

**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.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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**BILL:** SPB 7034

**INTRODUCER:** For consideration by the Governmental Oversight and Accountability Committee

**SUBJECT:** Public Records, Exemptions for Archival Materials

**DATE:** February 12, 2009      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson		<b>Pre-meeting</b>
2.				
3.				
4.				
5.				
6.				

**I. Summary:**

Section 257.38, F.S., makes manuscripts or other archival materials donated to an official archive of a municipality or county confidential and exempt from public records requirements. This section was certified by the Division of Statutory Revision as being subject to open government sunset review and the exemption will repeal without legislative action to save it. The bill also retains the local government archive exemption, and merges it with an existing exemption for materials held by the Florida State Archives.

This bill substantially amends sections 257.35 and 257.38 of the 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.<sup>1</sup> 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.<sup>2</sup> Article I, s. 24(a) of the State Constitution, provides that:

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

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

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

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, 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 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.

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>

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>

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<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).

<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).

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<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. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.

The act 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. 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.<sup>15</sup>

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?

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<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> Art. I, s. 24(c) of the State Constitution.

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

<sup>13</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>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(4)(b), F.S.

- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) 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(4)(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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

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 section, 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 penalty, 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.

The Open Government Sunset Review Act provides for the review and repeal of public records exemptions in the 5th year after their enactment.<sup>17</sup> By letter dated, May 19, 2008, the Division of Statutory Revision of the Office of Legislative Services certified that s. 257.38, F.S., was subject to repeal October 2, 2009, unless reenacted during the 2009 legislative session.

**The Florida State Archives-** Section 257.35(1), F.S., creates the Florida State Archives within the Division of Library and Information Services of the Department of State for the preservation of public records, manuscripts, and other archival material. Section 257.35(1)(b), F.S., contains an exemption for the Florida State Archives. That exemption contains two parts. The first provides that any public record transferred to the division is subject to the provisions of s. 119.07(1), F.S., except that any public record or other record provided by law to be confidential or prohibited from being inspected must be made accessible only after a period of 50 years from the date of the creation of the record. The second portion of s. 257.35(1)(b), F.S., exempts:

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

<sup>17</sup> Section 1390, 1391 F.S. (Rev. 1892).

. . . any nonpublic manuscript or other archival material which is placed in the keeping of the division under special terms and conditions, shall be made accessible only in accordance with such law terms and conditions and shall be exempt from the provisions of s. 119.07(1) to the extent necessary to meet the terms and conditions for a nonpublic manuscript or other archival material.

**Archival Material Held by Local Governments-** Section 257.38, F.S.,<sup>18</sup> states:

A manuscript or other archival material that is donated to and held by an official archive of a municipality or county contingent upon special terms and conditions that limit the right to inspect or copy such manuscript or other material, but which manuscript or archival material is not otherwise made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except as otherwise provided in the special terms and conditions. However, a manuscript or other archival material received under special terms and conditions as provided by this section shall be made available for inspection and copying 50 years after the date of the creation of the manuscript or other archival material, at an earlier date specified in the special terms or conditions, or upon a showing of good cause before a court of competent jurisdiction.

The stated public necessity for exempting donated archival and other information is based upon a legislative finding that private manuscripts or other archival material “ may be of important historical interest” to a county or municipality and “should be preserved in the public interest.” The public necessity statement notes

. . . The diaries of prominent historical figures, manuscripts of important writers, and personal effects of significant persons are examples of the types of archival material that could be placed in an official municipal or county archive. A private donor often makes the donation of such manuscripts or other material contingent upon special terms and conditions in order to protect private facts during the lifetime of the donor or during the lifetime of another person. If a municipal or county archive is unable to comply with the special terms and conditions, a potential donor would be unlikely to donate manuscripts or other material that is of significant archival value to the municipality or county. As a result, important historical information could be lost to the public.

The statement of public necessity also notes that special terms and conditions will not forever preclude the ability of the public to inspect and copy such manuscripts or other archival material and that the interests of the donor and the public are protected by limiting such special terms and conditions to 50 years following the date of the creation of the manuscript or other material. Such a limitation helps to protect private facts during the lifetime of an affected person and

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<sup>18</sup> Senate Bill 1626 by Senator Margolis (HB 1031) passed the Senate 40-0 on April 14, 2004; it passed the House 108-0 on April 30, 2004. The Governor approved the bill on May 12, 2004. Chapter 2004-50, L.O.F.

ensures the preservation of manuscripts and material beneficial to the public, while ultimately preserving public access.

Current law, however, does not define the term “official archive” for local governments. Further, it is unclear how many archives there are at the local level or how many of these archives might be “official archives.” Nevertheless, a number of local government entities have what they consider to be official archives and, while small in number, they benefit from the existence of the exemption under review.

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

The bill moves the current records exemption relating to materials held by the Florida State Archives from s. 257.35(1)(b) to s. 257.38, F.S. Section 257.38, F.S., will then specify the public records exemptions for materials held by both the Florida State Archives, and the reenacted public records exemption for nonpublic manuscripts or other archival materials held by local government archives.

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

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

None.

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

This bill is the result of Open Government Sunset Review. *See*, Interim Project Review 2009-211. The exemption under review in s. 257.38, F.S., appears to meet the requirements for retaining the exemption.

The review process for public records exemptions in s. 119.15, F.S., requires an inquiry into whether there are multiple exemptions for the same type of record or meeting that it would be appropriate to merge. Merging the exemption in s. 257.35(1)(b), F.S., with the retained exemption in s. 257.38, F.S., will reduce the number of exemptions.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

None.

C. Government Sector Impact:

None.

**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.)

None.

B. Amendments:

None.