exemption found in s. 316.066(3)(c), 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 exempting 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 containing 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.

VIII. Summary of Amendments:

None.

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