

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

B. EFFECT OF PROPOSED CHANGES:

Background on Alternative Investments

The State Board of Administration exists pursuant to article IV, section 4(e) of the Florida Constitution. It is composed of the governor, as chair, the chief financial officer, and the attorney general. The SBA is charged with investing all the funds in the System Trust Fund of the Florida Retirement System as well as other funds¹ such as the Public Employee Optional Retirement Program Trust Fund, the Florida Hurricane Catastrophe Trust Fund, the Lawton Chiles Endowment Fund, and the Local Government Surplus Funds Trust Fund.² For fiscal year 2003-2004, the net asset value of all funds managed by the SBA was \$134.2 billion.³ The System Trust Fund of the Florida Retirement System comprises 76 percent of these assets.⁴

Section 215.44, Florida Statutes, sets forth the powers and duties of the SBA in relation to the investment of trust funds. Among the powers granted to the SBA is the authority to make purchases, sales, exchanges, and reinvestments for the System Trust Fund.⁵ The SBA is charged to ensure that investments are handled in the best interests of the state,⁶ but also to have an appropriately diversified portfolio which maximizes financial return consistent with the risks incumbent in each investment.

As part of its best interests, maximization, and diversification actions, the SBA, invests in multiple asset classes: domestic equities (U.S. stocks), global equities (U.S. and non-U.S. stocks), international equities (non-U.S. stocks), fixed income (bonds), real estate (including direct-owned properties and real estate investment trusts), and cash/cash equivalents (short-term instruments).⁷ The SBA also invests in an “alternative investment” asset class which “is composed principally of private equity investments through limited partnerships and captive (exclusive) arrangements” with resulting portfolio investments being “predominantly equity investments in domestic companies.”⁸ In other words, the alternative investments class generally consists of private equity funds, venture capital funds, distress debt funds, and hedge funds.⁹

The Total Fund Investment Plan approved by the Board of Trustees provides a target of five percent for the alternative investments assets class with a range from one percent to eight percent.¹⁰ The actual investment for the System Trust Fund has been approximately 3.27 percent over the last four years:¹¹

¹ Fla. Stat. § 215.44(1) (2005).

² Fla. State Board of Adm., 2003-2004 Inv. Rep. (2004) at 3, available at <http://www.sbafla.com/pdf/investment/annual/2004/SBA-AIR.pdf> (last visited Feb. 20, 2006).

³ *Id.*

⁴ *Id.*

⁵ Fla. Stat. § 215.44(2)(a) (2005).

⁶ *Id.*

⁷ Fla. State Board of Adm., 2003-2004 Investment Rep., at 14.

⁸ *Id.* at 15.

⁹ Fla. State Board of Adm., Summary of SBA Public Records Exemption Proposal (Dec. 1, 2005), at 1.

¹⁰ Fla. State Board of Adm., Fla. Ret. Sys. Total Fund Inv. Plan (As Approved by the Trustees Aug. 12, 2003), at 5, available at http://www.sbafla.com/pdf/funds/FRSDB_TFIP_2003_07_01.pdf (last visited Feb. 20, 2006)

¹¹ Fla. State Board of Adm., FRS DB Assets by Type, available at http://www.sbafla.com/popup.aspx?image=images\WebCharts\FRSDB_assets_by_type.gif (last visited Feb. 20, 2006); Fla. State Board of Adm., Alternative Investment Information for FRS DB Plan, available at http://www.sbafla.com/funds_detail.aspx?parent=1§ion=8&type=ai#3 (last visited Feb. 20, 2006).

	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
Alternative Investments (\$/millions)	2,822	3,326	3,410	3,581
Net Contributions (\$/millions)	(135)	445	(225)	(270)
Market Gain (Loss) (\$/millions)	(145)	59	309	440
Total Market Value (\$/millions)	86,166	96,490	106,752	114,122
Percent Alternative Investments	3.28	3.45	3.19	3.14

In order to make alternative investments, the SBA engages private equity managers:

Only 30% of all private equity partnerships have been able to produce the SBA-required premium over public market returns which justify incurring the risks associated with these investments. The top of these private equity managers have generated sizable premiums over the public markets (19.4% and 29.7%) because of substantial information advantages. The information advantages of these private equity managers include confidential business information and trade secrets.¹²

Some of this information may become a public record which must be open to inspection and copying¹³ unless exempt or confidential and exempt.¹⁴

Access to Public Records

Access to the public records of any public body is a right provided by Article 1, section 24(a) of the Florida Constitution:

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 119.07(1), Florida Statutes, provides further implementation of this right:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.¹⁵

Requirements for Public Records Exemptions

The Legislature may limit the right of the public to inspect or copy any public record by creating an exemption by general law. This general law must "state with specificity the public necessity justifying the exemption" and be "no broader than necessary to accomplish the stated purpose of the law." The Legislature has created numerous public records exemptions.

