

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405

Public Meetings

SPONSOR(S): Kiar

TIED BILLS:

IDEN./SIM. BILLS: SB 138

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee		Williamson	Williamson
2)	Civil Justice & Courts Policy Committee			
3)	Economic Development & Community Affairs Policy Council			
4)				
5)				

SUMMARY ANALYSIS

In the absence of a legislative exemption, discussions between a public board and its attorney are subject to open meetings requirements.

Current law provides a public meeting exemption for certain discussions by a public board or commission and the chief administrative or executive officer of the governmental entity. Such board or commission and the chief administrative or executive officer may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided certain conditions are met. Only the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present.

The bill amends the public meeting exemption to allow the risk manager and division heads of a governmental entity to attend the closed meeting if such manager or division head is identified by the chief administrative or executive officer as being involved in pending litigation. It requires a person attending the closed attorney-client session to agree not to disclose any part of the discussion that took place during such session until conclusion of the litigation, unless ordered by a court. The bill also prohibits a person who is an adverse party of the litigation from attending the closed attorney-client session. That means a staff person or member of the board or commission who currently is legally authorized to attend a closed attorney-client session may be prohibited from attending future closed sessions if such person or member is an adverse party to the litigation being discussed.

The new prohibitions created by the bill related to attendance at closed attorney-client sessions appear to serve as an expansion of the current public meeting exemption. As such, it appears the bill requires a public necessity statement and a two-thirds vote for final passage as mandated by the State Constitution. In addition, bills creating or expanding a public record or public meeting exemption typically provide for future review and repeal of the exemption pursuant to the Open Government Sunset Review Act. This bill does not provide such provision.

Finally, the bill reorganizes the exemption and provides editorial changes.

The bill does not appear to create a fiscal impact on state or local governments.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Open Meetings Laws

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of the executive branch and local government be open and noticed to the public. The Legislature may, however, provide by general law for the exemption of meetings from the requirements of Article I, s. 24(b) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its stated purpose. In addition, the State Constitution requires enactment of the exemption by a two-thirds vote of the members present and voting.<sup>1</sup>

Public policy regarding access to public meetings is addressed further in the Florida Statutes. Section 286.011, F.S., requires that all state, county, or municipal meetings be open and noticed to the public. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

##### Attorney-Client Meetings

In the absence of a legislative exemption, discussions between a public board and its attorney are subject to s. 286.011, F.S.<sup>3</sup>

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> Section 119.15, F.S.

<sup>3</sup> *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, F.S., which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings; application of the Sunshine Law to the discussions of a public commission with its attorney does not usurp the constitutional authority of the Supreme Court to regulate the practice of law, nor is it at odds with Florida Bar rules providing for

Current law provides a public meeting exemption for certain discussions by any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity. Such board or commission and the chief administrative or executive officer may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

- The attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- The entire closed session must be recorded by a certified court reporter, including the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking.<sup>4</sup>
- The entity must give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session must commence at an open meeting at which the persons chairing the meeting must announce the commencement and estimated length of the attorney-client session and the names of the persons attending.<sup>5</sup>
- The transcript must be made part of the public record upon conclusion of the litigation.<sup>6</sup>

Only the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present.<sup>7</sup> However, because the entity's attorney is permitted to attend the closed session, if the entity hires outside counsel to represent it in pending litigation, both the entity's attorney and the litigation attorney may attend a closed session.<sup>8</sup>

Finally, qualified interpreters for the deaf are treated by the Americans with Disabilities Act as auxiliary aids in the nature of hearing aids and other assistive devices and may attend litigation strategy meetings of a board or commission to interpret for a deaf board member without violating section 286.011(8), F.S.

## Effect of Bill

The bill amends the public meeting exemption to allow the risk manager and division heads of a governmental entity to attend the closed meeting if such manager or division head is identified by the chief administrative or executive officer as being involved in pending litigation.

