

# 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.)

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Prepared By: Judiciary Committee

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BILL: CS/SB 1438

INTRODUCER: Governmental Oversight and Productivity Committee and Senator Argenziano

SUBJECT: Custodial Requirements for Public Records

DATE: March 28, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	<b>Fav/CS</b>
2.	Maclure	Maclure	JU	<b>Favorable</b>
3.			WM	
4.			RC	
5.				
6.				

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## I. Summary:

The bill clarifies custodial requirements for public records. It places subheadings in the section of the Public Records Law which establishes custodial requirements for public records. It also clarifies that the custodian of public records that are confidential and exempt, as opposed to records that are only exempt, may not release those records except as provided in statute or by court order. Although this clarification is the standard contained in case law, some confusion exists because some statutes making records confidential and exempt expressly state that the custodian may not release the confidential and exempt record except as provided in law, while other statutes do not. The bill makes it clear that same standard applies to each exemption that is confidential and exempt by expressly stating this standard in the Public Records Law.

The bill further specifies that an agency or other governmental entity that is authorized to receive a confidential and exempt record is required to maintain the record's confidential and exempt status. Maintaining the confidential and exempt status is consistent with limiting the release of the record.

The bill further clarifies that the provision does not limit access to any record by an agency or entity acting on behalf of a custodian, by the Legislature, or pursuant to court order.

This bill amends section 119.021, Florida Statutes.

## II. Present Situation:

### Public Records Law

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 1892.<sup>1</sup> In 1992, Floridians amended the State Constitution to raise 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 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 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. Under s. 119.07(1)(a), F.S.:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

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>

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<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."

<sup>5</sup> Section 119.011(11), F.S.

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>

The State Constitution permits only the Legislature the authority to create exemptions from public records requirements.<sup>8</sup> Article I, s. 24(c) 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>

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.<sup>11</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>12</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>13</sup>

In *B.B. v. Dep't of Children and Family Services*, the Court noted the following with regard to criminal discovery:

In the context of a criminal proceeding, the first district has indicated that “the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure,” so that a public records exemption cannot limit a criminal defendant’s access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), “we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure.” Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).<sup>14</sup>

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

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

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

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

<sup>10</sup> Art. I, s. 24(c), State Constitution.

<sup>11</sup> *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985).

<sup>12</sup> *B.B. v. Dep't of Children and Family Services*, 731 So. 2d 30 (Fla. 4th DCA 1999).

<sup>13</sup> *Department of Highway Safety and Motor Vehicles v. Krejci Co., Inc.*, 570 So. 2d 1322 (Fla. 2d DCA 1990).

<sup>14</sup> *B.B.*, 731 So. 2d at 34.

In a footnote, the Court also said:

We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is “not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution....”

Under s. 119.10, F.S., any public officer violating any provision of the Public Records Law 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.

### **Confidential and Exempt Records**

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential.<sup>15</sup> If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, the record may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>16</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>17</sup>

In *Ragsdale v. State*,<sup>18</sup> the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,<sup>19</sup> a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative

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<sup>15</sup> *WFTV, Inc., v. School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004).

<sup>16</sup> *Id.*; see also Attorney General Opinion 85-62.

<sup>17</sup> *WFTV*, 874 So. 2d at 54; see also *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So. 2d 289 (Fla. 1991).

<sup>18</sup> 720 So. 2d 203 (Fla. 1998).

<sup>19</sup> 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994).

information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.<sup>20</sup>

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

### **Custodial Requirements**

The Public Records Law imposes duties on custodians of public records. In particular, s. 119.021, F.S.:

- Prescribes the manner in which a custodian of public records must maintain and preserve the records;
- Provides for the Division of Library and Information Services of the Department of State to adopt rules governing retention schedules and a disposal process for public records;
- Requires agencies to maintain records of orders that comprise final agency action; and
- Requires an agency entitled to custody of public records to demand them from persons who have illegal possession of the records.

### **III. Effect of Proposed Changes:**

This bill clarifies the custodial requirements for public records as prescribed in s. 119.021, F.S. In particular, the bill clarifies that the custodian of public records that are confidential and exempt, as opposed to records that are only exempt, may not release the record except as provided in statute or by court order. This clarification is the standard contained in case law, but some confusion exists because some statutes making records confidential and exempt expressly state that the custodian may not release the confidential and exempt record except as provided in law, while other statutes do not. The bill makes it clear that same standard applies to each exemption that is confidential and exempt by expressly stating this standard in the Public Records Law.

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<sup>20</sup> *Ragsdale*, 720 So. 2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

The bill further specifies that an agency or other governmental entity that is authorized to receive a record that is confidential and exempt is required to maintain the record's confidential and exempt status. Maintaining the confidential and exempt status of the record is consistent with limiting the release of the record. The records custodian may require the recipient agency to acknowledge these conditions in a written release.

The bill further clarifies that these new provisions do not limit access to any record by an agency or entity acting on behalf of a custodian, by the Legislature, or pursuant to a court order.

Lastly, for organizational clarity, the bill places topical subheadings into the relevant statutory section.

The bill is effective July 1, 2006.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

The bill does not create an exemption from public records requirements. Rather, it adds language to the Public Records Law regarding custodial requirements for public records that are already made confidential and exempt in other provisions of statute.

##### **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.

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

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## **VIII. Summary of Amendments:**

None.

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