

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1297 Pub. Rec./Florida False Claims Act
SPONSOR(S): Young
TIED BILLS: CS/HB 935 **IDEN./SIM. BILLS:** CS/SB 1496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Ward	Bond
2) Government Operations Subcommittee	10 Y, 0 N	Stramski	Williamson
3) Judiciary Committee	17 Y, 0 N	Ward	Havlicak

SUMMARY ANALYSIS

This public records bill amends the Florida False Claims Act to provide that both the complaint and information held by the Department of Legal Affairs or the Department of Financial Services pursuant to an investigation under the Act are confidential and exempt from disclosure under the public records law. The information may be disclosed by either department to a law enforcement agency or other administrative agency. The exemption expires once the investigation is completed, unless otherwise protected from disclosure.

The bill provides for repeal of the exemption on October 2, 2018, 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 provides that the exemption will take effect on the same date as House Bill 935 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for investigative records related to the Florida False Claims Act; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This 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 Article I, s. 24(a) 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.¹

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 Act² 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.

Confidential versus Confidential and Exempt

There is a difference between records the legislature has determined to be exempt and those which have been determined to be confidential and exempt.³ If the legislature has determined the information to be confidential then the information is not subject to inspection by the public.⁴ Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the statute.⁵ However, the agency is not prohibited from disclosing the documents in all circumstances where the records are only exempt.⁶

The Florida False Claims Act

The Florida False Claims Act (FFCA)⁷ authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. These types of actions were recognized at common law, and have historically been called "*qui tam*" actions.⁸ Actions that violate the FFCA include:

- Submitting a false claim for payment or approval;
- Making or using a false record to get a false or fraudulent claim paid or approved;
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid; or

¹ Art I., s. 24(c), Fla. Const.

² See s. 119.15, F.S.

³ *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

⁴ *Id.*

⁵ *Id.*

⁶ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

⁷ Sections 68.081 - 68.09, F.S.

⁸ The term "*qui tam*" is short for a Latin phrase given to suits brought individually to benefit the sovereign. It literally means "who as well." <http://dictionary.law.com/Default.aspx?selected=1709> (last visited April 1, 2013).

- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.⁹

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state government for the FFCA violation.¹⁰

Under current law, an agency which has been damaged by a false claim, the Department of Financial Services, or the Department of Legal Affairs may bring an action for a false claim, or may join a private action brought on the grounds set out in the statute.

Effect of the Changes

Currently the Attorney General may investigate claims but does not have subpoena powers prior to the filing of a civil action. A companion bill, House Bill 935, grants the Department of Legal Affairs discovery capabilities prior to the institution of a civil proceeding if it has reason to believe that any person has testimony or evidence relevant to the investigation. House Bill 935 provides that the department may issue subpoenas requiring the recipient to:

- Produce documents;
- Answer interrogatories under oath; and
- Give sworn testimony.

The instant bill provides that the complaint and information held by the department¹¹ pursuant to an investigation of s. 68.082, F.S., is confidential and exempt from the public records laws. Such information may be disclosed to another agency or law enforcement. The information is no longer confidential and exempt once the investigation is completed unless the information is otherwise protected by law.

An investigation is complete when:

- The department files its own action;¹²
- Closes the investigation without filing an action;
- Upon unsealing of the action; or
- Voluntary dismissal of the action.

The exemption is repealed on October 2, 2018, unless reviewed and saved from repeal.

The bill includes a public necessity statement.

B. SECTION DIRECTORY:

Section 1 amends s. 68.083., F.S., regarding civil actions for false claims.

Section 2 provides a statement of public necessity.

Section 3 provides for an effective date to coincide with HB 935.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

⁹ Section 68.082(2), F.S.

¹⁰ Section 68.082(2)(g), F.S.

¹¹ The "department" may mean the Department of Legal Affairs or the Department of Financial Services, according to s. 68.083(4), F.S.

¹² Note that when the state brings an action, it is not a "*qui tam*" action, since the state itself brings it.

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the Department of Legal Affairs, the Department of Financial Services, the court system and clerks of court. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and the above named offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed as day-to-day duties of the departments, the court system and court clerks.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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 final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption related to false claims; thus, it 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. The bill creates a new public record exemption related to investigations; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption related to investigations under the Florida False Claims Act. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

Compliance with the Open Government Sunset Review Act

The Open Government Sunset Review Act places several requirements on many bills that would create or expand a public record exemption. Although it purports to be mandatory, it is important to note that nothing in the Constitution allows a previous Legislature to bind the actions of this Legislature. As such, the Act is advisory, not mandatory; and while this bill appears to comply with the Act, the bill if passed would be valid even if it did not comply with the Act.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 68.083(2), F.S., references the unsealing of a complaint filed in a false claims action under the statute. The reference appears again in s. 68.083(5), F.S., and is referred to in the bill. However, there is no provision in the false claims statute that expressly directs the complaint be filed in camera or under seal. Thus the application of the exemption to "the complaint and information held by the department" is unclear. It could be construed to mean the department's own copies of the complaint, or it could refer to the complaint in the court's file. However, the complaint file in court is not expressly sealed unless the statute is amended to so provide. On the other hand, Rule 2.420(c)(7) Fla. R. Jud. Admin. provides in part that all records made confidential under Florida law are confidential; pursuant to Rule 2.420(d)(2), Fla. R. Jud. Admin., any person filing such a complaint would be required to indicate to the clerk of court that the complaint is confidential and exempt at the time of filing.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.