

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 Military Affairs and Domestic Security Committee

BILL: SPB 7000

INTRODUCER: For consideration by the Military Affairs and Domestic Security Committee

SUBJECT: OGSR/Domestic Security Oversight Council

DATE: October 28, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	Skelton		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

Current law provides an open meeting exemption for portions of Domestic Security Oversight Council meetings at which active criminal investigative and active criminal intelligence information is discussed. Current law also provides for a public records exemption for certain Domestic Security Oversight Council records that are generated during closed meetings. The exemption is subject to Open Government Sunset Review and will be repealed unless reenacted by the Legislature. This proposed committee bill deletes the provisions that repeal the exemption.

This proposed committee bill reenacts section 943.0314 of the Florida Statutes.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The Florida Legislature enacted the first public records law in 1892.¹ In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

Article I, section 24(a) of the State Constitution, and the Public Records Act,² specify the conditions under which public access must be provided to governmental records. Article I,

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

² Chapter 119, F.S.

section 24(b) of the State Constitution and s. 286.011, F.S., the Sunshine Law, specify the requirements for public meetings. While the State Constitution provides that records and meetings are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, section 24 of the Florida Constitution governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, section 24 of the Florida Constitution provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

The Open Government Sunset Review Act,³ provides for the review and repeal of any public records or meetings exemptions that are created or substantially amended in 1996 and subsequently. The chapter defines the term “substantial amendment” for purposes of triggering a review and repeal of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption. The law was amended by ch. 2005-251, Laws of Florida, to modify the criteria under the Open Government Sunset Review Act so that consideration will be given to reducing the number of exemptions by creating a uniform exemption during the review of an exemption subject to sunset.

Under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

- 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?

³ Section 119.15, F.S.

- 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?

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., 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 the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

2005 Legislative Findings

In creating s. 943.0314, F.S., the Legislature found the public necessity to exempt any meeting or portion of a meeting of the Domestic Security Oversight Council at which criminal investigative information or criminal intelligence information is discussed.⁴ The finding further stated the necessity to exempt an audio or video recording of, and any minutes and notes generated during a closed session until such time as the criminal investigation information or criminal intelligence information heard or discussed at such meeting ceases to be active.

This section of the statutes is due to sunset on October 2, 2010, unless it is reviewed and reenacted by the Legislature.

2010 Open Government Sunset Review

The Senate Military Affairs and Domestic Security Committee, in its review of Senate Interim Report 2010-225, accepted the report's recommendation that the exemption provided for in s. 943.0314, F.S., continues to be sufficiently compelling to override the strong public policy of open government under narrowly defined conditions.

International terrorists continue to demonstrate the ability to plan and carry out sophisticated acts of terrorism. Their capability appears to be no less today than at the time of the Legislature's original findings in 2005. In fact, terrorists' use of satellite imagery and communications, advance location reconnaissance, Global Positioning System(GPS) technology, and real-time operational command and control procedures exhibited in the November, 2008 Mumbai, India attack demonstrated a level of sophistication usually associated with highly trained military forces. The attackers appeared to be better informed, armed, and equipped than the Mumbai police forces initially tasked with responding to the attack.

⁴ Chapter 2005-211, Laws of Florida.

Further, there is no evidence of any abatement of known terrorists' motivation to cause harm to the United States.

In its December 2, 2008 report to the President of the United States and the presiding officers of the Congress, the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism stated its conclusion, "that a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013."⁵

The Commission further illustrated the poignancy and urgency of the challenge facing us all by quoting testimony it received from New York City Police Commissioner Raymond Kelly:

"Whether it's fixing gaping holes in regulation, securing loose nuclear materials abroad, or fully funding programs here at home that represent our last line of defense, we have absolutely no time to lose," Commissioner Kelly told the Commission. "Everything we know about Al Qaeda tells us they will try to hit us again, possibly the next time with a weapon of mass destruction. We must do everything in our power to stop them before it's too late."⁶

III. Effect of Proposed Changes:

This proposed committee bill provides for the reenactment of s. 943.0314, F.S., by deleting provisions that repeal the section.

Section 943.0314, F.S., provides an open meeting exemption for those portions of Domestic Security Oversight Council meetings at which active criminal investigative information or active criminal intelligence information is discussed. The section also exempts from public disclosure an audio or video recording of and any minutes and notes generated during a closed meeting.

The Council is required to record and maintain the entire closed portion of the meeting. Such recording must include the times of commencement and termination of the closed portion, all discussion and proceedings, and the names of the persons present. No portion of the closed meeting shall be off the record. The records exemption terminates as soon as the investigative or intelligence information ceases to be active.

This proposed committee bill provides an effective date of October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁵ Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, World at Risk: The Report of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism. (New York: Vintage Books, 2008), xv.

⁶ *Ibid.*, 112.

B. Public Records/Open Meetings Issues:

Article I, section 24 of the State Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷

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.

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

⁷ See, *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)