

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EES 13-03 Public Records and Meetings/Commission on Ethics

SPONSOR(S): Ethics & Elections Subcommittee

TIED BILLS: PCB EES 13-02 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Ethics & Elections Subcommittee	13 Y, 0 N	Davison	Marino

SUMMARY ANALYSIS

This bill is linked to PCB EES 13-02, which, in part, authorizes the Governor, the Department of Law Enforcement, a state attorney, or a United States Attorney to submit a written referral of a possible violation of the Code of Ethics for Public Officers and Employees or other possible breach of the public trust to the Commission on Ethics (Commission). PCB EES 13-02 also requires the Commission to investigate allegations in a referral if the Commission determines by a supermajority vote that the referral is sufficient to indicate a violation.

This bill adds to existing public records exemptions related to *complaints* of alleged ethics violations received by the Commission by creating a public records exemption for the following:

- Written referrals of alleged ethics violations and records relating to such referrals that are held by the Commission, its agents, or a public officer authorized to make such a referral, and
- Records relating to any preliminary investigation of such referrals that are held by the Commission or its agents.

The bill also creates a public meetings exemption for any portion of a Commission proceeding in which a determination regarding a referral is discussed or acted upon.

Lastly, the bill extends the existing Open Government Sunshine Review repeal date from October 2, 2015, to October 2, 2018, and provides a public necessity statement as required by the Florida Constitution. The statement finds the new public records and meetings exemptions necessary because the release of information for individuals under investigation could potentially be defamatory, cause unwanted damage to the reputation of the individual, or significantly impair the integrity of the investigation.

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

This bill creates new public records and meetings exemptions. Therefore, as required by the Florida Constitution, it must pass by a two-thirds vote of the members present and voting in each house.

This bill is linked to PCB EES 13-02.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Public Records and Meetings Laws

The Florida Constitution provides specific requirements for public access to government records and meetings. It 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, officer, or employee of the state, or of persons acting on their behalf.¹ The Constitution specifically includes the records of the legislative, executive, and judicial branches 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 the Constitution.² The Florida Constitution also requires all meetings of any collegial body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.³

Additionally, the Florida Statutes also specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶ The Sunshine Law⁷ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

The Florida Constitution requires any exemption from public records or public meetings requirements to be created by the Legislature.⁹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ Further, an exemption must be no broader than necessary to accomplish the stated purpose of law.¹¹ A bill enacting an exemption may not contain other substantive provisions¹² and must pass by a two-thirds vote of the members present and voting in each house.¹³

Exemptions are subject to the Open Government Sunset Review Act,¹⁴ which prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions by requiring

¹ Fla. Const., art. I, s. 24(a).

² Fla. Const., art. I, s. 24(a).

³ Fla. Const., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public records" as "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." The Public Records Act does not apply to legislative or judicial records. See *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

⁶ s. 119.07(1)(a), F.S.

⁷ s. 286.011, F.S.

⁸ s. 286.011(1), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Art. III, s. 4(e), Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- 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 or to take formal legislative action, must be reasonably open to the public.

⁹ Fla. Const., art. I, s. 24(c).

¹⁰ Fla. Const., art. I, s. 24(c).

¹¹ Fla. Const., art. I, s. 24(c).

¹² The bill may, however, contain multiple exemptions that relate to one subject.

¹³ Fla. Const., art. I, s. 24(c).

¹⁴ s. 119.15, F.S.

the automatic repeal of such exemptions on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemptions.¹⁵

The Open Government Sunset Review Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves.¹⁶ An identifiable public purpose is served if the exemption meets one of the following three criteria, and 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:

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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.¹⁷

The Open Government Sunset Review Act requires the Legislature to consider the following in reviewing an exemption:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?¹⁸

Entities That May Investigate Possible Ethics Violations

The Florida Commission on Ethics (Commission) serves as guardian of the standards of conduct for the officers and employees of the state and its political subdivisions.¹⁹ It is an independent commission responsible for investigating and issuing public reports on complaints of breaches of the public trust²⁰ by public officers and employees.²¹ The Commission must investigate sworn complaints of violations of the Code of Ethics for Public Officers and Employees (Code of Ethics)²² or of any other law over which it has jurisdiction.²³ The Commission may only initiate an investigation if it receives a sworn complaint.²⁴ Under current law, there is no process by which another public agency or officer may refer a possible ethics violation to the Commission.

Current law provides that the Code of Ethics does not prohibit the governing body of a political subdivision or agency from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in the Code of Ethics, so long as those standards and requirements do not otherwise conflict with the Code of Ethics.²⁵

¹⁵ s. 119.15, F.S.

¹⁶ s. 119.15(6)(b), F.S.

¹⁷ s. 119.15(6)(b), F.S.

¹⁸ s. 119.15(6)(a), F.S.

¹⁹ s. 112.320, F.S.

²⁰ Section 112.312(3), F.S., defines "breach of the public trust" as "a violation of a provision of the State Constitution or this part which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests, including, without limitation, a violation of s. 8, Art. II of the State Constitution," or the Code of Ethics.

²¹ Fla. Const., art. II, s. 8.

