

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Regulated Industries Committee

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BILL: SB 2344

SPONSOR: Senator Haridopolos

SUBJECT: Public Records Exemption/Board of Funeral, Cemetery and Consumer Services

DATE: April 19, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/1 amendment</u>
2.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>GO</u>	_____
5.	_____	_____	<u>RC</u>	_____
6.	_____	_____	_____	_____

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## I. Summary:

In 2004, the Legislature enacted the Florida Funeral, Cemetery, and Consumer Services Act (act), effective October 1, 2005.<sup>1</sup> This act merges the funeral and cemetery regulation provided by the Board of Funeral and Cemetery Services and the Board of Funeral Directors and Embalmers into one board, the Board of Funeral, Cemetery, and Consumer Services (board). The act also establishes the Division of Funeral, Cemetery, and Consumer Services within the Department of Financial Services under the provisions of ch. 497, F.S.<sup>2</sup> Unless legislation is enacted during the 2005 Session, the new board and the department will not have any public record or meeting exemptions under ch. 497, F.S.

The bill provides that public meetings of the Board of Funeral, Cemetery, and Consumer Services conducted for developing or reviewing licensure examination questions and answers and holding probable cause panel meetings are exempt from s. 286.011, F.S., and s. 24(b), Art. I of the Florida Constitution. The bill exempts records pertaining to the scheduling of inspections and special examinations by the department, information obtained by the department pursuant to an examination, inspection, or investigation, including any consumer complaint, and trade secrets of a licensee or applicant for a license from the public records provisions of s. 119.07, F.S., and s. 24(a), Art. I of the Florida Constitution.

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<sup>1</sup> Ch. 2004-301, L.O.F.

<sup>2</sup> Presently, the Board of Funeral Directors and Embalmers within the Department of Business and Professional Regulation administers the provisions of ch. 470, F.S., which regulates funeral directors, embalming, and the practice of cremating human remains. The Board of Funeral and Cemetery Services within the Department of Financial Services administers the provisions of ch. 497, F.S., which provides for the regulation of cemeteries, cremation services, cemetery companies, and pre-need contracts for funeral merchandise or services.

Information related to an investigation or examination that is held by the department remains confidential and exempt until the investigation or examination is completed or ceases to be active. Investigative records related to complaints against licensees cease to be confidential and exempt 10 days after the board makes a finding of probable cause. If the board does not find probable cause, the public records exemption for these records continues indefinitely. The bill authorizes the department to release confidential and exempt information in the following situations:

- In furtherance of the investigation or examination, the department may disclose information to experts assisting the department in an investigation and to witnesses, potential witnesses, or other persons believed to have knowledge pertinent to the examination or investigation;
- To the probable cause panel of the board for the purpose of probable cause proceedings;
- To any law enforcement agency for use in the performance of its official duties and responsibilities;
- In response to a media inquiry concerning a specific identified matter, the department may confirm that it has the specific matter inquired about under investigation; and
- If the department, within the course of an investigation, uncovers information of immediate and serious concern to the public health, safety, or welfare, it may disseminate such information, as it deems necessary for the public health, safety, or welfare.

The bill provides that an investigation, inspection, or examination is considered active if:

- The investigation, inspection, or examination is proceeding with reasonable dispatch; and
- The agency believes that the investigation, inspection, or examination may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license, or other approval required.

Once an investigation or examination is complete or is no longer active, the information will remain confidential and exempt from public disclosure if disclosure would jeopardize another active investigation or examination; reveal the identity of a confidential source; or reveal investigative techniques or procedures.

The bill provides for review and repeal of the exemption on October 2, 2010, and provides a statement of public necessity.

This bill creates section 497.172, Florida Statutes.

## **II. Present Situation:**

### **Public Records; Exemptions**

Section 24(a), Art. I of the Florida Constitution states, "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution."

Section 24(c), Art. I of the Florida Constitution permits the Legislature to create exemptions from the public records law. However, the bill creating the exemption must contain a statement of public necessity that justifies the exemption, and the exemption must be no broader than necessary to accomplish its purpose. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides for the repeal and prior legislative review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The law states that an exemption may be created or expanded only if the exemption:

- 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 information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.

