

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: CS/SB 1660

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Board of Funeral, Cemetery, and Consumer Services

DATE: April 11, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Messer	Burgess	BI	Fav/CS
2.	Naf	Wilson	GO	Favorable
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill is the result of an Open Government Sunset Review conducted by the Senate Committee on Banking and Insurance.

Current law creates the Board of Funeral, Cemetery, and Consumer Services (board) within the Department of Financial Services (department). The board consists of 10 members appointed for terms of four years. The board enforces the provisions of chapter 497, F.S., relating to funeral, cemetery, and consumer services.

Current law provides multiple public-records and public-meetings exemptions for the board and the department. Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.

This bill reenacts the public-records and public-meetings for the board relating to examination development meetings and probable cause panel meetings. It requires a recording to be made of any closed portion of a meeting, and for the recording to be maintained by the board. The bill expands the current exemptions to protect such recordings. As such, the bill extends the repeal date from October 2, 2010, to October 2, 2015. It also provides a public necessity statement.

The bill reenacts the temporary public-records exemption for records related to examinations, inspections, and investigations conducted by the department. It also reenacts the public-records exemption for trade secrets held by the board or the department.

Because the bill expands existing exemptions, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 497.172, F.S.

II. Present Situation:

Public Records

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 1892.¹ 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.² Article I, s. 24 of the State Constitution, provides that:

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,³ which pre-dates the public records provisions of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

(a) 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.

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

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ 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.

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.⁵

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.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 that relate to one subject.¹¹

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

Public Meetings

The “Sunshine Law” was first enacted in 1967.¹⁴ As codified in s. 286.011, F.S., the provision states:

- (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, 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 Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

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

¹⁴ Section 1, ch. 67-356, L.O.F.

made at such meeting. The board or commission must provide reasonable notice of all such meetings.

- (2) The minutes of a meeting of any such board or commission or any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

In effect, the Sunshine Law requires:

1. Meetings of public boards or commissions to be open to the public;
2. Reasonable notice for meetings; and
3. Minutes to be taken.

In 1992, the electorate approved an amendment to the State Constitution that raised the statutory requirement of open meetings to a constitutional mandate. Article I, s. 24(b) of the State Constitution provides:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article II, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Collegial bodies within the state, including state and local bodies, are subject to open-meeting requirements, whether the members are appointed or elected.¹⁵ Further, advisory boards without the authority to take action or to bind a decision-making entity, must comply with open-meeting requirements.¹⁶ Fact-finding committees that function solely to find facts and to report them, however, have an exception under open meetings requirements.¹⁷

Given the increasing reliance of government upon legislatively-created corporations, as well as private service-providers, to perform governmental services, the applicability of open meetings requirements to these entities may arise. The judiciary has found that the Sunshine Law is to be construed liberally in order to give the full effect of its purpose.¹⁸ The Sunshine Law has been held to apply to private entities created by law or a public agency. It also applies to private entities that provide services to governmental agencies on behalf of those agencies in the

¹⁵ *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).

¹⁶ *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Accord, Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988); *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 869 (Fla. 3d DCA 1994); *Lyon v. Lake County*, 765 So.2d 785 (Fla. 5th DCA 2000).

¹⁷ *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985).

¹⁸ *Wood v. Marston*, 442 So.2d 934 (Fla. 1983); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

performance of their public duties. Generally, a private organization is not subject to the Sunshine Law unless it has been delegated the authority to perform a governmental function.¹⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act²⁰ 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 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:

- 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 their safety; 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 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.²¹

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 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?

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

¹⁹ See, e.g., Inf. Op. to Fasano, June 7, 1996, where the Attorney General opined that the Sunshine Law does not apply to meetings of a homeowners' association board.

²⁰ Section 119.15, F.S.

²¹ Section 119.15(4)(b), F.S.

for passage are required.²² 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 created then a public necessity statement and a two-thirds vote for passage are not required.

Board of Funeral, Cemetery, and Consumer Services

Current law creates the Board of Funeral, Cemetery, and Consumer Services (board) within the Department of Financial Services (department).²³ The board consists of 10 members appointed for terms of four years.²⁴ The Governor may suspend and the Senate may remove any member for malfeasance or misfeasance, neglect of duty, incompetence, substantial inability to perform official duties, commission of a crime, or other substantial cause as determined by the Governor or Senate.²⁵ The board enforces the provisions of chapter 497, F.S., relating to funeral, cemetery, and consumer services.

