

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 1480

INTRODUCER: Senator Baxley

SUBJECT: Public Records/Active Audit or Investigation/Agency Inspector General

DATE: April 14, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	Ferrin	GO	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 1480 creates a public record exemption for any audit workpapers, records, reports, or other documentation obtained or created during or in relation to an active audit or investigation conducted by an agency inspector general.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2022, unless reviewed and reenacted by the Legislature.

The bill contains a public necessity statement as required by the Florida Constitution.

Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

**II. Present Situation:**

**Chief Inspector General**

Section 14.32, F.S., creates the Office of Chief Inspector General in the Executive Office of the Governor. The Chief Inspector General is responsible for promoting accountability, integrity, and efficiency in the agencies under the jurisdiction of the Governor.<sup>1</sup> The Chief Inspector General is appointed by, and serves at the pleasure of, the Governor and serves as the inspector general for the Executive Office of the Governor.<sup>2</sup> Some of the duties of the Chief Inspector General include:

- Initiating investigations, recommending policies, and carrying out other activities designed to deter, detect, and prevent, fraud, waste, mismanagement, and misconduct in government;

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<sup>1</sup> Section 14.32(1), F.S.

<sup>2</sup> *Id.*

- Investigating and examining records of any agency under the direct supervision of the Governor, and coordinate complaint-handling activities with the agencies;
- Coordinating the activities of the Whistle-blower's Act<sup>3</sup> and maintaining the whistle-blower's hotline;
- Acting as a liaison and monitoring the activities of the inspectors general in the agencies under the Governor's jurisdiction; and
- Conducting special investigations and management reviews at the request of the Governor.<sup>4</sup>

The Chief Inspector General also has various duties relating to public-private partnerships, including advising on internal control and performance measures, conducting audits, investigating complaints of fraud, and monitoring contract compliance.<sup>5</sup>

## **Agency Inspectors General**

### *Duties*

Section 20.055, F.S., requires each state agency<sup>6</sup> of state government to have an Office of Inspector General (OIG). The OIG is created to provide a focal point of accountability efforts within the agency.<sup>7</sup> Each agency inspector general is responsible for the following:<sup>8</sup>

- Advising in the development of performance measures, standards, and procedures for the evaluation of state agency programs;
- Assessing the reliability and validity of information provided by the agency on performance measures and standards;
- Reviewing the actions taken by the agency to improve agency performance, and making recommendations, if necessary;
- Supervising and coordinating audits, investigations, and management reviews relating to the programs and operations of the agency;
- Conducting, supervising, or coordinating other activities carried out or financed by the agency for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;
- Informing and recommending corrective action to the agency head or, for state agencies under the jurisdiction of the Governor, the Chief Inspector General about fraud, abuses, deficiencies relating to programs and operations administered or financed by the state agency, and reporting on progress made in implementing corrective action;
- Ensuring effective coordination and cooperation between the Auditor General, federal auditors, and other governmental bodies to avoid duplication;
- Reviewing rules relating to the programs and operations of the agency and making recommendations concerning their impact;

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<sup>3</sup> The Whistle-blower's Act can be found in ss. 112.3187-112.31895, F.S.

<sup>4</sup> Section 14.32(2), F.S.

<sup>5</sup> Section 14.32(3), F.S.

<sup>6</sup> Section 20.055(1)(d), F.S., defines the term "state agency" as "each department created pursuant to this chapter and the Executive Office of the Governor, the Department of Military Affairs, the Fish and Wildlife Conservation Commission, the Office of Insurance Regulation of the Financial Services Commission, the Office of Financial Regulation of the Financial Services Commission, the Public Service Commission, the Board of Governors of the State University System, the Florida Housing Finance Corporation, the Agency for State Technology, the Office of Early Learning, and the state courts system."

<sup>7</sup> Section 20.055(2), F.S.

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

- Ensuring that an appropriate balance is maintained between audit, investigative, and other accountability activities; and
- Complying with the General Principles and Standards for Offices of Inspector General as published and revised by the Association of Inspectors General.

In carrying out the investigative duties and responsibilities, the inspector general initiates, conducts, supervises, and coordinates investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government.<sup>9</sup>

Each inspector general must submit an annual report on its activities to the agency head,<sup>10</sup> and provide any written complaints about the operations of the inspector general.<sup>11</sup> Audit plans and reports are submitted to the Auditor General.<sup>12</sup>

### ***Appointment***

Section 20.055(3)(a), F.S., governs appointment of inspector generals. For state agencies under the jurisdiction of the Governor and Cabinet, the inspector general is appointed by the agency head. For agencies under the jurisdiction of the Governor, the inspector general is appointed by the Chief Inspector General. The agency head or Chief Inspector General is required to notify the Governor in writing of their intent to hire the inspector general at least 7 days prior to an offer of employment. Inspectors general are appointed without regard to political affiliation.<sup>13</sup>

### ***Removal***

Section 20.055(3)(c), F.S., governs removal of inspector generals. For agencies under the jurisdiction of the Governor and Cabinet, inspectors general may be removed by the agency head. For agencies under the jurisdiction of the Governor, the inspector general may only be removed from office by the Chief Inspector General for cause, including concerns regarding performance, malfeasance, misfeasance, misconduct, or failure to carry out his or her duties. At least 21 days before removal, the Chief Inspector General must notify the Governor in writing of his or her intention to remove an inspector general. For state agencies under the jurisdiction of the Governor and Cabinet, the agency head shall notify the Governor and Cabinet in writing of his or her intention to remove the inspector general at least 21 days before the removal. If the inspector general disagrees with the removal, the inspector general may present objections in writing to the Governor within the 21-day period.

