

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 352

SPONSOR: Committee on Ethics and Elections and Senator Sanderson

SUBJECT: Ethics; public records and meeting exemption

DATE: November 26, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 352 re-enacts a public records/meeting exemption for all records and proceedings relating to ethics investigations by state or county ethics commissions until: the complaint of violation is dismissed as legally insufficient; the alleged violator requests that such materials be made public; or, the commission determines whether probable cause exists to believe that a violation occurred.

The bill also makes a number of technical and conforming changes.

This bill amends section 112.324, Florida Statutes.

II. Present Situation:

Senate Bill 352 is the culmination of an Ethics and Elections Committee interim project entitled, *Confidentiality of Ethics Complaints* (September 2001) (No. 2002-216).

The public records and public meetings exemption for complaints and preliminary investigations of alleged violations of the Code of Ethics for Public Officers and Employees will be automatically repealed on October 2, 2002, unless reviewed and reenacted by the Legislature pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Section 112.324, F.S., provides that a complaint¹ filed with the Commission on Ethics or a county Commission on Ethics and Public Trust, and all records and proceedings relating to the

¹ A 1988 federal court decision invalidated a Florida law prohibiting a person from disclosing information about his or her intent to file a complaint or the existence or content of any already-filed complaint. *Doe v. Gonzalez*, 723 F.Supp. 690 (S.D.Fla. 1988). The practical result of the court decision is that the Commission on Ethics is the only entity not allowed to

complaint, be confidential until the complaint is dismissed as legally insufficient, the alleged violator waives confidentiality, or the preliminary investigation is completed. The stated public purpose of this exemption when enacted by the Legislature was to protect the good name or reputation of an individual under investigation until such time as the allegations could be substantiated through an investigation and to allow the Commission to conduct its investigation free from unnecessary scrutiny by the public or media.

As part of the Open Government review process, section 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the “identifiable public purpose” or goal of the exemption? An “identifiable public purpose” is served if the exemption:
 - a. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
 - b. 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; or,
 - c. 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.
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

In addition, the exemption must be no broader than is necessary to meet the public purpose it serves. Finally, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

(1) What specific records or meetings are affected by the exemption?

The records embraced by the exemption include the complaint and all records and documents relating to the preliminary investigation, including the investigative report. In addition, the meeting at which the Commission makes a determination of probable cause is not an open meeting and only the complainant and respondent, along with their counsel, may attend. Once probable cause is determined, or when the Commission determines that a complaint is found legally insufficient, all records and documents which were confidential until that time become public.

(2) *Whom does the exemption uniquely affect, as opposed to the general public?*

The exemption uniquely affects the complainant, the alleged violator, and any witnesses involved in the preliminary investigation.

(3) *What is the identifiable public purpose or goal of the exemption?*

Chapter 97-293, L.O.F., stated the public purpose of the exemption when it was expanded to include records and meetings of local ethics commissions as follows:

The Legislature finds it a public necessity that information concerning individuals under investigation for alleged violations of the ethics standards be kept confidential and exempt from the public records law. The release of such information could potentially be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals. In addition, the Legislature finds it a public necessity that records be protected and meetings be closed to the public so that administration of the Commission...is not otherwise significantly impaired. The exemption of this information would minimize the possibility of unnecessary scrutiny by the public or media of individuals under investigation and their families, and will create a secure environment in which the Commission... may conduct its business.

There have been no significant changes during the past five years that would alter the public purpose of the exemption as stated above.

4) *Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so how?*

There is no means of obtaining most of the information other than through the Commission on Ethics or the local commission. The complaint, however, could be obtained from the complainant, provided he or she wanted to make it available.

The Open Government Sunset Review Act allows an exemption to be maintained only if it serves an identifiable public purpose. This exemption appears to serve not just one but two of the three identifiable public purposes outlined in the Act. See *infra* p. 2 (identifying specific purposes). It allows the Commission on Ethics or a local commission to conduct the investigation free from interference and scrutiny from the media, the accused violator, and the complainant. In addition, the exemption protects the accused from potential unwarranted damage to his or her good name or reputation until such time as the allegations are substantiated through an investigation and probable cause determination.

III. Effect of Proposed Changes:

Senate Bill 352 re-enacts a public records/meeting exemption for all records and proceedings relating to ethics investigations by state or county ethics commissions until: the complaint of violation is dismissed as legally insufficient; the alleged violator requests that such materials be made public; or, the commission determines whether probable cause exists to believe that a violation occurred.

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IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.