

STORAGE NAME: h0273.sgc.doc
DATE: December 11, 2001

**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 273 (PCB SA 02-02)
RELATING TO: Public Records and Meetings / Ethics
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 8 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) provides that an exemption from the requirements of the public records or public meetings laws may be created or *maintained* only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. The Act, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 112.324, F.S., provides a public records and meetings exemption regarding preliminary investigations concerning complaints of ethics violations filed with the Commission on Ethics. This section was certified by the Division of Statutory Revision for repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

This bill reenacts the public records and public meetings exemptions, with certain editorial and clarifying changes. The complaint and records relating to the complaint or to any investigation held by the Commission on Ethics or its agents, or a Commission on Ethics and Public Trust established by any county must be kept confidential and exempt. All proceedings relating to such investigation must be closed to the public. The public records and meetings exemptions no longer apply if the complaint is: dismissed as legally insufficient; until the alleged violator requests in writing that such records and proceedings be made public; or until the Commission on Ethics or a Commission on Ethics and Public Trust, determines, based on the investigation, whether probable cause exists to believe that a violation has occurred. **In addition, this bill removes the sentence that requires the repeal of the public records and public meetings exemptions.**

If these exemptions were repealed, the untimely release of such information could potentially be defamatory to individuals who are the subject of the complaint, or cause unwarranted damage to the good name or reputation of such individuals. These exemptions create a secure environment in which the commissions conduct their business.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes ☐ | No ☐ | N/A ☒ |
| 2. <u>Lower Taxes</u> | Yes ☐ | No ☐ | N/A ☒ |
| 3. <u>Individual Freedom</u> | Yes ☐ | No ☐ | N/A ☒ |
| 4. <u>Personal Responsibility</u> | Yes ☐ | No ☐ | N/A ☒ |
| 5. <u>Family Empowerment</u> | Yes ☐ | No ☐ | N/A ☒ |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records and Public Meetings Laws

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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.

In regard to public meetings, Article I, s. 24(b), Florida Constitution, provides that

[a]ll 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

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records and meetings from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article 1, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

With regard to public meetings, section 286.011, F.S., provides that

[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority or 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 made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or *maintained* only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, and 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:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. 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 information would injure the affected entity in the marketplace.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or “substantial amendment”¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.²

Section 112.324(1), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.³ Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.⁴

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 is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. 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 (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption can be in a separate bill.⁵

Chapter 112, F.S., Public Officers and Employees: General Provisions

Chapter 112, F.S., pertains to public officers and employees and is divided into eight parts. Part III is entitled “Code of Ethics for Public Officers and Employees.” Part III addresses issues such as

- Standards of conduct for public officers, employees of agencies, and local government attorneys;
- Voting conflicts;
- Public records;
- Contractual services; and
- The Commission on Ethics.

¹ An exemption is “substantially amended” if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

² Section 119.15(3)(d), F.S.

³ The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

⁴ Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

⁵ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

Section 112.311(1), F.S., provides the legislative intent and declaration of policy. It states that

[i]t is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

Section 112.311(2), F.S., provides that it is essential that government attract those citizens best qualified to serve and that the “public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public.”⁶

Section 112.320, F.S., Commission on Ethics; purpose

Section 112.320, F.S., creates the Commission on Ethics (Commission). The purpose of the Commission is to

serve as guardian of the standards of conduct for the officers and employees of the state, and of a county, city, or other political subdivision of the state . . . and to serve as the independent commission provided for in s. 8(f), Art. II of the State Constitution.

Section 8(f), Art. II of the State Constitution provides that

[t]here shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.

The Commission is made up of nine members, five of which are appointed by the Governor. No member may hold any public employment and each member must serve a two-year term.⁷ The members of the Commission must elect a chair from amongst them. The chair serves a one-year term.⁸

Section 112.324, F.S., Procedures on complaints of violations

Section 112.324, F.S., provides that upon an executed written complaint, signed under oath by any person, the Commission must investigate any alleged violation of chapter 112, part III, F.S., or any other alleged breach of the public trust within the Commission's jurisdiction, by a public officer or employee. Within five days after receipt of a complaint, a copy must be transmitted to the alleged violator. The Commission must undertake a preliminary investigation, of each legally sufficient complaint, in order to determine whether there is probable cause to believe that a violation has occurred.⁹ Upon completion of the preliminary investigation, if the Commission finds no probable cause then the Commission must dismiss the complaint with the “issuance of a public report to the complainant and the alleged violator, stating with particularity its reasons for dismissal of the

⁶ Section 112.311(6), F.S.

⁷ Section 112.321(1), F.S.; No member may serve more than two full terms in succession.

⁸ Section 112.321(2), F.S.

⁹ Section 112.324(2), F.S.

complaint.”¹⁰ If the Commission finds that probable cause exists, it must notify the complainant and the alleged violator in writing.

Any person who the Commission finds probable cause against may submit a written request for a public hearing and will be entitled to that hearing. The request must be received within 14 days following the mailing of the probable cause notification. The Commission may “on its own motion, require a public hearing, may conduct such further investigation as it deems necessary, and may enter into such stipulations and settlements as it finds to be just and in the best interest of the State.”¹¹ The Commission may, at its discretion, “dismiss any complaint at any stage of disposition should it determine that the public interest would not be served by proceeding further, in which case the commission shall issue a public report stating with particularity its reasons for dismissal.”¹²

Section 112.324(1), F.S.