### ***Internal Audits***

Each inspector general must review and evaluate internal controls necessary to ensure the fiscal accountability of the state agency.<sup>14</sup> The inspector general must conduct financial, compliance, electronic data processing, and performance audits of the agency and prepare audit reports of his

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<sup>9</sup> Section 20.055(7), F.S.

<sup>10</sup> Section 20.055(8), F.S.

<sup>11</sup> Section 20.055(9), F.S. For agencies under the jurisdiction of the Governor, the inspector general must provide the complaint to the Chief Inspector General.

<sup>12</sup> Section 20.055(6)(f)-(i), F.S.

<sup>13</sup> Section 20.055(3)(a), 1., F.S.

<sup>14</sup> Section 20.055(6), F.S.

or her findings.<sup>15</sup> If the inspector general does not possess the specified qualifications, the director of auditing must perform the auditing functions.<sup>16</sup>

### **Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>17</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>18</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>19</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>20</sup> The Public Records Act states that

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>21</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>22</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>23</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>24</sup>

The Legislature may create an exemption to public records requirements.<sup>25</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>26</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> FLA. CONST., art. I, s. 24(a).

<sup>18</sup> *Id.*

<sup>19</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also, see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S.

Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>20</sup> Public records laws are found throughout the Florida Statutes.

<sup>21</sup> Section 119.01(1), F.S.

<sup>22</sup> Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” to mean as “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.”

<sup>23</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>24</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>25</sup> FLA. CONST., art. I, s. 24(c).

<sup>26</sup> *Id.*

broader than necessary to accomplish the stated purpose of the exemption.<sup>27</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>28</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>29</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>30</sup>

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

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>31</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>32</sup> 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>33</sup>

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than necessary.<sup>34</sup> An exemption serves an identifiable purpose if it meets one of the following purposes and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>35</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>36</sup> or

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<sup>27</sup> *Id.*

<sup>28</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>29</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>30</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>31</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

<sup>32</sup> Section 119.15(3), F.S.

<sup>33</sup> Section 119.15(5)(a), F.S.

<sup>34</sup> Section 119.15(6)(b), F.S.

<sup>35</sup> Section 119.15(6)(b)1., F.S.

<sup>36</sup> Section 119.15(6)(b)2., F.S.

- It protects trade or business secrets.<sup>37</sup>

In addition, the Legislature must find that the purpose of the exemption overrides the Florida's public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.<sup>38</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>39</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>40</sup>

### III. Effect of Proposed Changes:

**Section 1** creates a public records exemption for any audit workpapers, records, reports, or other documentation obtained or created during or in relation to an active audit or investigation conducted by an agency inspector general. Such information is confidential and exempt from public records requirements until completion of the audit or investigation or issuance of a final report. Upon completion of the audit or investigation or issuance of a final report, the information is subject to disclosure to the extent that it does not include information that has been made confidential and exempt by another exemption.

The bill provides for the repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** provides a public necessity statement for the public records exemption as required by the Florida Constitution.

The bill states that it is a public necessity to protect such information because the public release of such audit workpapers, records, reports, or other documentation during an active audit or investigation could jeopardize the overall integrity of such audit or investigation and any subsequent findings and recommendations issued by an agency inspector general. The bill states that this exemption is necessary to ensure that agency inspectors general are able to reasonably

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<sup>37</sup> Section 119.15(6)(b)3., F.S.

<sup>38</sup> Section 119.15(6)(a), F.S. The specified questions are:

- 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?

<sup>39</sup> FLA. CONST., art. I, s. 24(c).

<sup>40</sup> Section 119.15(7), F.S.

and effectively conduct independent and complete audits or investigations as necessary to fulfill their duties and responsibilities specified in s. 20.055, F.S.

**Section 3** provides an effective date.

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

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

The mandate restrictions do not apply because the bill does not require counties or municipalities to spend funds, reduce the counties' or municipalities' ability to raise revenue or reduce the percentage of state tax shared with counties or municipalities.

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

###### **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 records exemption. Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

###### **Public Necessity Statement**

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption. The bill includes a public necessity statement.

###### **Breadth of Exemption**

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law.

The bill creates a public records exemption for any audit workpapers, records, reports, or other documentation obtained or created during or in relation to an active audit or investigation conducted by an agency inspector general pursuant to s. 20.055, F.S. As such, the exemption does not appear to be in conflict with the constitutional requirements that it be no broader than necessary to accomplish its purpose.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Indeterminate.

**C. Government Sector Impact:**

The bill could have a minimal fiscal impact on state agencies since agency staff responsible for complying with public records requests may require training related to creation of this public records exemption. Additionally, agencies could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, should be absorbed, as they are part of the day-to-day responsibilities of state agencies.

**VI. Technical Deficiencies:**

Section 3 of the bill does not specify the linked bill. A reference to SB 1478 needs to be added.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends section 20.055 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.