

This bill expands an existing exemption and therefore requires a two-thirds vote of each house of the Legislature for passage.

This bill amends s. 383.412, 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 record⁴ 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 agency⁵ 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

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⁵ 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."

materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.¹¹

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.¹² If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁴ 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.¹⁵ 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.¹⁶ 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

⁶ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

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

⁹ *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).

¹⁰ 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.

¹¹ Section 24(c), art. I of the State Constitution

¹² Attorney General Opinion 85-62, August 1, 1985.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

- 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.¹⁷

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁸

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.¹⁹ 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 created²⁰ then a public necessity statement and a two-thirds vote for passage are not required.

Child Abuse Death Review

Current law establishes the State Child Abuse Death Review Committee and local child abuse death review committees within the Department of Health.²¹ The committees must review the facts and circumstances of all deaths of children from birth through age 18 that occurred in Florida as the result of verified child abuse or neglect. The state committee must prepare an annual statistical report on the incidence and causes of death resulting from child abuse in the state. The report must include recommendations for:

- State and local action, including specific policy, procedural, regulatory, or statutory changes; and
- Any other recommended preventive action.²²

Exemptions Under Review

Current law provides a public-records and a public-meetings exemption for the State Child Abuse Death Review Committee and local child abuse death review committees.²³

Information that reveals the identity of the surviving siblings, family members, or others living in the home of a deceased child who is the subject of review by the state committee or a local committee is confidential and exempt from public-records requirements.²⁴ In addition, confidential or exempt information obtained by the state committee or a local committee retains its confidential or exempt status.²⁵ The state and local committees may share with each other any

¹⁷ *Id.*

¹⁸ Section 119.15(6)(a), F.S.

¹⁹ Section 24(c), art. I of the State Constitution.

²⁰ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

²¹ Section 383.402, F.S.

²² Section 383.402(3)(c), F.S.

²³ Section 383.412, F.S.

²⁴ Section 383.412(1)(a), F.S.

²⁵ Section 383.412(1)(b), F.S.

relevant confidential or exempt information regarding case reviews.²⁶ Any person who knowingly or willfully violates the public-records exemption commits a misdemeanor of the first degree.^{27,28}

Portions of meetings of the State Child Abuse Death Review Committee or a local committee wherein confidential and exempt information is discussed is exempt from public-meetings requirements.²⁹ Current law does not require a recording of the closed portions of meetings.

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.³⁰

Senate Interim Report 2010-220

Staff reviewed the public records and meetings exemptions in s. 383.412, F.S., pursuant to the Open Government Sunset Review Act and recommended that the exemptions to the public records and open meetings requirements in s. 383.412, F.S., be reenacted. Staff's findings and recommendations are detailed in *Interim Report 2010-220*.

III. Effect of Proposed Changes:

The bill repeals subsection (5) of section 383.412, Florida Statutes, which would repeal the public-records and public-meetings exemptions for information held by the State Child Abuse Death Review Committee or local panels or committees that would reveal the identity of household members of a deceased child whose death is under review and for portions of meetings at which such information would be revealed. The bill saves the exemptions from repeal under the Open Government Sunset Review Act.

The bill also requires any portion of a closed meeting to be recorded. Such recordings must be maintained by the state committee or local committee. No portion of the closed meeting may be off the record.

The bill creates a public-records exemption for any such recording of a closed portion of a meeting. As such, the bill extends the repeal date for the exemptions from October 2, 2010, to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.³¹

The effective date of the bill is October 1, 2010.

²⁶ Section 383.412(3), F.S.

²⁷ Section 383.412(4), F.S.

²⁸ A misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year and a fine not to exceed \$1,000. See 775.082(4)(a) and 775.083(1)(d), F.S.

²⁹ Section 383.412(2), F.S.

³⁰ Section 383.412(5), F.S.

³¹ Section 24(c), art. I of the State Constitution.

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

The provisions of this bill have no impact on municipalities and the counties under the requirements of article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records and public-meetings exemptions. The bill also expands the public-records exemption. This bill complies with the requirement of s. 24(c), art. I of the State Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill expands the exemption, it contains a constitutionally required statement of public necessity for the expansion. Additionally, this bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by s. 24(c), art. I of the State Constitution because it expands the public-records exemption.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Proposed Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)

PCS by Governmental Oversight and Accountability on April 6, 2010:

The proposed committee substitute:

- Requires the State Child Abuse Death Review Committee and local child abuse death review committees to record all portions of closed meetings and to maintain such recordings;
 - Creates a public-records exemption for such recordings;
 - Extends the repeal date for the exemptions under the Open Government Sunset Review Act; and
 - Provides a public necessity statement.
- B. **Amendments:**

None.