

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 Committee on Governmental Oversight and Accountability

BILL: SB 560

INTRODUCER: Senator Steube

SUBJECT: Public Meetings and Records/Imminent Litigation

DATE: January 9, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|-----------------|-----------|------------------|
| 1. | <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | Favorable |
| 2. | <u>Brown</u> | <u>Caldwell</u> | <u>GO</u> | Favorable |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 560 expands a public meeting exemption that presently allows certain individuals of a governmental entity to discuss litigation pending before a court or administrative agency. More specifically, the current exemption authorizes board and commission members and the chief administrative or executive officer of the entity to conduct a private meeting about pending litigation with the attorney of the entity.

The bill broadens the exemption to additionally authorize a private meeting for the purpose of discussing imminent litigation. Litigation is imminent when the entity has received notice of a claim or demand by a party threatening litigation before a court or administrative agency.

The bill subjects the parties involved in discussions of imminent litigation to the same standards that apply to private discussions of pending litigation.

Therefore:

- The attorney must advise the entity at a public meeting that he or she is seeking advice about the litigation.
- The subject matter at the private meeting is limited to settlement negotiations or strategy sessions related to legal expenses.
- The entire session must be recorded by a certified court reporter.
- The entity must provide reasonable public notice of the time and date of the attorney-client session, and other information related to the process.

If the imminent litigation does not proceed, the transcript of the private meeting must be made part of the public record the earlier of within a reasonable time or when the underlying statute of limitations expires.

These new provisions are subject to review under the Open Government Sunset Review Act and repeal October 2, 2023, unless reviewed and saved from repeal by legislative reenactment.

The bill includes a public necessity statement and requires a two-thirds vote of each house of the Legislature for passage.

II. Present Situation:

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.¹ 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.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ 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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² 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’ may be released at the discretion of the records custodian under certain circumstances.¹³

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”¹⁷ or the “Sunshine Law,”¹⁸ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ Public meetings may

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *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.

¹² 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).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ FLA. CONST., art. I, s. 24(b).

¹⁵ FLA. CONST., art. I, s. 24(b).

¹⁶ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.²¹ Minutes of a public meeting must be promptly recorded and open to public inspection.²² Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.²⁵ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.²⁶ A statutory exemption that does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²⁸ 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.²⁹ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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 is necessary.³⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy 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;³¹

²¹ Section 286.011(6), F.S.

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ FLA. CONST., art. I, s. 24(c).

²⁷ *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.

²⁸ 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 s. 119.15(2), F.S.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1., F.S.

- 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;³² or
- It protects trade or business secrets.³³

The OGSR also requires specified questions to be considered during the review process.³⁴ 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.³⁵ 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.³⁶

Exemption for Private Meetings with an Attorney

In 1993, the Legislature created an exemption to the public meeting requirements by allowing a private meeting between a governmental entity and its attorney.³⁷ Specifically, a board or commission of a state agency or other specified authority³⁸ and the chief administrative or executive officer of the entity may meet in private with the entity's attorney to discuss *pending litigation* that the entity is *presently* a party to, before a court or administrative agency.

To qualify as an exempt meeting:

- The entity's attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- The entire session must be recorded by a certified court reporter during which no portion of the session may be off the record and the notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- The entity must give reasonable public notice of the time and date of the attorney-client session and name all persons who will be attending. The session must begin at an open

³² Section 119.15(6)(b)2., F.S.

³³ Section 119.15(6)(b)3., F.S.

³⁴ 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?

³⁵ FLA. CONST. art. I, s. 24(c).

³⁶ Section 119.15(7), F.S.

³⁷ Section 286.011(8), F.S., Ch. 93-232, s. 1, L.O.F.

³⁸ Section 286.011(8), F.S., also lists other entities to include "any agency or authority of any county, municipal corporation, or political subdivision."

meeting where it is announced by the chair the beginning and estimated length of the meeting and the names of the people attending. When the session ends, the meeting must be reopened and the chair must announce the termination of the session.

- The transcript must be made part of the public record when the litigation is concluded.

In 1998, the Attorney General rendered an opinion clarifying when litigation is pending.³⁹ The opinion stated that the exemption for *pending litigation* does not apply “if no lawsuit has been filed even though the parties involved believe that litigation is inevitable.” The opinion concluded that the Legislature, had it intended, could have extended the exemption to include impending or imminent litigation.

As a result of this interpretation, governmental entities may not use this exemption to discuss settlement options or strategies tied to litigation that is *imminent* but not formally initiated by the filing of a complaint or petition. Even when a demand letter has been presented to a government entity who will soon be a defendant, the attorney may not meet privately with his or her governmental client. As a result, this inability to have preliminary discussions may have an adverse impact on a governmental entity because the opportunity to settle the case, reduce the issues to be litigated, and potentially reduce upcoming legal fees and costs is prohibited.

III. Effect of Proposed Changes:

This bill expands a public meeting exemption that allows certain individuals of a governmental entity to discuss litigation pending before a court or administrative agency. The current exemption authorizes board and commission members and the chief administrative or executive officer of the entity to conduct a private meeting about pending litigation with the attorney of the entity.

The bill broadens the exemption to additionally authorize a private meeting for the purpose of discussing imminent litigation. Litigation is considered imminent when the entity has received notice of a claim or demand by a party threatening litigation before a court or administrative agency.

The bill subjects the parties involved in discussions of imminent litigation to the same standards that apply to discussions of pending litigation.

Therefore:

- The attorney must advise the entity at a public meeting that he or she is seeking advice about the litigation.
- The subject matter at the private meeting is limited to settlement negotiations or strategy sessions related to legal expenses.
- The entire session must be recorded by a certified court reporter.
- The entity must provide reasonable public notice of the time and date of the attorney-client session, and other information related to the process.

³⁹ AGO 98-21; AGO 2004-35.

If the imminent litigation does not proceed, the transcript of the private meeting must be made part of the public record the earlier of when it becomes apparent to the governmental entity that any litigation will not occur or when the underlying statute of limitations expires.

As the public meetings bill expands an existing exemption, a statement of public necessity is required. The statement of public necessity notes that the private meeting is necessary to privately prepare for threatened litigation by obtaining legal advice, exploring and developing relevant facts, and considering an early settlement or other options to make decisions that are better informed. The public necessity statement provides that the bill is also needed to facilitate that governmental entities receive fair treatment during judicial and administrative processes.

These new provisions are subject to review under the Open Government Sunset Review Act and will be repealed on October 2, 2023, unless reviewed and saved from repeal by reenactment of the Legislature.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

When a bill creates or expands an exemption to the public meeting law, a favorable two-thirds vote of each house of the Legislature for passage is required.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By allowing individuals of a government entity to privately meet with the attorney of the entity to discuss imminent litigation, private parties may financially benefit from early settlement, such as through reduced billable hours and other costs of litigation.

C. Government Sector Impact:

The bill may reduce a governmental entity's legal fees by allowing claims to be resolved before they turn into lawsuits and are more costly.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 286.011 of the Florida Statutes and creates an undesignated section of law.

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.