

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 Judiciary Committee

BILL: CS/SB 2484

INTRODUCER: Judiciary Committee and Senator Posey

SUBJECT: Public Records/Discrimination Complaints

DATE: March 27, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Fav/CS
2.			CA	
3.			GO	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Current law provides a public-records exemption for all complaints and other records in the custody of an executive branch agency which relate to a complaint of discrimination in hiring and other personnel practices. This bill transfers the exemption to a different location in the Florida Statutes and expands it to apply to the same discrimination-complaint records when in the custody of *any* agency as that term is broadly defined under the public-records law (ch. 119, F.S.). The bill provides for the future review and repeal of the revised public-records exemption and provides a statement of public necessity.

This bill substantially amends section 119.071; transfers section 119.0711(1); and conforms section 338.223, Florida Statutes.

II. Present Situation:

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides 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 Act,³ which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

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.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" 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.⁵

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ 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.

⁵ 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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

The Open Government Sunset Review Act¹² provides for the systematic review, through a five-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The act states that an exemption may be created, revised 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. An exemption meets the three statutory criteria if it:

- (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.¹³

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

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

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *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, 569 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

Public-Records Exemption for Complaints of Discrimination

Current law provides a public-records exemption for all complaints and related records in the custody of an executive branch state agency which concern a complaint of discrimination relating to race, color, religion, sex, national origin, age, handicap, or marital status *in connection with* hiring practices, position classifications, salary, benefits, discipline, discharge, employee performance, evaluation, or other related activities.¹⁴ The records remain confidential and exempt until a finding is made relating to probable cause, the investigation of the complaint becomes inactive, or the complaint or other record is made part of the official record of any hearing or court proceeding.¹⁵ Further, all records relating to an allegation of employment discrimination are confidential and exempt from public-records requirements when the alleged victim chooses not to file a complaint and requests that the complaint records remain confidential.¹⁶

Current law also provides a public-records exemption for all complaints and related records in the custody of any unit of local government which concern a complaint of discrimination relating to race, color, religion, sex, national origin, age, handicap, marital status, sale or rental of housing, the provision of brokerage services, or the financing of housing.¹⁷ As written, the exemption for units of local governments appears to be broader than the exemption for executive branch state agencies, in that the identified discrimination grounds in the local government exemption are not specifically linked to hiring practices or similar personnel matters, but rather appear to apply generally. The records remain confidential and exempt until a finding is made relating to probable cause, the investigation of the complaint becomes inactive, or the complaint or other record is made part of the official record of any hearing or court proceeding.¹⁸

There is not currently a general exemption relating to discrimination complaints which is applicable to *all* agencies under ch. 119, F.S. The definition of “agency” under the public records law captures a broader array of organizations and entities beyond solely executive branch state agencies or units of local government.¹⁹

III. Effect of Proposed Changes:

This bill revises²⁰ an existing public-records exemption for complaints and related records held by agencies in the executive branch which concern allegations of discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status in connection with hiring and other personnel practices. The bill expands the exemption to provide the same confidential-and-exempt status to discrimination complaints and related records held by *any* agency as defined under ch. 119, F.S. In this manner, the bill applies the public-records

¹⁴ Section 119.0711(1), F.S.

¹⁵ *Id.*

¹⁶ Section 119.071(2)(g), F.S.

¹⁷ Section 119.0713(1), F.S.

¹⁸ *Id.*

¹⁹ See note 4, *supra*, for the definition of “agency” under s. 119.011, F.S.

²⁰ The bill transfers the existing exemption from s. 119.0711(1), F.S., to a new paragraph (g) within s. 119.071(2), F.S., thereby merging the exemption with existing provisions governing confidentiality of employment-discrimination complaint records upon the request of the alleged victim. Under the terms of the bill, both of these provisions would stand repealed on October 2, 2013, unless reviewed and saved from repeal under the Open Government Sunset Review Act.

exemption for discrimination complaints to the broad array of governmental and quasi-governmental organizations, as well as private corporations acting on behalf of public agencies, that are currently governed by the public records law but are not within the executive branch of state government.²¹ The bill retains the qualification in existing law that the discrimination-complaint records are confidential and exempt until a probable cause finding is made, the investigation is no longer active, or the record becomes part of the official records of hearing or court proceeding.

Because the definition of “agency” under s. 119.011(2), F.S., includes units of local government, this bill would apply the exemption for discrimination complaints and related records to them. The revised public-records exemption – which relates to discrimination in hiring and other personnel practices – would, therefore, be supplemental to a public-records exemption that currently applies to local government under s. 119.0713(1), F.S., and appears to cover discrimination complaints generally, as well as discrimination in housing rentals or sales, brokerage services, and housing finance.

Under the bill’s terms, the expanded public-records exemption expires on October 2, 2013, unless it is saved from repeal through reenactment by the Legislature after being reviewed under the Open Government Sunset Review Act.

Finally, the bill conforms a statutory cross-reference contained in s. 338.223(2)(b), F.S.

The bill provides an effective date of upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public-records or public-meetings exemption. The bill expands an existing public-records exemption applicable to executive branch agencies to include all agencies under ch. 119, F.S. Because the bill substantially amends an existing exemption in a manner that makes records exempt when in the custody of more agencies, it appears to be equivalent to a new exemption and to therefore require a two-thirds vote for passage.

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity for a newly created public records or public meetings exemption. The bill includes a public-necessity statement, finding that the exemption is necessary to avoid defaming an individual through the release of records during a pending investigation of discrimination.

²¹ See note 4, *supra*, for the definition of “agency” under ch. 119, F.S.

C. Trust Funds Restrictions:

None.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill likely may create a minimal fiscal impact on agencies, because staff responsible for complying with public-records requests could require training related to the expansion of the current public-records exemption. In addition, agencies may incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agency.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 25, 2008:

The committee substitute differs from the underlying bill by:

- Codifying the public-records exemption for complaint records held by all agencies in a different paragraph within s. 119.071(2), F.S., than the underlying bill; and
- Leaving in place, and distinct from the public-records exemption addressed by the bill, an existing public-records exemption under s. 119.0713(1), F.S., for certain discrimination-complaint records held by units of local government.

B. Amendments:

None.

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