¹² Fla. State Board of Adm., Summary of SBA Public Records Exemption Proposal (Dec. 1, 2005).

¹³ Fla. Stat. § 119.07(1) (2005).

¹⁴ There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are permitted to be disclosed under certain circumstances. See *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 certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62, Aug. 1, 1985.

¹⁵ Fla. Stat. § 119.07(1)(a) (2005).

Relevant Public Records Exemptions: State Board of Administration

Some public records of the State Board of Administration are currently confidential and exempt:

- Records relating to acquiring, hypothecating, or disposing of real property or related personal property or mortgage interests in same, as well as interest in collective real estate investment funds, publicly traded securities, or private placement investments;¹⁶
- Reports and documents relating to value, offers, counteroffers, or negotiations until closing is complete and all funds have been disbursed;¹⁷
- Reports and documents relating to tenants, leases, contracts, rent rolls, and negotiations in progress until the executive director determines that releasing such information would not be detrimental to the interests of the board and would not cause a conflict with the fiduciary responsibilities of the State Board of Administration;¹⁸
- Records relating to investments made by the board pursuant to its constitutional and statutory investment duties and responsibilities until 30 days after completion of an investment transaction;¹⁹ and
- Information concerning service provider fees may be maintained until six months after negotiations relating to such fees have been terminated.²⁰

A New Public Records Exemption for the State Board of Administration

This proposed committee bill is being considered by the Governmental Operations Committee pursuant to House Rule 7.9. The bill contains a public records exemption sought by the State Board of Administration for certain information related to alternative investments.

Public Records Exemption for Alternative Investments: Definitions

The bill provides definitions for a new public records exemption for the State Board of Administration.

The bill defines an alternative investment as “an investment...in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company through an investment manager.”

The bill also defines “proprietary confidential business information” as information which has been designated by a proprietor as meeting all three of the following criteria:

Proprietary Confidential Business Information Criteria	Elements of the Criteria
1. <i>Owned or controlled</i> by a proprietor.	A proprietor is defined as “an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the State Board of Administration.”

¹⁶ Fla. Stat. § 215.44(8)(a) (2005).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Fla. Stat. § 215.44(8)(b) (2005).

²⁰ *Id.*

Proprietary Confidential Business Information Criteria	Elements of the Criteria
2. Intended to be and is treated by the proprietor as <i>private</i> .	The disclosure of this information must harm the business operations of the proprietor. The information must not have been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process or pursuant to law or an order of a court or administrative body;
3. Relates to any of the designated areas.	<p>These designated areas include:</p> <ul style="list-style-type: none"> - Trade secrets - Information provided to the State Board of Administration regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information. - Financial statements and auditor reports of an alternative investment vehicle. - Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle. - Information regarding the portfolio positions in which the alternative investment vehicles invest. - Capital call and distribution notices to investors of an alternative investment vehicle. - Alternative investment agreements and related records. - Information concerning investors, other than the State Board of Administration, in an alternative investment vehicle.

The bill also defines what information does not meet the definition of proprietary confidential business information and which would continue to be available as a public record:

1. The name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.
2. The dollar amount of the commitment made by the State Board of Administration to each alternative investment vehicle since inception.
3. The dollar amount and date of cash contributions made by the State Board of Administration to each alternative investment vehicle since inception.
4. The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration from each alternative investment vehicle.

5. The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration plus the remaining value of alternative-vehicle assets that are attributable to the State Board of Administration's investment in each alternative investment vehicle.
6. The net internal rate of return of each alternative investment vehicle since inception.
7. The investment multiple of each alternative investment vehicle since inception.
8. The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the State Board of Administration to each alternative investment vehicle.
9. The dollar amount of cash profit received by the State Board of Administration from each alternative investment vehicle on a fiscal-year-end basis.

