

**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 Committee on Ethics and Elections

BILL: SB 4

INTRODUCER: Ethics and Elections Committee

SUBJECT: Public records; ethics

DATE: January 18, 2013      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts		ee SPB 7008 as introduced
2.				
3.				
4.				
5.				
6.				

**I. Summary:**

Senate Bill 4 exempts,

- From public records requirements, written referrals to the Florida Ethics Commission from the Governor, the Department of Law Enforcement, a state attorney, or a United States Attorney, involving possible violations of the Code of Ethics for Public Officers and Employees and other breaches of the public trust, as well as Commission records relating to preliminary investigations, and,
- From the sunshine law, Commission proceedings involving determinations on referrals,

until such time as Commission determines that it will not investigate the referral, until it makes a probable cause determination after an investigation. Additionally, the records and proceedings can be made public at any point during the proceedings if the alleged violator requests in writing that such records and proceedings be made public.

This public records bill is linked to SB 2, which provides for certain officers to refer cases of possible violation to the Florida Ethics Commission, who in turn is able to initiate an investigation upon a supermajority vote.

The bill also provides that any complaint filed or referral made against a candidate on day of an election or during the 30 days immediately preceding the election must be based on personal knowledge or information other than hearsay.

This bill substantially amends section 112.324 of the Florida Statutes.

## II. Present Situation:

### **Public Records and Open Meetings Requirements**

The Florida Constitution specifies requirements for public access to government records and meetings. It provides every person 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 of persons acting on their behalf.<sup>1</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>2</sup> The Florida Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>4</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>5</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>6</sup> The Sunshine Law<sup>7</sup> requires all meetings of any board or Commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.<sup>8</sup>

Only the Legislature may create an exemption to public records or open meetings requirements.<sup>9</sup> Such an exemption must be created by general law and must specifically state the public

<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> FLA. CONST., art. I, s. 24(b).

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

<sup>6</sup> Section 119.07(1)(a), F.S.

<sup>7</sup> Section 286.011, F.S.

<sup>8</sup> Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Art. III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

<sup>9</sup> FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to

necessity justifying the exemption.<sup>10</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>11</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>12</sup>

### **Commission on Ethics**

The Commission on Ethics (Commission) is a non-paid, appointed body consisting of nine members.<sup>13</sup> The Commission serves as guardian of the standards of conduct for officers and employees of the state and of a county, city, or other political subdivision of the state.<sup>14</sup>

Current law establishes the duties and powers of the Commission.<sup>15</sup> Chief among these responsibilities is the duty to receive and investigate sworn complaints of violation of the code of ethics and of any other breach of the public trust,<sup>16</sup> including investigation of all facts and parties materially related to the complaint.

A county or municipality also has the authority to create a Commission on Ethics and Public Trust.

### **Exemptions Relating to Complaints of Violations**

The only way to initiate an ethics investigation under current law is by the filing of a sworn complaint; there is no referral process of suspected violations from other public officers.

Current law provides a public-records exemption for a complaint or any records relating to the complaint or to any preliminary investigation by the Commission or a Commission on Ethics and Public Trust established by a county or a municipality. The complaint and associated records are confidential and exempt from public-records requirements.<sup>17</sup> In addition, any proceedings regarding a complaint or preliminary investigation are exempt from public-meetings requirements. Such exemptions no longer apply when the:

- Complaint is dismissed as legally insufficient;
- Alleged violator requests in writing that the records and proceedings be made public; or

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anyone other than the persons or entities specifically designated in the statutory exemption (*see* Attorney General Opinion 85-62, August 1, 1985).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>12</sup> FLA. CONST., art. I, s. 24(c).

<sup>13</sup> Section 112.321(1), F.S.

<sup>14</sup> Section 112.320, F.S.

<sup>15</sup> *See* s. 112.322, F.S.

<sup>16</sup> As provided in s. 8(f), art. II of the State Constitution.

<sup>17</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

- Commission or Commission on Ethics and Public Trust determines whether probable cause exists to believe that a violation has occurred.<sup>18</sup>

### III. Effect of Proposed Changes:

Senate Bill 4 provides that:

- Written referrals and records relating to such referrals held by the Florida Ethics Commission, the Governor, the Department of Law Enforcement, or state attorneys, and records relating to any preliminary investigation of such referrals held by the Commission, are confidential and exempt from the public records provisions of s. 119.07(1) and s. 24(a), 46 Art. I of the State Constitution, and,
- Any proceeding of the Commission in which a determination regarding a referral is discussed or acted upon is exempt from the open meeting law in s. 286.011 and s. 24(b), Art. I of the State 56 Constitution, and s. 120.525

Such exemptions remain in place until the Commission determines that it will not investigate the referral or until it makes a probable cause determination pursuant to an investigation, at which time the records become public. Additionally, the records and proceedings can be made public at any point during the proceedings if the alleged violator requests in writing that such records and proceedings be made public.

This public records bill is linked to SB 2, which provides for the Governor, the Department of Law Enforcement, a state attorney, or a United States Attorney, to refer cases of possible violation of the Code of Ethics to the Florida Ethics Commission, who in turn is able to initiate an investigation upon a supermajority vote.

The bill also provides that any complaint filed or referral made against a candidate on day of an election or during the 30 days immediately preceding the election must be based on personal knowledge or information other than hearsay; currently, any complaints against candidates on the day of an election or the preceding 5 days is prohibited.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

##### **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 creates a new public records exemption, it requires a two-thirds vote for passage.

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<sup>18</sup> Section 112.324(2)(a), F.S.

**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 creates a new public records exemption, 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 bill will likely result in additional costs to the Florida Ethics Commission to process and dispose of referrals, depending on the number received and the complexity and scope of investigations and proceedings with respect to violations; such costs are indeterminate at this time.

**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.