

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public meetings.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Public Meetings Law

Article I, s. 24(b) of the Florida Constitution, sets forth the state's public policy regarding access to government meetings. The section requires all meetings of the executive branch and local government to be open and noticed to the public. The Legislature, however, may provide by general law for the exemption of meetings from the requirements of Article I, s. 24(b) of the Florida 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.

Public policy regarding access to government meetings is addressed further in the Florida Statutes. Section 286.011, F.S., requires all state, county, or municipal meetings to be open and noticed to the public. Furthermore, the Open Government Sunset Review Act¹ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes:

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

Public Meeting Exemption for Discussions regarding Pending Litigation

Current law provides a public meeting exemption for state or local government entities² meeting with their attorney to discuss pending litigation to which the government entity is presently a party before a court or administrative agency.³ Specifically, the government entity may meet with its attorney in private only to discuss settlement negotiations or strategy sessions related to litigation expenditures. If a government entity goes beyond the "strict parameters of settlement negotiations and strategy sessions related to litigation expenditures" and takes "decisive action" during the closed meeting, then a violation of the Sunshine Law results.⁴

The following conditions must be met if a government entity meets with its attorney to discuss privately pending litigation:

- The attorney must advise the government entity, at a public meeting, that he or she desires advice concerning the litigation.⁵

¹ Section 119.15, F.S.

² Specifically, any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet privately with the entity's attorney to discuss the pending litigation.

³ Section 286.011(8), F.S.

⁴ *Zorc v. City of Vero Beach*, 722 So.2d at 900; see also AGO 99-37, "closed meeting exemption may be used only when the attorney for a governmental entity seeks advice on settlement negotiations or strategy relating to litigation expenditures; such meetings should not be used to finalize action or discuss matters outside these two narrowly prescribed areas."

⁵ Section 286.011(8)(a), F.S.

- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.⁶
- The entire session must be recorded by a certified court reporter.⁷
- The government entity must give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session.⁸
- The transcript must be made part of the public record upon conclusion of the litigation.⁹

Notice of Intent to Initiate a Tort Action Lawsuit

Current law requires a tort claimant to provide written notice of her or his intent to sue the state or one of its agencies or subdivisions¹⁰ within three years after the claim accrues.¹¹ If the claim is for contribution pursuant to s. 768.31, F.S., then the claimant must provide notice within six months after the judgment against the person seeking contribution has either discharged the common liability by payment or agreed to discharge the common liability while the action is pending against her or him.¹² The state or its agency or subdivision must accept or deny the claim that is asserted within six months after the notice is filed. If the appropriate agency fails to make final disposition of a claim within six months after filing, then the claim is deemed denied.¹³

The notice and denial requirements are preconditions to filing a lawsuit.¹⁴

EFFECT OF BILL

The bill expands the current public meeting exemption for discussions regarding settlement negotiations or strategy sessions related to pending litigation expenditures by expanding the definition of pending litigation. The bill provides that the term “pending litigation” includes any matter that is the subject of the mandatory six-month notice of intent to initiate a tort action lawsuit provided to a government entity pursuant to s. 768.28, F.S., and for which a lawsuit has not yet been filed.

Current law provides conditions that must be met in order for the government entity to meet privately with its attorney. The bill expands the current list of conditions to provide that if a lawsuit is not filed on any matter for which the mandatory notice of intent is required, then the transcript must be made part of the public record:

- Within 30 days of the settlement or disposition of the claim; or
- When the time for filing a claim has run if the claim has not been settled or otherwise disposed.

The bill provides for future review and repeal of the exemption on October 2, 2013, pursuant to the Open Government Sunset Review Act. It also provides a public necessity statement as required by the Florida Constitution.

⁶ Section 286.011(8)(b), F.S.

⁷ The court reporter must record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session may be off the record. The court reporter's notes must be fully transcribed and filed with the government entity's clerk within a reasonable time after the meeting. Section 286.011(8)(c), F.S.

⁸ The session must commence at an open meeting. The person chairing the meeting must announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting must be reopened, and the person chairing the meeting must announce the termination of the session. Section 286.011(8)(d), F.S.

⁹ Section 286.011(8)(e), F.S.

¹⁰ Section 768.28(2), F.S., provides that “state agencies or subdivisions” include the executive departments, legislature, judicial branch (including public defenders), independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

¹¹ Section 768.28(6)(a), F.S.

¹² *Id.*

¹³ Section 768.28(6)(d), F.S.

¹⁴ Section 768.28(6)(b), F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 286.0113, F.S., to expand the current public meeting exemption for government entities discussing pending litigation.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill could create a positive fiscal impact by allowing state entities to meet privately to discuss settlement offers, which could result in earlier settlements thus reducing attorney fees and costs.

2. Expenditures:

The bill could create an insignificant fiscal impact on state entities availing themselves of the public meeting exemption, because the closed sessions would be recorded by a certified court reporter; however, it is possible these are costs that eventually would be incurred. The exemption only creates the need for such services sooner rather than later.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill could create a positive fiscal impact by allowing local governments to meet privately to discuss settlement offers, which could result in earlier settlements thus reducing attorney fees and costs.

2. Expenditures:

The bill likely could create a minimal fiscal impact on local governments availing themselves of the public meeting exemption, because the closed sessions would be recorded by a certified court reporter; however, it is possible these are costs that eventually would be incurred. The exemption only creates the need for such services sooner rather than later.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could create a positive fiscal impact on businesses marketing certified court reporter services as the bill could create an increase in need for those services. It also could create a negative fiscal impact on law firms as state and local government entities could settle pending issues more quickly.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does not appear to apply because this bill is not expected to require counties and municipalities to spend funds or to take an action requiring the expenditure of funds, reduce the percentage of a state tax shared with counties or municipalities, or reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created or substantially amended public record or public meeting exemption. The bill expands the current public meeting exemption for pending litigation. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created or substantially amended public record or public meeting exemption. The bill expands the current public meeting exemption for pending litigation. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Not applicable.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

Not applicable.