²² Chapter 112, Part III, F.S.

²³ s. 112.322(1), F.S.

²⁴ s. 112.324(1), F.S.

²⁵ s. 112.326, F.S.

Public Records and Meetings Exemptions Relating to Possible Ethics Violations

A complaint alleging an ethics violation or any records relating to the complaint or to any preliminary investigation held by the Commission is temporarily confidential and exempt²⁶ from public records requirements.²⁷ Current law also temporarily exempts any proceeding conducted pursuant to a complaint or preliminary investigation by the Commission from public meetings requirements.²⁸

Both the public records and public meetings exemptions expire when:

- (1) The complaint is dismissed as legally insufficient;
- (2) The alleged violator requests in writing that the records and proceedings be made public; or
- (3) The Commission determines whether probable cause exists to believe that a violation has occurred.²⁹

Effect of Proposed Changes

Linked PCB

This bill is linked to PCB EES 13-02, which, in part, authorizes the Governor, the Department of Law Enforcement, a state attorney, or a United States Attorney to submit a written referral of a possible violation of the Code of Ethics or other possible breach of the public trust to the Commission. PCB EES 13-02 requires the Commission to investigate allegations in a referral if the Commission determines by a supermajority vote³⁰ that the referral is sufficient to indicate a violation.

Public Records and Meetings Exemptions Relating to Possible Ethics Violations

This bill amends s. 112.324, F.S., to create new public records and meetings exemptions related to referrals of possible ethics violations to the Commission. The bill also clarifies that the existing public meetings exemption for any proceeding conducted by the Commission on Ethics or a local government pursuant to a complaint or preliminary investigation is limited to those *portions of* proceedings that are conducted pursuant to a complaint or preliminary investigation.

Consistent with the existing exemptions applicable to complaints alleging violations of the ethics laws, the bill makes the following records temporarily confidential and exempt from public records requirements in s. 119.07(1), F.S., and Art. I, s. 24(a), Florida Constitution:

- (1) Written referrals of possible ethics violations and records relating to such referrals that are held by the Commission on Ethics or its agents, the Governor, the Department of Law Enforcement, or a state attorney;³¹ and
- (2) Records relating to any preliminary investigation of such referrals that are held by the Commission or its agents.

Any portion of a proceeding conducted by the Commission in which a determination regarding a referral is discussed or acted upon is temporarily exempt from public notice and meeting requirements pursuant to s. 286.011, F.S.; Art. I, s. 24(b), Florida Constitution; and s. 120.525, F.S.

Consistent with existing exemptions applicable to complaints alleging violations of the ethics laws, the public records and public meetings exemptions created by this bill expire when:

²⁶ There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So. 2d 687, 687 (Fla. 5th DCA 1991), cited by *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 54 (Fla. 5th DCA), review denied 892 So. 2d 1015 (Fla. 2004). 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 AGO 85-62.

²⁷ s. 112.324(2)(a), F.S.

²⁸ s. 112.324(2)(b), F.S.

²⁹ s. 112.324(c), F.S.

³⁰ Six of the nine members of the Commission on Ethics are required to vote in favor of finding that the referral is sufficient to indicate a violation of the Ethics Code or a breach of the public trust.

³¹ United States Attorneys are not included in the exemption because a United States Attorney is a federal, not state, agency.

- (1) The complaint is dismissed as legally insufficient;
- (2) The alleged violator requests in writing that the records and proceedings be made public; or
- (3) The Commission determines whether probable cause exists to believe that a violation has occurred.

In addition, the bill provides that the public records and meetings exemptions expire when the Commission determines that it will not investigate a referral.

The bill also extends the Open Government Sunset Review repeal date for the public records exemptions related to complaints or referrals,³² extending the repeal date from October 2, 2015, to October 2, 2018.

Lastly, the bill includes a public necessity statement as required by the Florida Constitution, providing a legislative finding that the new public records and meetings exemptions are necessary because the release of information for individuals under investigation could potentially be defamatory, cause unwanted damage to the reputation of the individual, or significantly impair the integrity of the investigation.

B. SECTION DIRECTORY:

- Section 1. Amends s. 112.324, F.S., creating an exemption from public records requirements for written referrals and related records held by the Commission on Ethics, the Governor, the Department of Law Enforcement, or a state attorney; creating an exemption for records relating to a preliminary investigation held by the Commission on Ethics; creating an exemption from public meetings requirements for portions of proceedings of the Commission on Ethics in which the referrals are discussed or acted upon; providing for future repeal and legislative review of the exemption under the Open Government Sunset Review Act.
- Section 2. Provides a statement of public necessity.
- Section 3. Provides an effective date.

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.
2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

³² s. 112.324(2), F.S.
STORAGE NAME: pcb03a.EES
DATE: 3/26/2013

1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or cities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or cities.

2. Other:

Vote Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates new public records and meetings exemptions, it requires a two-thirds vote.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates new public records and meetings exemptions, it includes a public necessity statement finding the new public records and meetings exemptions necessary because the release of information for individuals under investigation could potentially be defamatory, cause unwanted damage to the reputation of the individual, or significantly impair the integrity of the investigation.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A