

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 Judiciary

BILL: SB 560

INTRODUCER: Senator Steube

SUBJECT: Public Meetings and Records/ Imminent Litigation

DATE: November 13, 2017 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Favorable
2.			GO	
3.			RC	

I. Summary:

SB 560 expands the current public meeting exemption that allows a governmental entity and its attorney to meet privately to discuss pending litigation. Under this bill, the governmental entity and its attorney may also meet to discuss “imminent litigation.” Litigation is defined to be imminent when the entity has received notice of a claim or demand by a party threatening litigation before a court of administrative agency.

For the meeting to be legal, the attorney must identify the name of the potential claimant or litigant at a public meeting, in addition to meeting other existing requirements. If the imminent litigation does not begin, the transcript of the private meeting must be made part of the public record after a reasonable time or when the underlying statute of limitations expires.

II. Present Situation:

Public Records and Open Meetings Requirements

Florida’s open government laws, written into the State Constitution and Florida Statutes, guarantee public access to government records and meetings.

The Florida Constitution

The Florida Constitution provides that the public may inspect or copy any public record made or received in connection with the official business of any governmental entity unless the record is exempted or specifically made confidential.¹ The public is also guaranteed the right to be notified and have access to meetings of any collegial public body of the executive branch of state

¹ FLA. CONST., art. I, s. 24(a).

government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless an exception is provided for in the Constitution.³

The Florida Statutes

Public Records Act

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., the Public Records Act, contains the main body of public records laws.⁴ The Act deals with public records access and guarantees every person's right to inspect and copy any state or local government public record, unless the record is confidential or exempt.⁵ A violation of the Public Records Act may result in civil or criminal liability.⁶

Sunshine Law

Section 286.011, F.S., which is often referred to as the state's Sunshine Law, 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 law requires governmental bodies to conduct business during open, public meetings. The law was enacted to ensure that the public interests are protected from "closed door" politics. To that end, the Sunshine law is to be broadly construed to effect its protective purpose⁸ in favor of open government.⁹ Exemptions to the law, however, must be narrowly construed.¹⁰

Public Records Exemptions

Only the Legislature may create an exemption to public records or open meeting requirements. An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law. The law must be passed by a two-thirds vote of each house of the Legislature.¹¹

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Additional public records laws are found throughout the Florida Statutes.

⁵ Section 119.011(12), F.S. The public records chapter does not apply to legislative records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁶ Section 119.10, F.S.

⁷ Section 286.011(1) and (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 provides that legislative committee meetings must be open and noticed to the public.

⁸ *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

⁹ *Brown v. City of Lauderhill*, 654 So. 2d 302 (Fla. 4th DCA 1995).

¹⁰ *Zorc v. City of Vero Beach*, 722 So. 2d 891, 897 (Fla. 4th DCA 1998).

¹¹ FLA. CONST., art. I, s. 24(c).

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.¹³ The Act requires that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.¹⁴

Exemption for Private Meetings with an Attorney

In 1993, the Legislature created an exemption to the public meeting requirements by allowing a private meeting between a governmental entity and its attorney.¹⁵ Specifically, a board or commission of a state agency or other specified authority¹⁶ and the chief administrative or executive officer of the entity may meet in private with the entity's attorney to discuss *pending litigation* that the entity is *presently* a party to before a court or administrative agency. All of the following conditions must be met for the meeting to be legal:

- The entity's attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- The entire session must be recorded by a certified court reporter during which no portion of the session may be off the record and the notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- The entity must give reasonable public notice of the time and date of the attorney-client session and name all persons who will be attending. The session must begin at an open meeting where it is announced by the chair the beginning and estimated length of the meeting and the names of the people attending. When the session ends, the meeting must be reopened and the chair must announce the termination of the session.
- The transcript must be made part of the public record when the litigation is concluded.

In 1998, the Attorney General rendered an opinion clarifying when litigation is pending.¹⁷ The opinion stated that the exemption for *pending litigation* does not apply "if no lawsuit has been filed even though the parties involved believe that litigation is inevitable." The opinion

¹² Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is 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 s. 119.15(2), F.S.

¹³ Section 119.15(3), F.S.

¹⁴ Section 119.15(6)(b), F.S. An exemption serves an identifiable purpose if it meets one of the stated requirements below and the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. The exemption must: (1) Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption; (2) Protect sensitive personal information that would be defamatory or damaging to someone's reputation 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 or (3) Protect confidential information of entities including, but not limited to, trade or business secrets.

¹⁵ Section 286.011(8), F.S., Ch. 93-232, s. 1, Laws of Fla.

¹⁶ Section 286.011(8), F.S. also lists other entities to include "any agency or authority of any county, municipal corporation, or political subdivision."

¹⁷ Op. Att'y Gen. Fla. 98-21(1998).

concluded that the Legislature, had it intended, could have extended the exemption to include impending or imminent litigation, but it chose not to make that extension.

As a result of this interpretation, governmental entities may not use this exemption to discuss settlement options or strategies tied to litigation that is *imminent* but not formally initiated by the filing of a complaint or petition. Even when a demand letter has been presented to a government entity who will soon be a defendant, the attorney may not meet privately with his or her governmental client. As a result, this inability to have preliminary discussions may have an adverse fiscal impact on a governmental entity because the opportunity to settle the case and reduce upcoming legal fees and costs is prohibited. If the client and attorney could meet and reach a settlement before a case is initiated, it could significantly reduce the billable hours the attorneys will have in the case, as well as discovery costs.

III. Effect of Proposed Changes:

This bill expands the current attorney-client public meeting exemption to allow a governmental entity to meet in private with its attorney to discuss “imminent” litigation that the entity is or may be a party to in the foreseeable future. Litigation is considered imminent when the entity has received notice of a claim or a demand by a party threatening litigation before a court or administrative agency.

The five requirements in current law discussed above must still be met for a private meeting to be legal. Additionally, the attorney must identify the name of the potential claimant or litigant at the public meeting where he or she states that he or she desires advice concerning the imminent or pending litigation. If imminent litigation does not begin, the transcript of the private meeting must be made part of the public record in a reasonable time after the matter is resolved or when the statute of limitations involved in the underlying claim expires.

Exemptions and expansions to public meetings and records laws must be supported by a statement of public necessity. This statement of public necessity notes that the private meeting is necessary to privately prepare for threatened litigation by obtaining legal advice, explore and develop relevant facts, and consider an early settlement or discuss other possible resolutions to make decisions that are better informed. It will also help ensure that governmental entities receive fair treatment during the judicial and administrative processes.

These new provisions are subject to review under the Open Government Sunset Review Act and will be repealed on October 2, 2023, unless reviewed and saved from repeal by reenactment of the Legislature.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

When a bill creates an exception to the public meeting law, it requires a favorable 2/3 vote of each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

By allowing a government entity to meet in private with its attorney to discuss imminent litigation, the bill may allow private parties to settle legal claims against a governmental entity without resorting to costly litigation.

C. Government Sector Impact:

The bill may reduce a governmental entity's legal fees by allowing claims to be resolved before they turn into lawsuits and are more costly. It may also give governmental entities more flexibility to resolve claims.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 286.011 of the Florida Statutes and creates an undesignated section of the Florida Law.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
