

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 Children, Families, and Elder Affairs Committee

BILL: CS/SB 656

INTRODUCER: Committee on Children, Families, and Elder Affairs and Senators Fasano and Storms

SUBJECT: Public Records/Long-Term Care Ombudsman Program

DATE: March 4, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hansson	Walsh	CF	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 656 creates a public records exemption for the home addresses, telephone numbers, places of employment, and photographs of certified ombudsmen and employees of the State Long-Term Care Ombudsman program; the home addresses, telephone numbers, and places of employment of their spouses and children; and the names and locations of schools and day care facilities attended by their children, making that information confidential and exempt from the public records provisions of s. 119.07(1)(a), F.S., and s. 24(a), Art. I of the State Constitution. The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.¹ The bill further provides justification for the public necessity of the exemption.

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends section 400.0077, Florida Statutes.

¹ Section 119.15, F.S.

II. Present Situation:

Public Access - Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), Art. I, State Constitution – Section 24(a), Art. I of the State Constitution provides the following:

(a) Every person has the right to inspect or copy any public records 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 there under; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Florida's Public Records Law – Florida's public records law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency³ records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of public records to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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

² Section 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

³ Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

⁶ Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act - The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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.

Long-Term Care Ombudsman Program - The federal Older Americans Act (OAA) requires each state to create a long-term care ombudsman program to be eligible to receive funding associated with programs under the OAA.¹² In Florida, the program is a statewide, volunteer-based system of district councils that protect, defend and advocate on behalf of long-term care facility residents – residents of nursing homes, assisted living facilities, and adult family-care homes. The program is directed by the State Long-Term Care Ombudsman, administratively housed in the Department of Elder Affairs (DOEA). The program is supported with both federal and state funding.

Currently, Florida has 417 volunteer long-term care ombudsmen organized in 17 districts councils around the state.¹³ During the 2008-2009 federal fiscal year, ombudsmen:

- completed 3,881 administrative assessments statewide, visiting 100 percent of the licensed long-term care facilities in Florida
- completed 8,363 complaint investigations, serving over 500,000 residents¹⁴
- donated almost 22,000 hours of volunteer service to the residents

⁷ *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).

⁸ Section 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Article 1, s. 24(c) of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹² 42 U.S.C 3058

¹³ The data relating to Ombudsman activities is taken from *Florida's Long-Term Care Ombudsman Program 2008-2009 Annual Snapshot*, available at http://ombudsman.myflorida.com/publications/ar/AnnualSnapshot08_09.pdf (last visited February 26, 2010).

¹⁴ Section 400.0073, F.S., requires that a local council must investigate any complaint of a resident, a representative of a resident, or any other credible source.

- provided 3,623 free in-service trainings in nursing homes, assisted living facilities and adult family care homes throughout the state to encourage facility staff members to adopt best practices to improve the residents quality of life.

Exemptions pertaining to an employee or volunteer's personal information exist to protect many types of investigators as well as other persons who make decisions that may adversely impact an individual. Currently, such exemptions apply to law enforcement personnel; Department of Children and Family Services personnel who investigate abuse, neglect and exploitation of vulnerable adults; firefighters; human resource employees whose duties include hiring and firing employees; code enforcement officers; juvenile probation officers; counselors of the Department of Juvenile Justice; guardians ad litem, including volunteer guardians ad litem;¹⁵ hospital employees providing direct care or security services;¹⁶ and personnel who investigate the mortgage lending industry,¹⁷ securities transactions¹⁸ and banking¹⁹. Ombudsmen regularly interact with several of these classes of persons, and often conduct joint investigations with them.²⁰

III. Effect of Proposed Changes:

The bill creates a public records exemption for the home addresses, telephone numbers, places of employment, and photographs of certified ombudsmen and employees of the State Long-Term Care Ombudsman program; the home addresses, telephone numbers, and places of employment of their spouses and children; and the names and locations of schools and day care facilities attended by their children. Such identifying information is made confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The bill provides the exemption does not apply to a state or federal agency that is lawfully authorized to have access to such information in furtherance of its statutory duties.

The exemption is subject to the provisions of the Open Government Sunset Review Act and will stand repealed on October 2, 2015, unless reviewed and reenacted by the Legislature.

The bill provides justification for the public necessity of the exemption. The bill identifies a long-term care ombudsman as a designated representative of the program who helps to improve the lives of people who live in long-term care settings such as nursing homes, assisted living facilities, and adult family care homes. The long-term care ombudsman works to identify, explore, and resolve the concerns of residents and their loved ones and performs annual assessments of all long-term care facilities in the state from a resident's perspective. The bill notes that long-term care ombudsmen explore thousands of complaints in long-term care facilities each year.

¹⁵ Section 119.071(4)(d)1, F.S.

¹⁶ Section 395.3025(1), F.S.

¹⁷ Section 494.00125(1)(c), F.S.

¹⁸ Section 517.2015, F.S.

¹⁹ Section 520.9965, F.S.

²⁰ Department of Elder Affairs 2010 Legislative Bill Analysis, Senate Bill 656, February 26, 2010 (on file with the committee).

The bill identifies the type of information that is currently subject to disclosure. Any person who files a public-records request can obtain the home address, phone number, photograph, and place of employment of an ombudsmen or employee, because the personal information is not currently exempt from disclosure. Additionally, the names, home addresses, telephone numbers, and places of employment of the spouses and children of ombudsmen and employees and the names of schools and day care facilities attended by an ombudsman's or employee's children are not exempt from disclosure. The bill notes that much of this information is on the ombudsman's or employee's program membership application, which is a public record.

The bill provides that the current situation raises privacy and public safety concerns among ombudsmen and employees, most of whom are volunteers and many of whom are themselves elders. Exempting the personal information of ombudsmen or employees and the personal identifying and location information of ombudsmen and employees from disclosure will provide the ombudsmen and employees with a sense of security, eliminate fears of harassment and retaliation, and allay concerns about identity theft.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption for certain identifying information relating to ombudsman and employees of the State Long-Term Care Ombudsman Program. In accordance with s. 24, Art. I, State Constitution, the bill requires a two-thirds vote of each house of the Legislature for enactment. The bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public records exemptions in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The confidentiality of personal identifying information accorded to ombudsmen by this bill may help the program recruit additional volunteers.

C. Government Sector Impact:

There may be minimal costs to the state associated with complying with the bill's exemption requirements.

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 Children, Families, and Elder Affairs on March 4, 2010:

Amendment 754018 makes technical changes to the bill. The amendment also expands on: the role of a long-term care ombudsman; the type of information that is currently subject to disclosure; the risks of disclosing such information; and the benefits of protecting the information.

B. Amendments:

None.