

## **FINAL BILL ANALYSIS**

**BILL #:** CS/HB 667

**FINAL HOUSE FLOOR ACTION:**

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**SPONSOR:** Rep. Clemens

**GOVERNOR'S ACTION:** Approved

**COMPANION BILLS:** CS/SB 828

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### **SUMMARY ANALYSIS**

CS/HB 667 passed the House on April 27, 2011, and subsequently passed the Senate on May 2, 2011. The bill was approved by the Governor on May 31, 2011, chapter 2011-87, Laws of Florida, and takes effect October 1, 2011.

The bill revises the current public record exemption for local government audit reports and audit work papers and notes.

Current law provides a limited public record exemption for an audit report prepared for or on behalf of a unit of local government. It also provides a public record exemption for audit work papers and notes related to the audit until the audit report becomes final.

The bill expands the current public record exemption for audit reports of an internal auditor prepared on behalf of a unit of local government.

The exemption is expanded to include an investigative or audit report of an inspector general prepared for or on behalf of a unit of local government. The exemption expires when the audit or investigation becomes final. An audit or investigation becomes final when the audit or investigative report is presented to the unit of local government.

The exemption is further expanded to provide that audit work papers and notes and information received, produced, or derived as a result of an investigation conducted by an inspector general are confidential and exempt from public records requirements. The exemption expires when the audit or investigation is completed and the audit or investigative report becomes final, or when the audit or investigation is no longer active.

The bill provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

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

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

##### Public Records Law

Section 24(a), Art. I of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of s. 24(a), Art. I 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 purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record or 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.

##### Local Government Auditing

Current law requires local governments to submit to the Department of Financial Services (DFS) an Annual Financial Report covering their operations for the preceding fiscal year.<sup>3</sup> DFS makes available to local governments an electronic filing system that accumulates the financial information reported on the annual financial reports in a database.

Current law provides that if a local government will not be audited by the Auditor General, then the local government must provide for an annual financial audit to be completed within 12 months after the end of the fiscal year.<sup>4</sup> The audit must be conducted by an independent certified public accountant retained by the entity and paid for from public funds.

The audit report of an internal auditor prepared for or on behalf of a unit of local government becomes a public record when the audit becomes final. Audit work papers and notes related to the audit are confidential and exempt from public records requirements until the audit report becomes final.<sup>5</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> Section 218.32(1), F.S.

<sup>4</sup> Section 218.39, F.S.

<sup>5</sup> Section 119.0713(2), F.S.

### Current Public Record Exemptions for Local Government Investigations

If certified pursuant to statute, an investigatory record<sup>6</sup> of the Chief Inspector General within the Executive Office of the Governor or of the employee designated by an agency head as the agency inspector general is exempt from public records requirements until:

- The investigation ceases to be active;
- A report detailing the investigation is provided to the Governor or the agency head; or
- Sixty days from the inception of the investigation for which the record was made or received.<sup>7</sup>

An investigation is considered active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.<sup>8</sup> At the local government level there is concern that 60 days is too little time to carry out an investigation, particularly if it is a criminal investigation.<sup>9</sup>

Current law also provides a public record exemption for inspectors general in whistle blower cases. Certain specified information is confidential and exempt from public records requirements until the conclusion of an investigation if the investigation is related to whether an employee or agent of an agency or independent contractor:

- Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or
- Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.<sup>10</sup>

Information, other than the name or identity of a person who discloses certain types of incriminating information about a public employee, may be disclosed when the investigation is no longer active.

In addition, current law provides a public record exemption for ethics investigations.<sup>11</sup> A recent Florida Attorney General's Opinion responded to the following question:

Do the public records and meeting exemptions provided for in Chapter 2010-130, Laws of Florida, apply to the investigatory process of the Palm Beach County Inspector General?<sup>12</sup>

The opinion concluded that, to the extent the inspector general is investigating complaints involving the violation of ethics codes, the exemption would apply. The public record exemption does not extend beyond ethics investigations; however, the Attorney General Opinion did note that similar investigations would be covered under s. 112.3188, F.S., as previously discussed.

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<sup>6</sup> Investigatory records are those records that are related to the investigation of an alleged, specific act or omission or other wrongdoing, with respect to an identifiable person or group of persons, based on information compiled by the Chief Inspector General or by an agency inspector general, as named under the provisions of s. 112.3189, F.S., in the course of an investigation. Section 112.31901(1), F.S.

<sup>7</sup> Section 112.31901(1), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> For example, the Palm Beach County Inspector General is an independent entity responsible for the county, 38 municipalities (by referendum), and the Solid Waste Authority (by interlocal agreement). As a result, there is no single agency head to certify the investigation as exempt. See Senate Bill Analysis and Fiscal Impact Statement, SB 828 (March 6, 2011), at 4.

<sup>10</sup> Section 112.3188, F.S.

<sup>11</sup> Section 112.324, F.S.

<sup>12</sup> Attorney General Opinion 2010-39 (September 16, 2010).

## **Effect of Proposed Changes**

The bill expands the current public record exemption for audit reports of an internal auditor prepared on behalf of a unit of local government.

The exemption is expanded to include an investigative or audit report of an inspector general prepared for or on behalf of a unit of local government. The exemption expires when the audit or investigation becomes final. An audit or investigation becomes final when the audit or investigative report is presented to the unit of local government.

The exemption is further expanded to provide that audit work papers and notes and information received, produced, or derived as a result of an investigation conducted by an inspector general are confidential and exempt<sup>13</sup> from public records requirements. The exemption expires when the audit or investigation is completed and the audit or investigative report becomes final, or when the audit or investigation is no longer active. An investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.

The bill provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.<sup>14</sup>

## **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.

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<sup>13</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (See Attorney General Opinion 85-62, August 1, 1985).

<sup>14</sup> Section 24(c), Art. I of the State Constitution.

**2. Expenditures:**

None.

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

None.

**D. FISCAL COMMENTS:**

None.