

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: SB 618

INTRODUCER: Military Affairs and Domestic Security Committee

SUBJECT: OGSR/Domestic Security Oversight Council

DATE: February 25, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	Skelton	MS	Favorable
2.	Naf	Wilson	GO	Favorable
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review conducted by the Committee on Military Affairs and Domestic Security.

Section 943.0314, F.S., provides public-records and public-meetings exemptions relating to the Domestic Security Oversight Council. The section exempts from public-meetings requirements those portions of the council’s meetings at which active criminal investigative information or active criminal intelligence information is discussed. The section also exempts from public-records requirements any records generated during such closed meetings until such time as the criminal investigative information or criminal intelligence information discussed therein ceases to be active.

These exemptions are subject to review under the Open Government Sunset Review Act¹ and will sunset on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature. This bill reenacts the exemptions.

This bill does not expand the public-records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill amends section 943.0314, Florida Statutes.

¹ Section 119.15, F.S.

II. Present Situation:

Florida's Public-Records Laws

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, Florida voters 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 that:

Every person has the right to inspect or copy any public records 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 Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² 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 agency³ records are to be available for public inspection.

Section 119.011(12), 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."⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

² Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

³ Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹³ 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.¹⁴ An exemption meets the statutory criteria if it:

- 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 ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; 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 ... would injure the affected entity in the marketplace.¹⁵

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *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).

⁸ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Section 24(c), Art. I of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ *Id.*

¹⁵ *Id.*

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁶

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.¹⁷ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created¹⁸ then a public necessity statement and a two-thirds vote for passage are not required.

Domestic Security Oversight Council

The Legislature created the Domestic Security Oversight Council in 2005.¹⁹ The council's function is to advise the Governor and the Legislature on issues pertaining to counter-terrorism and domestic security efforts.

The council is required by statute to:

- Review and make recommendations regarding:
 - A comprehensive domestic security strategy;
 - The development of integrated funding plans;
 - Approval of prioritized recommendations from regional domestic security task forces and state working groups;
 - Approval of statewide policies and operational protocols;
 - The current statewide effectiveness of domestic security and counter-terrorism efforts;
 - The efforts of entities involved in domestic security and counter-terrorism efforts;
 - Efforts to improve state and local security;
 - Relevant legislative initiatives; and
 - Responses to domestic security incidents;
- Undertake any further review or make further recommendations necessary to promote domestic security and counter-terrorism efforts;
- Promote intergovernmental cooperation; and
- Make an annual funding recommendation to the Governor and Legislature.²⁰

In the course of its duties, the council may receive and discuss active criminal investigative information and active criminal intelligence information.

¹⁶ Section 119.15(6)(a), F.S.

¹⁷ Section 24(c), Art. I of the State Constitution.

¹⁸ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

¹⁹ Chapter 2005-165, Laws of Florida.

²⁰ Sections 943.0313(5), F.S.

Public-Records and Public-Meetings Exemptions for the Domestic Security Oversight Council

Current law provides a public meeting exemption for those portions of council meetings wherein the council hears or discusses active criminal investigative information or active criminal intelligence information.²¹ The exemption applies only if:

- The chair of the council announces at a public meeting that, in connection with the performance of the council's duties, it is necessary that active criminal investigative information or active criminal intelligence information be discussed.
- The chair declares the specific reasons that it is necessary to close the meeting, or portion thereof, in a document that is a public record and filed with the official records of the council.
- The entire closed meeting is recorded. The recording must include the times of commencement and termination of the closed meeting or portion thereof, all discussion and proceedings, and the names of the persons present. No portion of the closed meeting may be off the record. The recording must be maintained by the council.²²

An audio or video recording of, and any minutes and notes generated during, a closed council meeting are exempt from public records requirements. However, the public record exemption expires at such time as the criminal investigative information or criminal intelligence information discussed therein is no longer active.²³

Only members of the council, staff supporting the council, and other persons whose presence has been authorized by the chair are allowed to attend closed portions of council meetings.²⁴

The Legislature's statement of public necessity for these exemption states that the purpose for the exemptions is to maintain the purpose of the exemptions for active criminal investigative information and active criminal intelligence information, to prevent release of sensitive information that could increase the risk of a terrorist attack, and to allow the council to make fully-informed recommendations:

... The council reviews information of a highly sensitive nature involving terrorism activity, counterterrorism methodologies, and planning, training, and operational activities ... This information is exempt from public disclosure ..., and if the meetings at which this exempt information is

²¹ Section 119.011(3), F.S., defines "criminal intelligence information," "criminal investigative information," and "active." Criminal intelligence information means "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." It is considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities. Criminal investigative information means "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." Criminal investigative information is considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

²² Section 943.0314(1)(a), F.S.

²³ Section 943.0314(1)(b), F.S.

²⁴ Section 943.0314(2), F.S.

discussed were open to the public, the purpose of the exemptions would be defeated. The council must be able to hear and discuss this exempt information in full in order to make sound recommendations to the Governor and Legislature ...²⁵

The exemptions thus appear to serve an identifiable public purpose of allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemptions, as state in s. 119.15(6)(b)1., F.S. This public purpose is compelling and cannot be accomplished without making the sensitive information exempt. Because the exemptions are limited to meetings and records pertaining to active criminal intelligence information and active criminal investigative information, they also appear to be no broader than necessary to meet the public purpose they serve.

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.

III. Effect of Changes:

The bill reenacts and saves from repeal s. 943.0314, F.S., allowing active criminal investigative information and active criminal intelligence information discussed in meetings held by the Domestic Security Oversight Council, as well as records generated therein until the time that such information ceases to be active, to remain exempt from public disclosure.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created or expanded public-records or public-meetings exemption. This bill does not expand the existing public-records and public-meetings exemptions, so it does not require a two-thirds vote for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁵ Chapter 2005-211, s. 2, Laws of Florida.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.