Section 119.15(3), F.S., provides that on October 2nd of the fifth year after enactment of a new exemption or substantial amendment of an existing exemption the exemption shall repeal, unless the Legislature reviews and reenacts the exemption.

## **Background**

The Board of Funeral Directors and Embalmers within the Department of Business and Professional Regulation (DBPR) administers and enforces the provisions of chapters 455 and 470, F.S., which regulates funeral directors, embalming, and the practice of cremating human remains. The Board of Funeral and Cemetery Services within the Department of Financial Services (DFS) administers and enforces the provisions of ch. 497, F.S., which provides for the regulation of cemeteries, cremation services, cemetery companies, and pre-need contracts for funeral merchandise or services.

During the 2004 Regular Session, the Legislature enacted the Florida Funeral, Cemetery, and Consumer Services Act (act), effective October 1, 2005.<sup>3</sup> The act merges the funeral and cemetery regulation into one board, the Board of Funeral, Cemetery, and Consumer Services (board), and the Division of Funeral, Cemetery, and Consumer Services within the DFS. The act abolishes the Board of Funeral Directors and Embalmers within the DBPR and the Board of Funeral and Cemetery Services within the DFS. The act sets forth the authority of the new board and the department, including investigatory and examination authority for the department and board.

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<sup>3</sup> Ch. 2004-301, L.O.F.

The 2004 act merges the provisions of ch. 470, F.S., into ch. 497, F.S. The act also incorporates into ch. 497, F.S., relevant provisions from ch. 455, F.S., relating to the administration of the regulation of the ch. 470, F.S., professions. The 2004 act did not address public records and meeting exemptions present in chs. 455, 470, and 497, F.S., because of the single subject limitation under s. 24(c), Art. I, Florida Constitution. Unless legislation is enacted prior to October 1, 2005, the new board will not have any public records or public meeting exemptions.

### **Public Records Exemptions in Chapters 455 and 497, F.S.**

Prior to the October 1, 2005 effective date of the act, s. 497.131, F.S., exempts any probable-cause proceeding of the Board of Funeral and Cemetery Services from the public meetings provisions under s. 286.011, F.S. Section 455.225(4), F.S., provides that probable cause proceedings of the Board of Funeral Directors and Embalmers are exempt from s. 286.011, F.S., until 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality. Section 455.225(2), F.S., exempts from s. 119.07(1), F.S., reports of Board of Funeral Directors and Embalmers for all cases dismissed prior to a finding of probable cause.

However, s. 455.225(10), F.S., exempts complaint and all investigation information obtained by the Board of Funeral Directors and Embalmers from s. 286.011, F.S., until 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality. This exemption in s. 455.225(10), F.S., does not apply in actions against unlicensed persons. Section 455.225(10), F.S., also provides a process for the subject of an investigation to inspect the investigative file, and respond to the information contained in the file. A request to inspect must be in writing, and responses to the information contained in the investigative file must be filed with the board within 20 days of the inspection.

Presently, s. 497.131(10), F.S., provides a public records exemption for any complaints, investigative reports, and all records and information relating to an investigation compiled by the Board of Funeral and Cemetery Services or the Department of Financial Services. This exemption applies while the investigation is active.

Section. 455.217(5), F.S., provides that meetings of the DBPR and its boards to develop licensure examinations are exempt from s. 286.011, F.S. Before the effective date of the act, ch. 497, F.S., had no similar provision because none of the licenses previously regulated by the DFS in that chapter required a licensure examination.

### **III. Effect of Proposed Changes:**

**Section 1** creates s. 497.172, F.S., to provide several public records and public meetings exemptions related to the administration of ch. 497, F.S., by the Department of Financial Services (DFS), the Board of Funeral, Cemetery, and Consumer Services, and the Division of Funeral, Cemetery, and Consumer Services.

