

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7061 PCB CJS 15-02 Pub. Rec./Florida RICO Act

**SPONSOR(S):** Civil Justice Subcommittee; Passidomo

**TIED BILLS:** HB 7059 **IDEN./SIM. BILLS:** SB 1536

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	12 Y, 0 N	Malcolm	Bond
1) Judiciary Committee		Malcolm	Havlicak

### SUMMARY ANALYSIS

The bill creates a public records exemption related to investigations of violations of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. Information held by an investigative agency during an investigation of RICO Act violations is generally confidential and exempt from a public records request.

The bill contains the following Legislative findings:

- It is a public necessity that the information held by an investigative agency related to an investigation of RICO Act violations be confidential and exempt;
- Premature release of the information could thwart the investigation and impair the ability of the agency to enforce the Act and;
- It protects the reputation of potential defendants in the event the investigation is closed without further action.

The bill contains a sunset provision and will be repealed on October 2, 2020, unless it is reenacted.

The bill 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 HB 7059 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 expands the current public record exemption for certain information related to civil investigative subpoenas; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Public Records Law - In General

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.<sup>1</sup>

###### Exempt 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.<sup>2</sup> If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.<sup>3</sup> Also, if the information is deemed to be confidential it may only be released to those person and entities designated in statute.<sup>4</sup> However, the agency is not prohibited from disclosing the records in all circumstances where the records are deemed only exempt.<sup>5</sup>

###### Civil Investigative Subpoenas

Under the RICO Act, an investigative agency<sup>6</sup> may, during the course of an investigation into civil violations of the RICO Act, subpoena witnesses and material if the agency has reason to believe that a person or other enterprise has engaged in conduct that violates the RICO Act. Generally, investigatory subpoenas are used to obtain information from third-parties through the production of documents, files, and records or through testimony.

Section 895.06, F.S., authorizes investigative agencies to apply ex parte to a circuit court for an order directing that a person or entity who has been subpoenaed to not disclose the existence of the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days.

HB 7059 amends s. 895.06, F.S., to make all subpoenas issued pursuant to the RICO Act automatically confidential for 120 days after the date of its issuance. The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period.

##### **Effect of the Bill**

The bill creates a public records exemption that corresponds to the investigative subpoena non-disclosure requirement in HB 7059. Specifically, the bill provides that information held by an investigative agency pursuant to an investigation of a violation of the RICO Act is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, information that is confidential and exempt may be disclosed by the investigative agency to a government entity in the performance of its official duties and a court or tribunal. The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information

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<sup>1</sup> Art I., s. 24(c), Fla. Const.

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

<sup>6</sup> "Investigative agency" means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney. Section 895.02(7), F.S.

is otherwise protected by law. An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.

The bill provides that the exemption it creates is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill includes a public necessity statement.

**B. SECTION DIRECTORY:**

Section 1 amends s. 895.06, F.S., regarding civil investigative subpoenas.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of HB 7059, if adopted in the same legislative session.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

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 and law enforcement agencies. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agencies.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

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

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 expands a public record exemption related to investigative subpoenas; 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 expands a public record exemption related to investigative subpoenas; 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 investigative subpoenas and, similar to other investigative subpoenas, provides that the record is open to public inspection as soon as the investigation is complete.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.