

# 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.)

BILL: CS/SB 2190

SPONSOR: Governmental Oversight and Productivity Committee and Senator Bennett

SUBJECT: Public Records & Meetings

DATE: March 31, 2004

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Favorable</u>
2.	<u>Branning</u>	<u>Kiger</u>	<u>NR</u>	<u>Favorable</u>
3.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The committee substitute makes exempt and confidential specified information of the Florida Alternative Energy Technology Center, as created by SB 1316 or similar legislation. The bill also creates a public meetings exemption for those portions of meetings of the board of directors of the Florida Alternative Energy Technology Center at which confidential information is presented or discussed. The bill requires confidential information to be released to public employees exclusively for the performance of their duties and provides criminal penalties for a person who fails to maintain the confidentiality of the information.

The bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### Public Records and Meetings Requirements

**Public Records** - Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, the people of Florida voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides:

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. This section specifically includes the legislative, executive, and

judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Law<sup>1</sup> specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The term “public records” has been defined by the Legislature in s. 119.011(1), F.S., to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>2</sup> Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under s. 24(c), Art. I of the State Constitution, the Legislature may provide by general law passed by a two-thirds vote of each house for the exemption of records, if: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must only contain exemptions to public records or meetings requirements and must relate to one subject.

**Public Meetings** - Section 286.011, F.S., commonly referred to as the “Sunshine Law,” provides a right of access to governmental proceedings at both the state and local levels. Three basic requirements are provided: (1) meetings of public boards or commissions must be open to the public (whether appointed or elected); (2) reasonable notice of such meetings must be given; and (3) minutes of the meeting must be taken.

Under the provision, private organizations may be subject to the Sunshine Law. The Attorney General has noted that private organizations generally are not subject to the Sunshine Law unless they have been delegated the authority to perform some governmental function.<sup>4</sup> While the Sunshine Law has been interpreted not to apply to a private nonprofit corporation established by a local business to foster economic development,<sup>5</sup> it has been held to apply to private entities created by law or by public agencies,<sup>6</sup> and also to private entities providing services to

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<sup>1</sup> Chapter 119, F.S.

<sup>2</sup> *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>3</sup> *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

<sup>4</sup> *See, e.g.*, Inf. Op. to Fasano, June 7, 1996 (Sunshine Law does not apply to meetings of a homeowners’ association board).

<sup>5</sup> *See, e.g.*, Inf. Op. to Hatcher and Thornton, September 15, 1992 and Inf. Op. to Armesto, September 18, 1979.

<sup>6</sup> *See, e.g.*, Atty. Gen. Op. 92-80, finding that the Sunshine Law applies to the Board of Directors of Enterprise Florida, Inc.

governmental agencies and acting on behalf of those agencies in the performance of their public duties.<sup>7</sup>

**Open Government Sunset Review Act** - The Open Government Sunset Review Act of 1995 establishes a review and repeal process for exemptions to public records or meetings requirements. Under the act, a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.<sup>8</sup> An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>9</sup>

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year. An exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year’s certification after the determination.

The Act provides that an exemption is to be created or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet that public purpose.<sup>10</sup> Further, the Act provides that an exemption is to be created or maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.<sup>11</sup>

The failure of the Legislature to comply strictly with the Open Government Sunset Review Act does not invalidate an otherwise valid reenactment. Further, one session of the Legislature cannot bind a future Legislature. Consequently, a new session of the Legislature may preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act, if the requirements of s. 24, Art. I of the State Constitution are not violated.

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<sup>7</sup> See, e.g., Atty. Gen. Op. 98-55, finding that a nonprofit corporation created by a city redevelopment agency to assist in the implementation of the agency’s redevelopment plan is subject to the Sunshine Law.

<sup>8</sup> Section 119.15(3)(a), F.S.

<sup>9</sup> Section 119.15(3)(b), F.S.

<sup>10</sup> Section 119.15(4)(b), F.S.

<sup>11</sup> Section 119.15(2), F.S.