### **Licensure Examination Development Meetings**

The bill provides a public meetings exemption for meetings of the board that are for the exclusive purpose of creating or reviewing licensure examination questions or answers under ch. 497, F.S. This provision does not appear to create a new exemption. Before the effective date of the act, s. 455.217(5), F.S., provides that such meetings of the DBPR and its boards are exempt from s. 286.011, F.S. Before the effective date of the act, ch. 497, F.S., had no similar provision because none of the licenses regulated by the DFS in that chapter required a licensure examination.

The First Amendment Foundation (FAF) has expressed concerns regarding this exception. The FAF suggests that when the board closes a meeting or a portion of meeting from the public, the board should make a record of the meeting to assure that the board restricted itself to the discussions permitted. This record, which could include a tape recording of the closed meeting or other documentation, should also become public at a certain point in the future.

### **Probable Cause Panel Meetings**

The bill provides a public meeting exemption for meetings of the probable cause panel of the board pursuant to s. 497.153, F.S., until 10 days after a finding of probable cause is made pursuant to s. 497.153, F.S.

Currently, the probable cause proceedings of the Board of Funeral Directors and Embalmers cease to be exempt 10 days after probable cause has been found to exist or until the subject of the investigation waives his or her privilege of confidentiality.<sup>4</sup> Reports of the Board of Funeral Directors and Embalmers related to cases dismissed prior to a finding of probable cause are exempt from the public record provisions of s. 119.07(1), F.S., indefinitely.

The FAF has expressed concerns regarding this public meeting exemption. Specifically, the bill does not require records related to meetings of the probable cause panel to become public in the event the panel dismisses a case prior to a finding of probable cause. The FAF believes that this provision should be amended to provide that the investigative records become public whether or not probable cause is found. This would provide greater accountability for the probable cause panel and serve as a means to exonerate an entity by allowing access to public records that document that an unfounded complaint was dismissed against an entity.

### **Records Related to Examinations, Inspections, and Investigations**

Records of the department which reveal the scheduling of inspections or special examinations under ch. 497, F.S., are confidential and exempt from the provisions of s. 199.07, F.S. There is no comparable provision in statute applicable for each of board prior to the effective date of the merger.

The bill provides that information, including consumer complaints, held by the department pursuant to an investigation of alleged unlicensed practice in violation of ch. 497, F.S., is

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<sup>4</sup> See s. 455.225(2), F.S.

confidential and exempt from s. 119.07, F.S., an s. 24(a), Art. I of the State Constitution. The exemption applies until the examination or inspection is completed or ceases to be active. Before the effective date of the act, each board had a similar exemption.<sup>5</sup>

Complaints against any licensee under ch. 497, F.S., investigative records relating to the department's investigation of the complaint, and portions of the record of a probable-cause-panel proceeding, if any, relating to consideration and action concerning such complaint are confidential and exempt from the provisions of s. 119.07, F.S., and s. 24(a) of Art. I of the State Constitution. The exemption is effective until 10 days after a finding of probable cause.<sup>6</sup>

The FAF has also expressed concerns regarding this exception. The FAF recommends that the bill should be amended to provide that the investigative records become public regardless of whether or not probable cause is found. This would provide greater accountability for the probable cause panel and serve as a means to exonerate an entity by allowing public access to records documenting that an unfounded complaint was dismissed against an entity.

### **Disclosure of Confidential and Exempt Information**

The bill provides the following circumstances in which confidential and exempt information can be disclosed prior to an investigation or examination was complete or no longer active:

- During and in furtherance of an investigation or examination, to experts engaged by the department, and to witness or possible witnesses for the purpose of obtaining information from such witnesses or persons;
- To the probable-cause panel of the board for the purpose of probable-cause proceedings;
- Any law enforcement agency or other government agency for use by the other agency in its official duties and responsibilities;
- The department may confirm that it has the specific matter inquired about under investigation when responding to a media inquiry regarding a specific identified matter; and
- In the course of an investigation, the department may disseminate such information, as it deems necessary for the public health, safety, or welfare.

The bill provides that if the department shares confidential information with a law enforcement agency or other government agency to further an investigation of matters within its jurisdiction, the information shall remain confidential and exempt until that agency's investigation is complete or is no longer active.