In 1975, the Legislature revised the procedures regarding complaints of violations and provided that “all proceedings, the complaint and other records relating to the preliminary investigation, . . . including the dismissal of the complaint, shall be confidential either until the alleged violator requests in writing that such investigation and records be made public records or until the preliminary investigation is completed.”¹³ This provision was amended in 1997. Chapter 97-293, Laws of Florida (L.O.F.), expanded the exemption to include complaints, proceedings, and records of a Commission on Ethics and Public Trust established by a county.

Expansion of the exemption required a public necessity statement and triggered the repeal and review required by the Open Government Sunset Review Act of 1995. The 1997 Legislature found that it was a public necessity that information concerning individuals, who were under investigation for alleged violations of the ethics standards, be kept confidential and exempt because “[t]he release of such information could potentially be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals.”¹⁴ Additionally, the Legislature found that “[t]he exemption of this information would minimize the possibility of unnecessary scrutiny by the public or media of individuals under investigation and their families,” and would “create a secure environment in which the Commission on Ethics and Public Trust may conduct its business.”¹⁵

Robert Meyers, Executive Director of the Commission on Ethics and Public Trust of Miami-Dade County, has stated that the

preliminary proceedings and records should be protected until the Commission has something substantive to convey to the public. There are no beneficial impacts to repealing the exemption. If the complaints were open to public inspection at the date of filing, such information might be reported by the media and could conceivably prejudice the public against the alleged violator or unfairly tarnish the alleged violator’s reputation or standing in community.¹⁶

¹⁰ Section 112.324(2), F.S.

¹¹ Section 112.324(2), F.S.

¹² Section 112.324(10), F.S.

¹³ The Florida Senate Interim Project Report 2002-216, September 2001, Committee on Ethics and Elections.

¹⁴ Section 4, chapter 97-293, L.O.F.

¹⁵ *Id.*

¹⁶ Response to Senate Survey, July 19, 2001.

Commission on Ethics and Public Trust

At present, Miami-Dade County is the only county with an established Commission on Ethics and Public Trust. The county's Citizens' Bill of Rights provides that

[t]he County shall, by ordinance, establish an independent Commission on Ethics and Public Trust comprised of five members, not appointed by County Commission, with the authority to review, interpret, render advisory opinions and enforce the county and municipal code of ethics ordinances, conflict of interest ordinances, lobbyist registration and reporting ordinances, ethical campaign practices ordinances, when enacted, and *citizens' bill of rights*.

Section 2-1066, Art. LXXVIII, Dade County Code, creates and establishes an "independent agency and instrumentality of Metropolitan Dade County to be known as the 'Commission on Ethics and Public Trust.'" Section 2-1072, Art. LXXVIII, Dade County Code, provides the powers and duties of the Commission on Ethics and Public Trust (commission). The section provides that the commission is "empowered" to review, interpret, render advisory opinions and letters of instruction, and enforce the County and municipal

- Code of Ethics Ordinances;
- Conflict of Interest Ordinances;
- Lobbyist Registration and Reporting Ordinances; and
- Ethical Campaign Practices Ordinances.

Open Government Sunset Review Questionnaire

The House of Representatives Committee on State Administration sent out an Open Government Sunset Review Questionnaire in June 2001 to the Commission on Ethics regarding the public records and public meetings exemptions found in s. 112.324(1), F.S. The Commission stated that "[d]epending on the nature of information obtained during an investigatory proceeding, it could be sensitive, defamatory, apt to cause unwarranted damage to the good name or reputation of the public officer or employee under investigation."¹⁷

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts the public records and public meetings exemptions in s. 112.324, F.S. The complaint and records relating to the complaint or to any investigation held by the Commission on Ethics *or its agents*, or a Commission on Ethics and Public Trust established by any county¹⁸ must be kept confidential and exempt. The bill provides that the public records exemption now applies to agents of the Commission on Ethics. This is comfort language to reiterate that those working with the Commission on Ethics, while investigating an ethics complaint, are also covered by the exemption.

¹⁷ House Committee on State Administration Open Government Sunset Review Questionnaire, Response by Bonnie Williams, Executive Director for the Commission on Ethics, June 19, 2001.

¹⁸ "County" is defined as "any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred. Use of the word 'county' within the above provisions shall include 'board of county commissioners' of such county." Section 125.011(1), F.S. Miami-Dade County is the only county that has a Commission on Ethics and Public Trust.

All proceedings relating to such investigation must be closed to the public. The public records and meetings exemptions no longer apply once the complaint is: *dismissed as legally insufficient*; until the alleged violator requests in writing that such records and proceedings be made public; or until the Commission on Ethics or a Commission on Ethics and Public Trust, determines, based on the investigation, whether probable cause exists to believe that a violation has occurred. This bill expressly clarifies that a complaint is to be made public if it is dismissed as legally insufficient.

The bill also removes a generic reference to chapter 120, F.S., and replaces it with a more specific reference to s. 120.525, F.S. The generic reference to chapter 120, F.S., was to relieve the commissions from having to file a notice regarding a closed meeting as is required by s. 120.525, F.S. This bill simply states with specificity the exact statutory reference.

Additionally, this bill amends the catch line to include “public records and meetings exemptions,” makes editorial changes, deletes obsolete language, and removes the sentence that requires the repeal of the public records and public meetings exemptions.

If these exemptions were repealed, the release of such information could potentially be defamatory to individuals who are the subject of the complaint, or cause unwarranted damage to the good name or reputation of such individuals. These exemptions create a secure environment in which the commission conduct their business.

D. SECTION-BY-SECTION ANALYSIS:

See “Effect of Proposed Changes.”

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

STORAGE NAME: h0273.sgc.doc

DATE: December 11, 2001

PAGE: 10

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

Don Rubottom