



access to public records to a constitutional level.<sup>2</sup> 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,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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.<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>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(11), 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).

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act (Act)<sup>14</sup> 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.

### Criteria for Exemption

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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- 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>15</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, 569 (Fla. 1999).

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

<sup>11</sup> Article I, s. 24(c) of the State Constitution.

<sup>12</sup> Florida Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5<sup>th</sup> DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

The Act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>16</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8)(e), F.S., makes explicit that:

notwithstanding s. 768.28 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 an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Unauthorized Disclosure**

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that subsection, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates 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.

### **Organ and Tissue Donor Registry**

Currently, part V of ch. 765, F.S., provides for a donor registry that is maintained by the Agency for Health Care Administration (AHCA). It includes donor information that is submitted directly to the AHCA and donor information received from the Department of Highway Safety and Motor Vehicles (DHSMV).

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<sup>16</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Personal information contained in a motor vehicle record that identifies an individual is confidential and exemption from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The restriction on disclosure is not in any way to affect the use of organ donation information on individual driver licenses or affect the administration of organ donation initiatives in this state.<sup>17</sup> However, currently there is no exemption from the public records provisions for records in the registry that may not have originated in motor vehicle records.

### III. Effect of Proposed Changes:

**Section 1.** Creates s. 765.5155, F.S.,<sup>18</sup> to provide that information held in the organ and tissue donor registry which identifies a donor is confidential and exempt. The bill authorizes disclosure of such information to certified organ, tissue, and eye procurement organizations for the purpose of ascertaining or effectuating the existence of an anatomical gift.

The bill provides that the amendments made by this act are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and provides that the public-records exemptions will stand repealed on October 1, 2013, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2.** Creates an undesignated section of law providing justification of public necessity for the exemption. If personal identifying information that is in the registry is publicly available, it could:

- Be used to invade the donor's personal privacy,
- Hinder the effective and efficient administration of the organ and tissue donation program,
- Potentially deter donations and thereby reduce the availability of organs, tissues, and eyes, and
- Be used to solicit, harass, stalk, or intimidate donors.

Accordingly, the harm that would result from the release outweighs any public benefit that might result from the disclosure.

**Section 3.** Provides that this public records exemption takes effect on the same date that SB 2630 takes effect. SB 2630 is to take effect on July 1, 2008.

### IV. Constitutional Issues:

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

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

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<sup>17</sup> Section 119.0712(2)(d), F.S.

<sup>18</sup> SB 2630 also creates s. 765.5155, F.S., which establishes an online organ and tissue donor registry to be developed, implemented, and maintained by a contract provider.

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

The provisions of this bill conform to the public records requirements of Article I, Section 24(a) and (b) of the Florida Constitution as discussed in the analysis.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Information that identifies an organ or tissue donor will be protected from public access and disclosure.

**C. Government Sector Impact:**

The DHSMV and the AHCA will need to assure that neither of these agencies or the contract provider disclose personal identifying information in violation of this provision or the provisions of SB 2630 that allow for limited access by organ, tissue, and eye procurement organizations and bona fide researchers.

**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 Governmental Operations on April 3, 2008:**

The committee substitute incorporates a traveling amendment which inserts the linked bill number, SB 2630, into this bill.

**B. Amendments:**

None.

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

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