The bill also provides definitions for alternative investment vehicle,²¹ portfolio company,²² and portfolio positions.²³

Public Records Exemption for Alternative Investments: Operation

The bill makes proprietary confidential business information held by the State Board of Administration confidential and exempt from section 119.07(1), Florida Statutes, and article I, section 24(a) of the Florida Constitution for 10 years after the termination of the alternative investment. The bill also makes the exemption applicable to proprietary confidential business information held by the State Board of Administration before, on, or after October 1, 2006.

The bill, however, permits access to inspect or copy a particular record under the provisions of section 119.07(1), Florida Statutes, if a proprietor, within a reasonable period of time after the request received by the State Board of Administration, fails to verify through a written declaration pursuant to section 92.525, Florida Statutes, that a particular records contains the following information:

1. That the requested record contains proprietary confidential business information and the specific location of such information within the record;
2. If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002, Florida Statutes;
3. That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and
4. That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

Public Records Exemption for Alternative Investments: Petition for Public Release

Any person may petition a court of competent jurisdiction in Leon County, Florida for an order for the public release of those portions of any record made confidential and exempt by operation of this bill. The petition must be served, along with any other initial pleadings, on the SBA and on the proprietor of the information sought to be released, if the proprietor can be determined through diligent inquiry.

²¹ Fla. HPCB GO 01-30, §1 (2005) (defined as "the limited partnership, limited liability company, or similar legal structure or investment manager through which the State Board of Administration invests in a portfolio company").

²² Fla. HPCB GO 01-30, §1 (2005) (defined as "a corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the State Board of Administration and any subsidiary of such corporation or other issuer").

²³ Fla. HPCB GO 01-30, §1 (2005) (defined as "individual investments in portfolio companies which are made by the alternative investment vehicles, including information or specific investment terms associated with any portfolio company investment").

The bill requires the court to make three findings in any order for the release of a public record: (1) that the record or portion thereof is not a trade secret as defined in section 688.002, Florida Statutes; (2) that a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record; and (3) that the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the State Board of Administration, or any trust fund, the assets of which are invested by the State Board of Administration.

Public Records Exemption for Alternative Investments: Open Government Sunset Review Act

Section 119.15, Florida Statutes, requires the review and repeal or reenactment of any exemption from section 24, article I of the Florida Constitution and section 119.07(1), Florida Statutes, in the fifth year after the enactment of a new exemption. Unless the Legislature acts to reenact the newly created exemption, it is repealed on October 2nd of the fifth year. The bill recognizes this required review and provides for repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Public Records Exemption for Alternative Investments: Public Necessity Statement

This bill provides a public necessity statement to comport with the requirements of article 1, section 24(c) of the Florida Constitution.

C. SECTION DIRECTORY:

- Section 1: Creates paragraph (c) of subsection 8 of section 215.44, Florida Statutes, to create a public records exemption for certain investment information held by the State Board of Administration.
- Section 2: Sets forth the public necessity statement for the exemption.
- Section 3: Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate any revenues of state government.

2. Expenditures:

The bill likely could create a fiscal impact on the State Board of Administration because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition, the State Board of Administration could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate any revenues of local governments.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate any expenditures of local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not appear to reduce the percentage of a state tax shared with counties or municipalities. This bill does not appear to reduce the authority that municipalities have to raise revenue.

2. Other:

Article 1, section 24(c) of the Florida Constitution contains three requirements for any general law creating an exemption to the constitutional 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: (1) passed by a two-third votes of each house, (2) state with specificity the public necessity justifying the exemption, and (3) be no broader than necessary to accomplish the stated purpose of the law. As such, the bill requires a two-thirds vote for passage. The adequacy of the public necessity statement and whether the bill is broader than necessary are ultimately matters of judicial interpretation.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its meeting on March 15, 2006, the Governmental Operations Committee adopted two amendments and reported the proposed committee bill favorably:

- Amendment 1 corrected a reference to the State Board of Administration.
- Amendment 2 addressed the application of the exemption and revises the structure, but not the operation, of the provision related to the release of records.

At its meeting on March 29, 2006, the State Administration Council adopted an amendment and reported the bill favorably with council substitute:

- Amendment 1 made stylistic changes to the provision related to verifying proprietary confidential business information in a record for purposes of maintaining the public records exemption.