

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 355 Public Meetings

**SPONSOR(S):** Kiar and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Williamson	Williamson
2) Rulemaking & Regulation Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

The State Constitution and the Florida Statutes set forth the state's public policy regarding access to government meetings; however, both are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida courts have heard two cases concerning whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings. In both cases, the court found that while Florida law requires meetings to be open to the public, it does not give the public the right to speak.

The bill requires members of the public to be given a reasonable opportunity to be heard on an item that is of significant interest to the public and that is within the subject matter jurisdiction of the state or local board or commission. It provides that a resolution, rule, or formal action is not binding if the board or commission is not in compliance with provisions regarding the opportunity to be heard.

The bill authorizes a board or commission to adopt reasonable rules or policies to ensure the orderly conduct of public meetings. If a board or commission adopts rules or policies in compliance with the law and follows the rules or policies, it is presumed that the board or commission is acting in compliance with the requirement that citizens be given the opportunity to be heard.

The bill also provides that the attorney's fees provisions and penalties found in current law also apply if the public has not been provided with the opportunity to be heard.

Finally, the bill revises a cross-reference found in a public meeting exemption for the Commission on Ethics. By revising the cross-reference, the bill expands the public meeting exemption found in current law. However, it does not do so in a separate bill as required by the State Constitution, it does not provide a public necessity statement as required by the State Constitution, and it does not provide for future review and repeal of the exemption as required by the Open Government Sunset Review Act.

The bill could have a negative fiscal impact on state and local governments.

This bill may be a county or municipality mandate. See Section III.A.1. of the analysis.

**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 meeting exemption found in current law; thus, it appears to require a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### RIGHT TO SPEAK AT PUBLIC MEETINGS

###### Background

###### *State Constitution: Open Meetings*

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

###### *Government in the Sunshine Law*

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.<sup>1</sup> The board or commission must provide reasonable notice of all public meetings.<sup>2</sup> Public meetings may 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.<sup>3</sup> Minutes of a public meeting must be promptly recorded and be open to public inspection.<sup>4</sup>

###### *Right to Speak at Meetings*

The State Constitution and the Florida Statutes are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida courts have heard two cases concerning whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings.

In *Keesler v. Community Maritime Park Associates, Inc.*,<sup>5</sup> the plaintiffs sued the Community Maritime Park Associates, Inc., (CMPA) alleging that the CMPA violated the Sunshine Law by not providing the plaintiffs with the opportunity to speak at a meeting concerning the development of certain waterfront property. The plaintiffs argued that the phrase "open to the public" granted citizens the right to speak at public meetings. The First District Court of Appeal held:

Relying on the language in *Marston*,<sup>6</sup> the trial court determined that, although the Sunshine Law requires that meetings be open to the public, the law does not give the public the right to speak at the meetings. Appellants have failed to point to any case construing the phrase "open to the public" to grant the public the right to speak, and in light of the clear and unambiguous language in *Marston* (albeit dicta), we are not inclined to broadly construe the phrase as granting such a right here.<sup>7</sup>

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<sup>1</sup> Section 286.011(1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 286.011(6), F.S.

<sup>4</sup> Section 286.011(2), F.S.

<sup>5</sup> 32 So.3d 659 (Fla. 1<sup>st</sup> DCA 2010).

<sup>6</sup> In *Wood v. Marston*, the Florida Supreme Court held that the University of Florida improperly closed meetings of a committee charged with soliciting and screening applicants for the deanship of the college of law. However, the *Marston* court noted "nothing in this decision gives the public the right to be more than spectators. The public has no authority to participate in or to interfere with the decision-making process." *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983).

<sup>7</sup> *Keesler* at 660-661.

