

**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 Governmental Oversight and Accountability Committee

BILL: SB 810

INTRODUCER: Environmental Preservation and Conservation Committee

SUBJECT: OGSR/Publicly Owned House Museums/Donor Information

DATE: January 24, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiggins	Yeatman	EP	<b>Favorable</b>
2.	Seay	Roberts	GO	<b>Pre-meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill is the result of the Environmental Preservation and Conservation Committee’s Open Government Sunset Review of the public records exemption for information that identifies a donor or prospective donor to publicly owned house museums designated by the U.S. Department of Interior as National Historic Landmarks if the donor desires to remain anonymous. The exemption will expire on October 2, 2012, unless saved from repeal through reenactment by the Legislature. This bill reenacts this public records exemption.

This bill substantially amends section 267.076 of the Florida Statutes.

**II. Present Situation:**

**Public Records Law**

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 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,

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

<sup>2</sup> Article I, s. 24, Fla. Constitution.

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 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 public records provision of 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:

- (a) 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

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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), Fla. Constitution.

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>

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 then an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 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.<sup>15</sup>

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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- 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
- 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>16</sup>

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<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).

<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), Fla. 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(5)(a), F.S.

<sup>16</sup> Section 119.15(4)(b), F.S.

The Act also requires consideration of the following:

- 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?
- 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?

### **Publicly Owned House Museums as National Historic Landmarks in Florida**

According to the Florida Department of State, there are only two National Historic Landmarks publicly owned house museums in Florida that are eligible for the exemption. The two houses are the Marjorie Kinnan Rawlings home in Cross Creek (between Gainesville and Ocala) that is owned by the Florida Department of Environmental Protection (DEP) and the Vizcaya Museum and Gardens (often referred to as Vizcaya) that is owned by Miami-Dade County and is located in the north Coconut Grove area of the City of Miami, overlooking Biscayne Bay.<sup>17</sup>

### **Public Records Exemption Under Review**

The professional staff of the Senate Committee on Environmental Preservation and Conservation surveyed the Marjorie Kinnan Rawlings Historic State Park through the Department of Environmental Protection's legislative staff to determine how often donors had requested anonymity when donating to the park. The survey also requested specifics regarding the amount of donations and if the park had a system in place to provide anonymity to its donors. Based on survey results provided, a park donor has never requested anonymity since the exemption was originally enacted in 2007. However, the survey did reveal that the agency was unaware of the anonymity exemption prior to completing the survey. The donations to the park between 2007 and 2010 totaled approximately \$13,000. In 2011, the park received two donations totaling approximately \$15,000.

Senate professional staff also surveyed the Vizcaya Museum and Gardens. The response to the survey was prepared and submitted by the Vizcayans, Inc., the private support organization for Vizcaya Museum and Gardens. The Vizcaya Museum and Gardens described their private support program for the publicly owned and operated museum as robust. According to Vizcayans, Inc., the exemption from disclosure of information on actual or prospective donors who request anonymity was sought from the Florida Legislature to ensure:

- that Vizcaya professional staff can pursue donations unhampered;
- the museum's ability to comply with donor privacy requirements of the Better Business Bureau (BBB); and
- encourage the charitable giving program at Vizcaya to fairly compete with programs for privately owned and operated museums.

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<sup>17</sup> Vizcaya Museum and Gardens General Information, [www.vizcayamuseum.com/plan-general.asp](http://www.vizcayamuseum.com/plan-general.asp) (last visited Jan. 11, 2012).

There is an operational requirement for Vizcaya under the (BBB) Wise Giving Alliance Standards for Charity Accountability.<sup>18</sup> Compliance with these standards is mandated and required under the terms of the Vizcayans' operating agreement with the Vizcaya Museum and Gardens Trust. The policy states that both new and continuing donors must have an annual option to inform the charity if they do not want their name and address shared. The charity must make the privacy policy available to donors and clearly state what information, if any, is shared with another organization and the charity must specify the security measures the charity has in place to protect personal information.

From 2010 to 2011, Vizcaya received approximately eight donations totaling \$483,941. According to the completed survey, one donor has asserted and consistently maintained their request for anonymity between 2008 and 2011. The total amount of donation that this person/entity donated is less than \$100,000. However, it is the Vizcayan's belief that future contributions from this donor may amount to millions of dollars as long as the museum can offer the option of anonymity. Further, according to the survey, many other prospective donors have stated that they are not willing to have their identities released publicly.

The exemption only affects donors who choose to donate anonymously to the Marjorie Kinnan Rawlings Historic State Park and Vizcaya Museum and Gardens. Although the Marjorie Kinnan Rawlings Historic State Park staff has not utilized the anonymous donor option, the Vizcaya Museum and Gardens has built their fundraising campaign around this exclusive option. As a result, the Environmental Preservation and Conservation Committee staff recommended that this public record exemption be reenacted.

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

**Section 1** amends s. 267.076, F.S., reenacting the public records exemption allowing a donor or prospective donor to publicly owned house museums designated by the U.S. Department of Interior as a National Historic Landmark to maintain anonymity if they desire to do so.

**Section 2** provides an effective date of October 1, 2012.

#### **Other Potential Implications:**

If the Legislature chooses not to retain the public records exemption for information identifying donors or prospective donors to publicly owned house museums designated as National Historic Landmarks, the exemption will expire on October 2, 2012. Without the exemption, information identifying donors or prospective donors will become public.

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

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

None.

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<sup>18</sup> Better Business Bureau, Standards for Charity Accountability, <http://www.bbb.org/us/Charity-Standards> (last visited Jan. 11, 2012.)

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

This bill retains an already-existing public records exemption and thus is not subject to the requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The bill complies with the requirement of Article I, section 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Donors or prospective donors made for the benefit of publicly owned house museums designated as National Historic Landmarks would continue to have the option of requesting anonymity, which may encourage private entities to donate.

**C. Government Sector Impact:**

Continuing the exemption may encourage donations and therefore result in a financial gain to publicly owned house museums designated as National Historic Landmarks.

**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.