## Florida Alternative Energy Technology Center

Committee Substitute for Senate Bill 1316 creates the Florida Alternative Energy Technology Center, Inc., to be the principal alternative energy technology organization for the state and to provide leadership for research and development on the production of, improvements in, or use of alternative energy technology in Florida. The Center is created as a not-for-profit corporation but is expressly made subject to the public records and meetings requirements of s. 24, Art. I of the State Constitution, ch. 119, F.S., and s. 286.011, F.S.<sup>12</sup>

### III. Effect of Proposed Changes:

The bill makes confidential and exempt the following information held by the Florida Alternative Energy Technology Center.

- The identity of a business that may be recruited and all negotiations to recruit a business to locate in Florida. This information becomes a public record at the conclusion or termination of the recruitment process and shall be made available for inspection and copying at that time.
- Proprietary business information obtained from a business entity, the disclosure of which would injure the business in the marketplace, and material relating to methods of manufacture or production, potential trade secrets.
- The identity of donors or potential donors.
- Information received from another person which would be confidential and exempt from disclosure while in that person's possession.

The bill also creates a public meetings exemption for that portion of a meeting of the board of directors of the Florida Alternative Energy Technology Center during which information is presented or discussed which is confidential and exempt from disclosure. The bill also exempts records of the closed portions of the board meetings from public disclosure.

Under Public Records Law, there is a distinction between records that are made exempt and records that are made exempt and confidential. If a record is made exempt only, an agency is not prohibited from disclosing the documents in all circumstances.<sup>13</sup> If the Legislature makes certain information exempt and confidential, however, such information may not be released to anyone

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<sup>12</sup> The term “agency” as used in the Public Records Act includes private entities “acting on behalf of any public agency.” The Florida Supreme Court has stated that this broad definition ensures that a public entity cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 592 So.2d 1029 (Fla. 1992). There is, however, no single factor which controls when analyzing if a private corporation is subject to public records requirements. A “totality of factors” test is used to determine applicability. The nine factors established in *Schwab* include: (1) the level of public funding; (2) commingling of funds; (3) whether the activity is conducted on public-owned property; (4) whether services contracted for are an integral part of the public agency’s chosen decision-making process; (5) whether the private entity is performing a governmental function or a function which the agency would otherwise perform; (6) the extent of the public agency’s involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by a public entity; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity is functioning. Examples of private entities created pursuant to law or by public agencies that have been determined by the Attorney General to be subject to open records and meetings requirements include the Florida Windstorm Joint Underwriting Association; the Pace Property Finance Authority, Inc., rural health networks, and the South Florida Fair and Palm Beach County Expositions, Inc.

<sup>13</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).

other than to the persons or entities designated in statute.<sup>14</sup> The bill requires information made exempt and confidential by the bill to be released to public employees exclusively for the performance of their duties.

The bill also requires public employees receiving confidential information to maintain the confidentiality of the information. The bill provides criminal penalties for a public employee who fails to maintain the confidentiality of the information, punishable as a misdemeanor of the first degree (up to 1 year in jail or up to a \$1,000 fine).

The bill provides a legislative statement of public necessity for the public records exemption, as required under s. 24(c), Art. I of the State Constitution. The bill makes the following findings of public necessity. Businesses may not be willing to participate in the recruitment and location process or to share information on research needs, ongoing research, or research results if information relating to recruiting, proprietary business information, and research information is not made confidential, and the state would lose the benefits of the economic development of businesses relocating to Florida, of having advanced research into alternative energy conducted in Florida, and of being positioned to make maximum use of new developments in alternative energy. The state university research system would also lose the benefits of a coordinated alternative energy research program involving private companies. Additionally, because some donors wish to remain anonymous and will not make donations if their identity is not protected, donor-identity information must be made confidential.

The bill takes effect on the same date as CS/SB 1316 or similar legislation if that legislation is enacted and becomes law.

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

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

A. Tax/Fee Issues:

None.

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<sup>14</sup> See, Inf. Op. to Chiaro, January 24, 1997.

**B. Private Sector Impact:**

Businesses may be more willing to participate in negotiations to locate or relocate to Florida as a result of the passage of this bill. Also, businesses and universities may be more willing to share information on research needs and research results through the coordinated efforts of the Center. This may encourage economic development. It may also enhance research and utilization of alternative energy technology in Florida, and development of technologies to market world wide.

**C. Government Sector Impact:**

Costs of administration would be insignificant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

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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