The bill requires a person attending the closed attorney-client session to agree not to disclose any part of the discussion that took place during such session until conclusion of the litigation, unless ordered by a court. This new requirement could be considered an expansion of the current public meeting exemption as persons would not be allowed to attend who were previously authorized if they do not agree to the prohibition on disclosure of information discussed during the closed session.

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attorney-client confidentiality). *Cf.*, s. 90.502(6), F.S., stating that a discussion or activity that is not a meeting for purposes of s. 286.011, F.S., shall not be construed to waive the attorney-client privilege. *And see, Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), stating that all decisions taken by legal counsel to a public board need not be made or approved by the board; thus, the decision to appeal made by legal counsel after private discussions with the individual members of the board did not violate s. 286.011, F.S.

<sup>4</sup> The court reporter's notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

<sup>5</sup> At the conclusion of the attorney-client session, the meeting must be reopened and the person chairing the meeting must announce the termination of the session.

<sup>6</sup> Section 286.011(8), F.S.

<sup>7</sup> *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d at 101. *And see, Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999) (city charter provision requiring that city clerk attend all council meetings does not authorize clerk to attend closed attorney-client session; municipality may not authorize what the Legislature has expressly forbidden); and Attorney General Opinion 01-10 (clerk of court not authorized to attend).

<sup>8</sup> Attorney General Opinion 98-06. *And see, Zorc v. City of Vero Beach*, 722 So. 2d at 898 (attendance of Special Counsel authorized).

The bill further expands the current public meeting exemption by prohibiting a person who is an adverse party of the litigation from attending the closed attorney-client session. That means a staff person or member of the board or commission who currently is legally authorized to attend a closed attorney-client session, may be prohibited from attending future closed sessions if such person or member is an adverse party to the litigation being discussed.

The new prohibitions created by the bill related to attendance at closed attorney-client sessions appear to serve as an expansion of the current public meeting exemption. As such, it appears the bill requires a public necessity as mandated by the State Constitution.<sup>9</sup> In addition, bills creating or expanding a public record or public meeting exemption typically provide for future review and repeal of the exemption pursuant to the Open Government Sunset Review Act.<sup>10</sup> This bill does not provide such provision.

Finally, the bill reorganizes the exemption and provides editorial changes.

**B. SECTION DIRECTORY:**

Section 1 amends s. 286.011, F.S., allowing additional persons to attend a private meeting between a governmental entity and the entity's attorney to discuss pending litigation to which the governmental entity is a party.

Section 2 provides an effective date of upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

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<sup>9</sup> Section 24(c), Art. I of the State Constitution.

<sup>10</sup> See s. 119.15, F.S.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require cities or counties to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a shared state tax or premium sales tax received by cities or counties.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public record or public meeting exemption. Because the bill creates additional prohibitions regarding attendance at closed attorney-client sessions, it could be argued that the bill expands the current public meeting exemption for such sessions. As such, it appears the bill requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. Because the bill creates additional prohibitions regarding attendance at closed attorney-client sessions, it could be argued that the bill expands the current public meeting exemption for such sessions. As such, it appears the bill requires a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Excerpt from the *Government-In-The Sunshine Manual* on closed attorney-client meetings<sup>11</sup>

In rejecting the argument that the exemption should be construed so as to allow staff to attend closed attorney-client sessions, the courts have noted that individual board members are free to meet privately with staff at any time since "staff members are not subject to the Sunshine Law."<sup>12</sup>

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

Not applicable.

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<sup>11</sup> Excerpt from the *Government-In-The-Sunshine Manual*, 2009 Edition, Volume 31, at 28.

<sup>12</sup> *Zorc v. City of Vero Beach*, 722 So. 2d at 899. *Accord, School Board of Duval County v. Florida Publishing Company*, 670 So. 2d at 101. *Cf.*, Attorney General Opinion 95-06 (s. 286.011(8), F.S., does not authorize the temporary adjournment and reconvening of meetings in order for members who are attending such a session to leave the room and consult with others outside the meeting).