The second case, *Kennedy v. St. Johns Water Management District*,<sup>8</sup> was argued before the Fifth District Court of Appeal on October 13, 2011. At a meeting of the St. Johns Water Management District (District), the overflow crowd was put in other rooms and provided a video feed of the meeting. Additionally, the District limited participation in the meeting by members of a group called “The St. Johns Riverkeeper.” Only the St. Johns Riverkeeper representative and attorney were allowed to address the District board. Mr. Kennedy, who wanted to participate in the discussion, sued arguing that the Sunshine Law requires that citizens be given the opportunity to be heard. Mr. Kennedy also alleged that the District violated the Sunshine Law by failing to have a large enough facility to allow all who were interested in attending the meeting to be present in the meeting room. On October 25, 2011, the Fifth District Court of Appeal affirmed the trial court’s ruling that the District did not violate the Sunshine Law as alleged.

### Effect of Bill

The bill requires members of the public to be given a reasonable opportunity to be heard on an item that is of “significant interest” to the public and that is within the subject matter jurisdiction of the state or local board or commission. The bill does not define the term “significant interest” for purposes of implementing the right to speak provisions.<sup>9</sup>

The bill provides that the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the opportunity occurs at a meeting that is during the decision-making process and within reasonable proximity before the board or commission takes official action. It also provides that a resolution, rule, or formal action is not binding if the board or commission is not in compliance with provisions regarding the opportunity to be heard.

The opportunity to be heard is not required when a board or commission is considering:

- An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, when compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;
- An official act involving no more than a ministerial act; or
- A meeting in which the board or commission is acting in a quasi-judicial capacity with respect to the rights or interests of a person, except as otherwise provided by law.

The bill authorizes a board or commission to adopt reasonable rules or policies to ensure the orderly conduct of public meetings. Boards or commissions subject to the Administrative Procedure Act<sup>10</sup> must adopt rules under ss. 120.536(1) and 120.54, F.S., governing the opportunity to be heard. The bill provides that rules or policies of a board or commission may:

- Limit the time that an individual has to address the board or commission;
- Require, at meetings in which a large number of individuals wish to be heard, that a representative of a group or faction on an item, rather than all of the members of the group or faction, address the board or commission; or
- Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard.

If a board or commission adopts rules or policies in compliance with the law and follows the rules or policies when providing an opportunity for the public to speak, it is presumed that the board or commission is acting in compliance with the requirement that citizens be given the opportunity to be heard.

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<sup>8</sup> 2011 WL 5124949 (Fla. 5<sup>th</sup> DCA 2011).

<sup>9</sup> According to the Department of Agriculture & Consumer Services, “[t]he failure to conform to the requirements of the proposed legislation would likely generate litigation from those with interests affected by the outcome of the official action taken. Litigation may also arise to seek judicial clarification of which government actions are of ‘significant interest to the public’ and which involve ‘no more than a ministerial act’.” Analysis of HB 355, Department of Agriculture & Consumer Services, at 3 (October 19, 2011) (On file with the Government Operations Subcommittee).

<sup>10</sup> See chapter 120, F.S.

Current law authorizes reasonable attorney's fees to be assessed against a board or commission found to have violated the Sunshine Law. Attorney's fees may be assessed against the individual members of the board or commission except in those cases where the board or commission sought, and took, the advice of its attorney.<sup>11</sup> The provision governing attorney's fees also applies to those instances when the public has not been provided with the opportunity to be heard and, as such, files an action against the board or commission.

Finally, the following penalty provisions provided in current law<sup>12</sup> also apply if the public has not been provided with the opportunity to be heard:

- Any public officer who violates the public meetings requirements commits a noncriminal infraction, punishable by fine not exceeding \$500.
- Any person who is a member of a board or commission who knowingly violates these requirements by attending a meeting not held in accordance with the public meeting requirements commits a misdemeanor of the second degree.<sup>13</sup>

## **COMMISSION ON ETHICS**

### Background

#### *State Constitution: Exemption Requirements*

The Legislature may provide by general law for the exemption of meetings from the requirements of Article I, s. 24(b) 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 stated purpose. In addition, the State Constitution requires enactment of the exemption by a two-thirds vote of the members present and voting.<sup>14</sup>

#### *Open Government Sunset Review Act*

The Open Government Sunset Review Act<sup>15</sup> provides that a 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.

