

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB OTM 20-01 OGSR/RICO Act Investigations  
**SPONSOR(S):** Oversight, Transparency & Public Management Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee		Toliver	Smith

### 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 Racketeer Influenced and Corrupt Organization (RICO) Act imposes criminal and civil liability on any person who engages in racketeering or the collection of unlawful debt to acquire real property or to establish or operate any enterprise or be associated with such an enterprise. Any property that is used in the course of or derived from the illegal conduct is subject to forfeiture to the state.

Current law provides a public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act. The information may be disclosed to a government entity in the performance of its official duties or to a court or tribunal. The information ceases to be exempt from public records requirements once the investigation to which the information pertains is complete.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2020, if this bill does not become law.

The bill does not appear to have a fiscal impact on 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 (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 then a public necessity statement and a two-thirds vote for passage are not required.

##### Florida Racketeer Influenced and Corrupt Organization (RICO) Act

The Florida RICO Act<sup>5</sup> makes it a first-degree felony for any person to engage in, or conspire to engage in, racketeering activity or the collection of unlawful debt to establish or operate an enterprise or to be associated with such an enterprise.<sup>6</sup> The term "racketeering activity" encompasses a broad range of state and federal criminal offenses identified in current law, including burglary, extortion, perjury, bribery, forgery, homicide, sexual battery, as well as various forms of fraud.<sup>7</sup>

In addition to criminal penalties, the Florida RICO Act imposes civil liability for violating certain provisions, including forfeiture to the state of all property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the act.<sup>8</sup> Current law requires a court to direct the distribution of the proceeds from a forfeiture in the following priority: the clerk of the court to cover statutory fees; claims by people whose interests in the property are preserved (known as "innocent persons"); claims by the Board of Trustees of the Internal Improvement Trust Fund; and restitution for victims of the racketeering activity.<sup>9</sup>

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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> Art. I, s. 24(c), FLA. CONST.

<sup>5</sup> Sections 895.01-895.06, F.S., are known as the "Florida RICO Act."

<sup>6</sup> Sections 895.03 and 895.04, F.S.

<sup>7</sup> Section 895.02(8)(a), F.S.

<sup>8</sup> Section 895.05(2), F.S.

<sup>9</sup> Section 895.09(1), F.S.

Under the Florida RICO Act, an investigative agency<sup>10</sup> may, during the course of an investigation into civil violations of the act, subpoena witnesses and material if the agency has reason to believe that a person or other enterprise has engaged in conduct that violates a provision of the act.<sup>11</sup> The purpose of the subpoena power is “to allow an investigative agency to investigate, collect evidence and determine if a RICO violation has occurred.”<sup>12</sup> All subpoenas issued pursuant to the Florida RICO Act are automatically confidential for 120 days.<sup>13</sup> The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period.<sup>14</sup> The investigative agency may apply for an extension of the confidentiality period for good cause.<sup>15</sup>

#### Public Record Exemption under Review

In 2015, the Legislature created a public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act.<sup>16</sup> The information is confidential and exempt<sup>17</sup> from public records requirements and may only be disclosed by the investigative agency to a governmental entity in the performance of its official duties and to a court or tribunal.<sup>18</sup> The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law.<sup>19</sup> An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.<sup>20</sup>

The 2015 public necessity statement<sup>21</sup> for the exemption provides that:

Because a Florida RICO Act investigation conducted by an investigative agency may lead to the filing of a civil action, the premature release of the information held by such investigative agency could frustrate or thwart the investigation and impair the ability of the investigative agency to effectively and efficiently administer its duties under the Florida RICO Act . . . This exemption also protects the reputation of the potential defendant in the event that the investigation is closed without the filing of a civil action. Further, without this exemption, a potential defendant under the Florida RICO Act may learn of the investigation and dissipate his or her assets and thwart any future enforcement action under the act.<sup>22</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2020, unless reenacted by the Legislature.

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<sup>10</sup> Section 895.02(6), F.S., defines “investigative agency” to mean the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

<sup>11</sup> Section 895.06, F.S.

<sup>12</sup> *Check ‘N Go of Florida, Inc. v. State*, 790 So.2d 454, 457 (Fla. 5th DCA 2001), *review denied* 817 So.2d 845 (Fla. 2002).

<sup>13</sup> Section 895.06(2), F.S.

<sup>14</sup> *Id.*

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

<sup>16</sup> Section 895.06(7), F.S.

<sup>17</sup> There is a difference between records the Legislature designates 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*, Aug. 1, 1985).

<sup>18</sup> Section 895.06(7)(b), F.S.

<sup>19</sup> Section 895.06(7)(c), F.S.

<sup>20</sup> Section 895.06(7)(d), F.S.

<sup>21</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption “state with specificity the public necessity justifying the exemption.”

<sup>22</sup> Chapter 2015-99, L.O.F.

During the 2019 interim, subcommittee staff sent a questionnaire to the Department of Legal Affairs (DLA).<sup>23</sup> Between July 1, 2015, and August 1, 2019, the DLA initiated five civil RICO investigations, of which three have been completed.<sup>24</sup> During the same time period the DLA received three public record requests for the confidential information; pursuant to the exemption under review the information was not released.<sup>25</sup> The DLA stated that the agency “thinks the exemption has accomplished its purpose of preventing the frustration or thwarting of a RICO investigation by the premature release of investigative information.”<sup>26</sup> The DLA recommended that the exemption be reenacted as is.<sup>27</sup>

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act.

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

Section 1 amends s. 895.06, F.S., to save from repeal the public record exemption for information held by an investigative agency pursuant to an investigation of a violation of the Florida RICO Act.

Section 2 provides an effective date of October 1, 2020.

## **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**

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<sup>23</sup> Open Government Sunset Review Questionnaire, DLA Response, Sept. 19, 2019, on file with the Oversight, Transparency & Public Management Subcommittee.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

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

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.