

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 Governmental Oversight and Accountability

BILL: SB 7008

INTRODUCER: Banking and Insurance Committee

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

DATE: March 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Billmeier</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

I. Summary:

SB 7008 is the result of an Open Government Sunset Review (OGSR) by the Banking and Insurance Committee professional staff of the public-meeting exemption for portions of meetings of the Board of Funeral, Cemetery, and Consumer Services (“board”) at which licensure examination questions or answers are discussed. The exemption also includes the recording of the portion of the meeting that is closed for discussion of licensure examination questions or answers.

The board enforces provisions of Chapter 497, F.S., relating to funeral and cemetery services. It also has broad authority over licensure and examination of applicants for various licenses. That authority includes specifying the content of examinations for licensure, striking any examination question determined before or after an examination to be inappropriate, and specifying which national examinations shall or shall not be required or accepted in Florida.

Current law provides that those portions of meetings of the board at which licensure examination questions or answers are discussed are exempt from public meetings requirements. The closed meeting must be recorded, and no portion of the closed meeting may be off the record. The recording shall be maintained by the board. The recording of a closed portion of a meeting is exempt from public record requirements. These exemptions will expire on October 2, 2015, unless reenacted. This bill repeals the scheduled expiration of the public meetings exemption and takes effect on October 1, 2015.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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.¹ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.³

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 Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ 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.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public record" 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. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ 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 the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, 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.

⁸ 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. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released, to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹²

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹³ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁴
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁵ or
- It protects trade or business secrets.¹⁶

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida’s open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.¹⁷

The OGSR also requires specific questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁰

¹¹ Section 119.15, F.S. Section 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(a), F.S. The specified questions are:

- 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?

¹⁹ FLA. CONST., art. I, s. 24(c).

²⁰ Section 119.15(7), F.S.

Board of Funeral, Cemetery, and Consumer Services

Current law creates the Board of Funeral, Cemetery, and Consumer Services.²¹ The board enforces provisions of Chapter 497, F.S., relating to funeral and cemetery services. The board has broad authority over licensure and examination of applicants for various licenses including:

- Authority to determine any and all criteria for licensure;
- Authority to specify who may conduct practical examination;
- Authority to specify the content of examinations for licensure, both written and practical, and the relative weighting of areas examined, and grading criteria, and determination of what constitutes a passing grade;
- Authority to strike any examination question determined before or after an examination to be inappropriate for any reason;
- Authority to specify which national examinations or parts thereof shall or shall not be required or accepted regarding Florida licensure;
- Authority to determine time limits and substantive requirements regarding reexamination of applicants who fail any portion of a licensing examination; and
- Authority to determine substantive requirements and conditions relating to apprenticeships and internships, and temporary licensure pending examination.²²

Current law provides that those portions of meetings of the board at which licensure examination questions or answers are discussed are exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. The closed meeting must be recorded, and no portion of the closed meeting may be off the record. The recording shall be maintained by the board. The recording of a closed portion of a meeting is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. In 2010, the Legislature made the following findings when it created the public record exemption for portions of the meeting that are closed:

The Legislature finds that it is a public necessity to make exempt from public records requirements the recording generated during those portions of meetings of the Board of Funeral, Cemetery, and Consumer Services at which licensure examination questions or answers are discussed. The release of such recordings would compromise those discussions of the board which took place during a closed meeting and would negate the public meeting exemption. Further, current law already provides a public record exemption for licensure examination questions and answers. As such, release of the recording generated during those closed portions of meetings would compromise the current protections already afforded such questions and answers. Thus, the effective and efficient administration of the licensure examination process would be compromised without this exemption.²³

²¹ Section 497.101(1), F.S.

²² Section 497.103(1)(a)-(g), F.S.

²³ Chapter 2010-76, Laws of Florida, section 2.

The Department of Financial Services (Department) reports that it has never closed a meeting to discuss licensure examination questions and answers,²⁴ however, the Department plans to revise its examination in 2015, and it will be necessary to close one or more board meetings to discuss those changes. The Department recommends continuing the exemption so that applicants will not have advance notice of what will be included on the licensing examination.²⁵

The OGSR provides that an exemption may only be maintained if it serves an identifiable public purpose and is no broader than necessary to serve that purpose. The exemptions maintained in this bill could be found to allow the state “to effectively and efficiently administer a governmental program” and administration of the program “would be significantly impaired without the exemption.”²⁶ The examination and licensing functions of the Board of Funeral, Cemetery, and Consumer Services would be significantly impaired if this exemption is not continued.

III. Effect of Proposed Changes:

This bill continues the public-meeting exemption for portions of the board meetings at which licensure examination questions or answers are discussed by repealing the scheduled expiration of the exemption. The board continues to be required to record the closed meeting and maintain the recording. This bill also continues the public record exemption for the recording of the portion of the meeting that is closed for discussion of licensure examination questions or answers.

This bill takes effect October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill continues a current exemption but does not expand the scope of an existing public records exemption; therefore, a simple majority vote of the members present and voting in each house of the Legislature is required for passage.

C. Trust Funds Restrictions:

None.

²⁴ Open Government Sunset Review Questionnaire completed by the Department of Financial Services (on file with the Banking and Insurance Committee).

²⁵ Bill Analysis from Department of Financial Services, dated February 11, 2015.

²⁶ Section 119.15(6)(b)1., F.S.

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. Statutes Affected:

This bill substantially amends section 497.172 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

None.

B. Amendments:

None.