

# 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: CS/SB 3006

SPONSOR: Ethics and Elections Committee and Senator Cowin

SUBJECT: Public Records; Campaign Finance

DATE: April 8, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Rubinas</u>	<u>EE</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This Committee Substitute is linked to Committee Substitute for Senate Bill 3004, which creates an electronic filing system for campaign finance reports filed with the Division of Elections.

Committee Substitute for Senate Bill 3006 creates a public records exemption for user identifications, passwords, and other identifying information assigned to authorized users by the Department of State for limiting access to the electronic filing system. The bill also creates a temporary public records exemption for all records, reports, and files electronically stored in the system as a result of periodic data submissions by reporting groups throughout the reporting period, which are made available to the public on the statutory due date for submitting a report of all unreported financial activities for the reporting period.

Article I, s. 24(c), Fla. Const., requires a two-thirds vote of each house for passage of a newly created public records or public meetings exemption. If enacted by such vote, the bill takes effect upon becoming law, provided CS/SB 3004 or similar bill creating the electronic filing system is also enacted into law.

This bill creates section 106.0706 of the Florida Statutes.

## II. Present Situation:

### A. Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida

Legislature in 1909.<sup>1</sup> In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, expresses Florida=s public policy regarding access to public records by providing that:

(a) 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 addition to the State Constitution, the Public Records Law<sup>3</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

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

The Public Records Law states that, unless specifically exempted, all agency<sup>4</sup> records are to be available for public inspection. The term “public records” is broadly defined 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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<sup>1</sup> Chapter 5942, L.O.F. (1909).

<sup>2</sup> Article I, s. 24 of the State Constitution

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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 Florida Constitution also establishes a right of access to any public record 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 those records exempted by law or the State Constitution.

<sup>5</sup> Section 119.011(1), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits only the Legislature the authority to create exemptions to public records requirements.<sup>8</sup> Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>9</sup> Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>10</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>11</sup> If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>12</sup>

The Open Government Sunset Review Act of 1995<sup>13</sup> states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. The three statutory criteria are if 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 would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>14</sup>

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<sup>8</sup> Article I, s. 24(c) of the State Constitution.

<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

<sup>10</sup> Article I, s. 24(c) of the State Constitution.

<sup>11</sup> Attorney General Opinion 85-62.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>13</sup> Section 119.15, F.S.

<sup>14</sup> Section 119.15(4)(b), F.S.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.<sup>15</sup> The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes explicit that:

... notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.<sup>16</sup> For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.<sup>17</sup> The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.<sup>18</sup>

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

## **B. Filing of Periodic Campaign Finance Reports**

Florida law requires many candidates, political committees supporting or opposing certain candidates or statewide ballot issues, committees of continuous existence (“CCEs”), and certain

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<sup>15</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

<sup>16</sup> *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1<sup>st</sup> DCA 1985).

<sup>17</sup> *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4<sup>th</sup> DCA 1999).

<sup>18</sup> *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2<sup>d</sup> DCA 1990).

individuals<sup>19</sup> to file periodic reports of their financial activities with the Division of Elections on paper forms provided by the division. The exact information that must be included on each report and the reporting dates vary, depending on the status of the reporting group or individual.<sup>20</sup> Florida law is consistent, however, in providing that reports submitted to the Division must include all previously unreported contributions received and expenditures made as of the preceding Friday, except that the report filed on the Friday immediately preceding an election must contain all previously unreported contributions and expenditures as of the date preceding the designated due date (the Thursday immediately preceding the election).<sup>21</sup>

### III. Effect of Proposed Changes:

This public records bill is linked to CS/SB 3004, creating a mandatory electronic filing system for all periodic campaign finance reports by candidates, state political parties, political committees, CCEs, and other groups or individuals required to file with the division.

The bill creates public records exemptions for:

- **Security/Identification:** exempts from public records all user identifications, passwords, and other identifying information used by the Department of State to limit unauthorized access to the electronic filing system.
- **Periodic Data Submission:** temporarily exempts all records, reports, and files submitted in advance of the statutory report filing date by a reporting group or individual and stored electronically in the system as an updated draft version of the final report to be submitted. This bill does require, however, that the exemption ceases when reports are periodically subject to filing deadlines.

The bill also provides for automatic repeal of the exemption in s. 106.0706, F.S., on October 2, 2009, unless reenacted by the Legislature.

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<sup>19</sup> Individuals making “independent expenditures” with respect to candidates or issues aggregating \$100 or more must report their expenditures in the same manner as political committees supporting or opposing such candidates or issues. Section 106.071(1), F.S.

<sup>20</sup> For example, legislative candidates, political committees, and CCEs required to file with the division do so on a quarterly basis, with the report due on the 10<sup>th</sup> day following the end of each calendar quarter. Section 106.07(1), F.S. Reporting frequency increases after the last day of qualifying (periodic reporting dates during the election season are on the 32<sup>nd</sup>, 18<sup>th</sup> and 4<sup>th</sup> days immediately preceding the first primary election, and on the 18<sup>th</sup> and 4<sup>th</sup> days immediately preceding the second primary and general election). *Id.* Most other groups and individuals required to file with the division must do so on the same reporting schedule. *See ss.* 106.04(4)(b)1., F.S. (reporting dates for CCEs); 106.071(1), F.S. (reporting dates for persons making independent expenditures of \$100 or more). The state executive committee of a political party follows the same quarterly off-season reporting schedule (on the 10<sup>th</sup> day following the end of each calendar quarter), but is only required to file on the Friday immediately preceding a primary or general election after the close of state candidate qualifying. Section 106.29(1), F.S., (reporting dates for state executive committee of a political party). All reports must be filed by 5 p.m. on the designated due date; reports in envelopes with postmarks from the U.S. Postal Service through midnight of the designated due date, however, are deemed timely filed. Section 106.07(2), F.S.

<sup>21</sup> Section 106.07(2), F.S.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

See above.

## 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:**

This public records bill is linked to CS/SB 3004, which creates s. 106.0705 mandating the electronic filing of periodic campaign finance reports.

**VIII. Amendments:**

None.