

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB OTA 18-02 OGSR/False Claims  
**SPONSOR(S):** Oversight, Transparency & Administration Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 7006

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Administration Subcommittee		Harrington	Harrington

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The Florida False Claims Act (FFCA) 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. The Department of Financial Services or the Department of Legal Affairs (DLA) may bring an action for a false claim, or may join a private action.

Current law provides that the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA are confidential and exempt from public record requirements. Such information may be disclosed by DLA to a law enforcement agency or other administrative agency in the performance of its official duties and responsibilities. The exemption expires once the investigation is completed.

The bill reenacts the public record exemption, which will repeal on October 2, 2018, if this bill does not become law.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The Act 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:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>5</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Florida False Claims Act

The Florida False Claims Act (FFCA) authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency.<sup>6</sup> These types of actions were recognized at common law and have historically been called "qui tam" actions. The Florida Legislature enacted the FFCA in 1994 and modeled the FFCA after the Federal Civil False Claims Act. Actions that violate the FFCA include:

- Knowingly presenting or causing to be presented a false claim for payment or approval;
- Knowingly making, using, or causing to be used 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;
- Possessing or controlling property or money used or to be used by the state and knowingly delivering or causing to be delivered less than all of that money or property;
- Intending to defraud the state, making or delivering a document certifying receipt of property used or to be used by the state and making or delivering the receipt without knowing that the information on the receipt is true;

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Section 24(c), Art. I of the State Constitution.

<sup>5</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

<sup>6</sup> Section 68.081, F.S. The FFCA is found in ss. 68.081-68.092, F.S.

- Knowingly buying or receiving, as a pledge of obligation or a debt, public property from an officer or employee of the state who may not sell or pledge the property; or
- Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly concealing or knowingly and improperly avoiding or decreasing payments owed to the state.<sup>7</sup>

An action for a false claim may be brought by the Department of Legal Affairs (DLA), the Department of Financial Services (DFS), or by any person.<sup>8</sup> Generally, such actions are brought by individuals rather than the departments. When an individual files an action, the complaint must be identified as a qui tam action and filed in the circuit court of the Second Judicial Circuit, in and for Leon County. Immediately upon filing the complaint, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses must be served on the Attorney General, as head of DLA, and on the Chief Financial Officer, as head of DFS. DLA, or DFS if the action is based on facts underlying a pending investigation by DFS, may elect to intervene and proceed on behalf of the state within 60 days.<sup>9</sup> DFS may bring an action only if the action arises from an investigation by DFS and DLA has not filed an action.<sup>10</sup>

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state for the FFCA violation.<sup>11</sup> The person who brought the action, if not initiated by DLA or DFS, is entitled to a percent of the proceeds of the action or settlement of the claim. The amount varies depending on whether DLA proceeds with the action or elects not to intervene.<sup>12</sup>

#### Public Record Exemption under Review

In 2013, the Legislature created a public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA. The complaint and information are confidential and exempt<sup>13</sup> from public record requirements.<sup>14</sup> Such information may be disclosed by DLA to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities. In addition, such information is no longer confidential and exempt once the investigation is completed.

The 2013 public necessity statement for the exemption provided that:

Because a false claims investigation conducted by [DLA] may lead to the filing of an administrative or civil proceeding, the premature release of the complaint and information held by the department could frustrate or thwart the investigation and impair the ability of the department to effectively and efficiently administer its duties under the [FFCA]. This exemption also protects the reputation of the named defendant in the event the allegations of the qui tam complaint ultimately prove to be unfounded. Without this exemption, a plaintiff can subject a

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<sup>7</sup> Section 68.082(2), F.S.

<sup>8</sup> Sections 68.083 and 68.084, F.S.

<sup>9</sup> Section 68.083(3) and (4), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> Section 68.082(2), F.S.

<sup>12</sup> Section 68.085, F.S.

<sup>13</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). 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 statute. *See* Attorney General Opinion 85-62 (August 1, 1985).

<sup>14</sup> Chapter 2013-105, L.O.F.; codified as s. 68.083(8), F.S.

defendant to serious fraud allegations in the name of the State of Florida merely by filing a qui tam complaint.<sup>15</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2018, unless reenacted by the Legislature.<sup>16</sup>

During the 2017 interim, subcommittee staff consulted with staff from DLA as part of its review under the Open Government Sunset Review Act. According to DLA, the exemption allows DLA to complete the investigation without compromising the integrity of the investigation, which is necessary to implement the FFCA to prevent fraud, waste, and abuse of state funds. As such, DLA supports reenactment of the public record exemption.

### **Effect of the Bill**

The bill removes the repeal date thereby reenacting the public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 68.083, F.S., to save from repeal the public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA.

Section 2 provides an effective date of October 1, 2018.

## **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.

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<sup>15</sup> Section 2, ch. 2013-105, L.O.F.

<sup>16</sup> Section 68.083(8)(a), F.S.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. This bill does not appear to affect county or municipal governments.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.