The bill provides the following circumstances in which information would remain confidential and exempt subsequent to the department completing or ceasing its investigation or examination or after probable cause was found by the board:

- Disclosure of information would jeopardize the integrity of another active investigation or examination;

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<sup>5</sup> See ss. 455.225(10) and 497.131, F.S.

<sup>6</sup> Before the effective date of the act, each board had a similar exemption. See ss. 455.225(10) and 497.131(10), F.S.

- Disclosure of information would reveal the identity of a confidential source; and
- Disclosure of information would reveal investigative or examination techniques or procedures that the department has reasonable good-faith belief will be used in future investigations or examinations.

There were no comparable provisions for either board before the effective date of the merger since the public records and meeting laws for both of the boards were created prior to significant changes in the public records laws under s. 119.07, F.S., and the Florida Constitution in the 1992. Section 24(c), Art. I of the Florida Constitution requires that an exemption must be no broader than necessary to accomplish its purpose.

The bill provides that an investigation, inspection, or examination is active when it is proceeding with reasonable dispatch and the agency has reasonable good-faith belief that the investigation, inspection, or examination may lead to the filing of an administrative, civil, or criminal proceeding or the denial or conditional grant of an application for license or other approval required under ch. 497, F.S. The Board of Funeral and Cemetery Services has a comparable provision under s. 497.131, F.S. The Board of Funeral Directors and Embalmers does not have a comparable provision in ch. 455, F.S., or ch. 470, F.S.

In subsection (5) of s. 497.172, F.S., the bill provides that records of the department that might reveal a trade secret, as defined in s. 812.081, F.S., are confidential and exempt from s. 119.07, F.S., and s. 24(a) of Art. I of the Florida Constitution.

The bill provides that s. 497.172, F.S., is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S. The bill also provides that this section will stand repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** provides a statement of public necessity for each of the public meetings and public records exemptions in the bill.

**Section 3** provides an effective date of October 1, 2005. The bill provides that the bill “shall not take effect unless SB\_\_\_\_\_ or substantially similar legislation is adopted in the same session or an extension thereof and becomes law.”

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

Section 24, Art. I, Florida Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. The bill provides a statement of

public necessity for each of the public meetings and public records exceptions in the bill. However, the bill does not provide justification for keeping records relating to a probable cause meetings that result in no finding of probable cause confidential and exempt indefinitely.

The First Amendment Foundation has suggested that investigative records related to a probable cause panel meeting become public regardless of whether the probable cause panel finds probable cause. Presently, the bill provides that investigative records relating to a complaint that results in a finding of probable cause become public 10 days after a finding of probable cause. If there is no finding of probable cause, such records remain confidential and exempt indefinitely. The FAF also suggested that any meetings that are made exempt from s. 286.011, F.S., and s. 24(b) of Art. I of the Florida Constitution, should be documented by means of a transcript or tape recording to ensure that the board restricts its meetings to the exempted topic and to preserve a record of the meeting.

Section 24(a), Art. I, Florida Constitution, requires a two-thirds vote of each house for passage of a newly created public records or public meetings exemption.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption in the bill would prevent disclosure of confidential sources. The public disclosure of such information could discourage individuals from providing information regarding alleged violations of the law.

The bill also exempt records containing trade secrets from disclosure, protecting businesses under investigation from the unfair practices that could arise if a competitor were able to obtain these records as the result of a public records request.

C. Government Sector Impact:

The public records exemption may provide the Department of Financial Services and the Board of Funeral, Cemetery, and Consumer Services with effective investigatory tools to assist in the performance of its compliance and enforcement duties relating to ch. 497, F.S. The exemption may help to protect the integrity of ongoing investigations and examinations.

**VI. Technical Deficiencies:**

Section 3 of the bill provides that the passage of this bill is contingent upon the passage of an undesignated companion Senate Bill; however, this bill is not tied to the provisions of any other bill.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

### **Barcode 293096 by Regulated Industries:**

This amendment provides a non-contingent effective date of October 1, 2005.

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