

The Florida Senate
PROFESSIONAL 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 Operations Committee

BILL: CS/CS/SB 186

INTRODUCER: Governmental Operations Committee, Children, Families and Elder Affairs Committee and Senator Aronberg and others

SUBJECT: Domestic Violence Public Records Exemption

DATE: April 13, 2007 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jameson	Jameson	CF	Fav/CS
2.	Gordon	Cooper	CM	Favorable
3.	Rhea	Wilson	GO	Fav/CS
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill is the public records companion to CS/SB 188, which requires the submission of documentation in order for an employee to be granted leave related to incidents of domestic violence. This bill makes confidential and exempt, from s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, personal identifying information that is contained in records documenting an act of domestic violence that are submitted to a public agency by that agency's employee.

This bill also makes confidential and exempt for a period of one year after the leave is taken both the written request for the leave and the agency time sheet related to the leave.

This bill specifies these exemptions as subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and provides that these exemptions will stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill provides a statement of public necessity for the exemptions.

This bill creates new public records exemptions and, as a result, is subject to article I, s. 24(a) of the Florida Constitution which requires that two-thirds of the members present and voting in each house pass the bill.

This bill creates subsection (7) of s. 741.313 of the Florida Statutes.¹

¹ Section 741.313, F.S., would be created by CS/SB 188.

II. Present Situation:

Employment Records of Public Employees

The employment records of public employees, unless specifically exempted, are public records. These records include requests for leave and time sheets.

Domestic Violence

Recently, it was estimated that more than 1.5 million adults in the United States are victims of domestic violence each year, and more than 85 percent of the victims are women.² After years of steady increases in domestic violence numbers, the total number of domestic violence offenses³ reported to law enforcement agencies in Florida declined slightly in 1998, and has continued the same slight decline through 2004, according to the Florida Department of Law Enforcement (FDLE).⁴

CS/SB 188

Committee Substitute for SB 188, to which this bill is linked, requires employers to allow employees to request or take up to three working days of leave with or without pay within a 12-month period if the employee is the victim of domestic violence and the leave is sought to:

- Seek an injunction for protection against domestic violence or an injunction for protection in cases of repeat violence, dating violence, or sexual violence;
- Obtain medical care or mental health counseling, or both, for the employee or a family or household member to address physical or psychological injuries resulting from the act of domestic violence;
- Obtain services from a victim-services organization, including, but not limited to, a domestic violence shelter, program, or a rape crisis center as a result of the act of domestic violence;
- Make the employee's home secure from the perpetrator of the domestic violence or to seek new housing to escape the perpetrator; or
- Seek legal assistance to address issues arising from the act of domestic violence and to attend and prepare for court-related proceedings arising from the act of domestic violence.

² Margaret Graham Tebo, *When Home Comes to Work*, ABA Journal, Sept. 2005, at 42 (citing statistics from Legal Momentum, an advocacy and research organization based in New York City).

³ Domestic violence crimes include murder, manslaughter, forcible rape, forcible sodomy, forcible fondling, aggravated assault, aggravated stalking (1996-present), simple assault, simple stalking (1996-present), threat/intimidation, and arson (1992-1995). See Fla. Statistical Analysis Ctr., Fla. Dep't of Law Enforcement, *Crime in Florida, Florida uniform crime report: Total Domestic Violence, 1992 – 2004*, at http://www.fdle.state.fl.us/FSAC/Crime_Trends/domestic_violence/index.asp (last visited March 3, 2007).

⁴ FDLE reports a total of 131,152 domestic violence crimes in 1995 and 119,772 in 2004. The rate of incidence has fallen from 926.9 to 683.8 per 100,000 of population during the same time period. Fla. Statistical Analysis Ctr., Fla. Dep't of Law Enforcement, *Crime in Florida, Florida uniform crime report: Total Domestic Violence, 1992 – 2004*, at http://www.fdle.state.fl.us/FSAC/Crime_Trends/domestic_violence/index.asp (last visited March 3, 2007).

Application of the CS is limited to employers with 50 or more employees and to employees who have been employed by the employer for at least 3 months. The employee is required to provide advance notice of the leave except in cases of imminent danger to the employee or the employee's family. The employer is authorized to require documentation of the act of domestic violence. The employee must use all available annual or vacation leave, personal leave, and sick leave available to the employee prior to using the leave provided for in CS/SB 188, unless this requirement is waived by the employer.

The employer is prohibited from taking any disciplinary action against the employee for exercising rights under CS/SB 188, but the employee is not granted any rights under the CS to continued employment or other benefits not available outside the provisions of the CS.

The CS requires employers to keep confidential all information relating to an employee's leave granted under this CS. However, the public employee's personnel records are a public record unless specifically exempted from Florida's public records law.

Public Records Law

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 1892.⁵ 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.⁶ 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,⁷ which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁸ Section 119.07(1) (a), F.S., states:

⁵ Section 1390, 1391 F.S. (Rev. 1892).

⁶ Article I, s. 24 of the State Constitution.

⁷ Chapter 119, F.S.

⁸ 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.

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.

Unless specifically exempted, all agency 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.⁹

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.¹⁰ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹¹

Only the Legislature is authorized to create exemptions to open government requirements.¹² 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.¹³ A bill enacting an exemption¹⁴ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁵

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.¹⁶ If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹⁷

The Open Government Sunset Review Act¹⁸ provides for the systematic review, through a 5-year cycle ending October 2nd 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

⁹ Section 119.011(11), F.S.

¹⁰ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹¹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

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

¹³ *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).

¹⁴ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁵ Art. I, s. 24(c) of the State Constitution.

¹⁶ Attorney General Opinion 85-62.

¹⁷ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁸ Section 119.15, F.S.

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 exemption meets the three statutory criteria if it:

- (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.¹⁹

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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.²⁰ The Legislature is only limited in its review process by constitutional requirements.

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

¹⁹ Section 119.15(4)(b), F.S.

²⁰ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

... 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 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.

III. Effect of Proposed Changes:

Section 1 creates s. 741.313(7), F.S., to provide a public records exemption for personal identifying information that is contained in records documenting an act of domestic violence which is submitted to a public agency by that agency's employee as required by the provisions of CS/SB 188. This bill is linked to CS/SB 188, which requires the submission of documentation in order for an employee to be granted leave related to incidents of domestic violence.

This section also makes confidential and exempt for a period of one year after the leave is taken both the written request for the leave and the agency time sheet related to the leave.

These exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and are repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a statement of public necessity for the exemptions.

Section 3 contains an effective date contingent on CS/SB 188 taking effect and becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption for personal identifying information that is contained in records documenting an act of domestic violence which is submitted to a public agency by an agency employee as required by the provisions of CS/SB 188. The bill also makes confidential and exempt, for a period of one year after the leave is taken, both the written request for the leave and the agency time sheet related to the leave. Consequently, it is subject to article I, s. 24(c) of the Florida Constitution which requires

that two-thirds of the members present and voting in each house of the Legislature pass the bill.

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 may be minimal costs of complying with the confidentiality and exemption requirements; however, these costs are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