Exemptions Under Review

In 2005, the Legislature created multiple exemptions for the board and the department.²⁶ Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.²⁷

Examination Development Meetings

Current law provides a public-meetings exemption for those portions of meetings of the board at which licensure examination questions or answers under chapter 497, F.S., are discussed.²⁸ The Public Records Act already provides a public-records exemption for examination questions and answer sheets of examination administered by a governmental agency for the purpose of licensure, certification, or employment.²⁹

Probable Cause Panel Meetings

Current law provides a public-meetings exemption for meetings of the probable cause panel of the board.³⁰ Current law also provides a temporary public-records exemption for records of exempt probable cause panel meetings. Those records are exempt from public-records requirements until 10 days after a determination regarding probable cause is made.³¹

²² Section 24(c), art. I of the State Constitution.

²³ Chapter 2004-31, L.O.F., codified as s. 497.101, F.S.

²⁴ Section 497.101(1) and (3), F.S.

²⁵ Section 497.101(4), F.S.

²⁶ Chapter 2005-162, L.O.F., codified as s. 497.172, F.S.

²⁷ Section 497.172(5), F.S.

²⁸ Section 497.172(1), F.S.

²⁹ Section 119.071(1)(a), F.S.

³⁰ Section 497.172(2)(a), F.S.

³¹ Section 497.172(2)(b), F.S.

Examinations, Inspections, and Investigations

Current law provides a public-records exemption for information held by the department pursuant to:

- A financial examination under chapter 497, F.S., until the examination is completed or ceases to be active.
- An inspection conducted under chapter 497, F.S., until the inspection is completed or ceases to be active.
- An investigation of a violation of chapter 497, F.S., until the investigation is completed or ceases to be active³² or until 10 days after a determination regarding probable cause is made.³³

However, such information remains confidential and exempt after the examination, inspection, or investigation is completed or ceases to be active if:

- The department submits the information to any law enforcement agency or other administrative agency for further examination or investigation. The information remains confidential and exempt until that agency's examination or investigation is completed or ceases to be active.
- Disclosure of the information would jeopardize the integrity of another active investigation or examination, reveal the identity of a confidential source, or reveal investigative or examination techniques or procedures.³⁴

Trade Secrets

Current law provides a public-records exemption for trade secrets as defined by the Uniform Trade Secrets Act³⁵ held by the department or board.³⁶

III. Effect of Proposed Changes:

Examination Development Meetings

The bill reenacts the public-meetings exemption. The bill also requires a recording to be made of all closed portions of meetings. No portion of the closed meeting may be off the record. The board must maintain the recordings.

³² For purposes of the exemption, an examination, inspection, or investigation is considered active so long as it is proceeding with reasonable dispatch and the department has a reasonable good faith belief that the examination, inspection, or investigation may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of an application for license or other approval required under chapter 497, F.S. (s. 497.172(3)(f), F.S.)

³³ Section 497.172(3)(a), (b), and (c), F.S.

³⁴ Section 497.172(3)(e), F.S.

³⁵ Section 688.002(4), F.S., defines "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

³⁶ Section 497.172(4), F.S.

The bill also creates a public-records exemption for such recordings. Therefore, the bill extends the Open Government Sunset Review repeal date for this exemption from October 2, 2010 to October 2, 2015. The bill provides a public necessity statement.

Probable Cause Panel Meetings

The bill reenacts the public-meetings exemption. The bill also requires a recording to be made of all closed portions of meetings. No portion of the closed meeting may be off the record. The board must maintain the recordings. Because the recording is a record of the closed meeting, it too would be protected from public disclosure until 10 days after a determination regarding probable cause is made.

Examinations, Inspections, and Investigations

The bill reenacts the public-records exemption.

Trade Secrets

The bill reenacts the public-records exemption.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains and expands existing public-records and public-meetings exemptions.

Vote Requirement

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. Because this bill expands existing exemptions, it requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly-created or expanded public-records or public-meetings exemption. Because this bill expands the current exemptions under review, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The board may incur a minor fiscal impact associated with recording closed portions of meetings.

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.)**CS by Banking and Insurance on April 7, 2010:**

This committee substitute differs from the bill in that it:

- Provides that closed meetings of the board must only be recorded, not recorded and transcribed;
- Expands the existing exemptions to also protect recordings of closed meetings; and
- Removes the permanent public-records exemption for photographs of dead human bodies held by the department.

B. Amendments:

None.