The Act also provides that a public meeting exemption is subject to a scheduled repeal on October 2<sup>nd</sup> in the fifth year after enactment, unless the Legislature acts to reenact the exemption.<sup>16</sup>

#### *Public Meeting Exemption*

Current law provides a public meeting exemption for those meetings of the Commission on Ethics (Commission) that are held pursuant to an investigation of violations of the lobbying compensation reporting laws.<sup>17</sup> The exemption provides that meetings are exempt from the provisions of s. 286.011(1), F.S. Section 286.011(1), F.S., provides that:

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<sup>11</sup> See s. 286.011(4) and (5), F.S.

<sup>12</sup> Section 286.011(3)(a) and (b), F.S.

<sup>13</sup> A person convicted of a second degree misdemeanor may be sentenced to a term of imprisonment not to exceed 60 days or a fine of up to \$500. (See ss. 775.082 and 775.083, F.S.)

<sup>14</sup> See s. 24(c), Art. I of the State Constitution.

<sup>15</sup> See s. 119.15, F.S.

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> See s. 112.3215(8)(b), F.S.

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

#### Effect of Bill

The bill amends the public meeting exemption for the Commission by removing the reference to subsection (1) of s. 286.011, F.S. As such, the current public meeting exemption is expanded, thus, making the Commission meetings exempt from all requirements provided in s. 286.011, F.S.

The bill expands the public meeting exemption found in current law. However, it does not do so in a separate bill as required by the State Constitution, it does not provide a public necessity statement as required by the State Constitution, and it does not provide for future review and repeal of the exemption as required by the Open Government Sunset Review Act.

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

Section 1 amends s. 112.3215, F.S., to expand the public meeting exemption for the Commission on Ethics.

Section 2 amends s. 286.011, F.S., to require that members of the public be given a reasonable opportunity to be heard at meetings of a board or commission.

Section 3 provides an effective date of July 1, 2012.

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

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

##### **1. Revenues:**

None.

##### **2. Expenditures:**

See FISCAL COMMENTS.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

See FISCAL COMMENTS.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

#### **D. FISCAL COMMENTS:**

Governmental entities could incur additional meeting related expenses because longer and more frequent meetings could be required when considering items of great public interest. As a result, it is likely staff would have to be compensated, security would have to be provided, and other expenses related to the meeting facility would be incurred. The amount of those potential expenses is

indeterminate and would vary depending on the magnitude of each issue and the specific associated meeting requirements.<sup>18</sup>

### **III. COMMENTS**

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

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

The mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because this bill could cause counties and municipalities to incur additional expenses associated with longer meetings or increased meetings due to the new requirement that the public be provided with the opportunity to speak at such meetings; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18, of the Florida Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

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

The bill appears to raise constitutional concerns. It expands a public meeting exemption found in current law; however, it does not do so in a separate bill as required by the State Constitution. Further, it does not provide a public necessity statement as required by the State Constitution.<sup>19</sup>

Article I, s. 24(c) of the State Constitution, also 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 meeting exemption; thus, it appears to require a two-thirds vote for final passage.

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

The bill authorizes a state or local board or commission to adopt reasonable rules or policies to ensure the orderly conduct of public meetings. Boards or commissions subject to the Administrative Procedure Act<sup>20</sup> must adopt rules under ss. 120.536(1) and 120.54, F.S., governing the opportunity to be heard. The bill provides guidelines regarding the rules or policies that may be adopted by a state or local board or commission.

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

None.

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

Not applicable.

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<sup>18</sup> According to the Commission on Ethics, "the only potential concern would be an increase in the length of the meetings and the possible need, and fiscal impact, of Commission members extending their stay in Tallahassee." Analysis of HB 355 (2012) by the Commission on Ethics (on file with the Government Operations Subcommittee).

<sup>19</sup> See s. 24(c), Art. I of the State Constitution.

<sup>20</sup> See chapter 120, F.S.