

# 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: Commerce and Consumer Services Committee

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BILL: CS/SB 2656

INTRODUCER: Commerce and Consumer Services Committee and Senator Atwater

SUBJECT: Public Records/Florida Opportunity Fund

DATE: April 5, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This committee substitute (CS) creates an exemption from Florida's public record law for trade secrets and other information related to portfolios of venture capital fund investments when held by the Florida Opportunity Fund under the Florida Capital Formation Act created by CS/SB 2668 (2006).

This CS creates the following sections of the Florida Statutes: 288.9961.

## II. Present Situation:

### Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, the electors of Florida approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides that:

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.

The Public Records Law<sup>1</sup> specifies conditions under which the public must be given access to governmental records. Section 119.011(11), F.S., defines the term “public records” 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.

The Florida Supreme Court has interpreted this definition as including all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge....”<sup>2</sup>

Under s. 24(c), Art. I of the State Constitution, the Legislature may enact a law exempting records from the open government requirements 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.

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act of 1995<sup>3</sup> establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. 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>4</sup>

Section 119.15(6)(a), F.S.,<sup>5</sup> requires, as part of the review process, the consideration of the following questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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

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

<sup>3</sup> Section 119.15, F.S.

<sup>4</sup> Section 119.15(3)(b), F.S.

<sup>5</sup> Formerly s. 119.15(4)(a), F.S. (as revised by s. 37, ch. 2005-251, L.O.F.).

An exemption may be maintained only if it serves an identifiable public purpose and only if the exemption is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes, the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government, and the purpose cannot be accomplished without the exemption:

- The exemption “[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption “[p]rotects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.” Is the record or meeting protected by another exemption?
- The exemption “[p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”<sup>6</sup>

### **Florida Opportunity Fund**

In January 2006, Governor Jeb Bush proposed several new economic development initiatives including the creation of the Florida Capital Formation Act (CS/SB 2668 (2006)). That act is designed to increase the amount of venture capital investment in Florida, by providing an unspecified amount of state funds to be invested in private venture capital funds.<sup>7</sup> Under CS/SB 2668, Enterprise Florida, Inc., (EFI) must establish the Florida Opportunity Fund as a wholly owned, private, not-for profit, limited liability company. The Florida Opportunity Fund must invest in venture capital funds, emphasizing investment in seed and early stage venture capital funds focusing on investment opportunities in Florida. The fund may only invest in venture capital funds that are able to match, on a one-to-one basis the Opportunity Fund’s investment.

### **Trade Secrets**

Section 812.081(1)(c), F.S., defines a trade secret to include, in pertinent part, “any scientific, technical, or commercial information” which provides a “business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.” According to that statute, a trade secret is: “secret, of value, for use in or use by the business; and of advantage to the business or providing an opportunity to obtain an advantage, over those who do not know or use it.”

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<sup>6</sup> Section 119.15(6)(b), F.S.

<sup>7</sup> Enterprise Florida, *Create the Florida Capital “Venture Capital” Formation Program—\$75Million*, [www.eflorida.com/pressroom/pubs/Innovation%20Economy%20Proposal%20-%20Venure%20Capital.pdf](http://www.eflorida.com/pressroom/pubs/Innovation%20Economy%20Proposal%20-%20Venure%20Capital.pdf). 29 March 2006.

### III. Effect of Proposed Changes:

**Section 1** creates s. 288.9961, F.S., to make the following information confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. 1 of the State Constitution:

- Trade secrets, as defined by s. 812.081, F.S., when held by the Florida Opportunity Fund; and
- Tax identification numbers, analyses of gross receipts, the amount of taxes paid, the amount of capital investment, the amount of employee wages paid, and detailed documentation submitted by venture capital funds to substantiate performance information included in a portfolio of venture capital funds receiving investments from the Florida Opportunity Fund.

This new exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** provides a statement of public necessity for the exemption. According to the statement, the exemption is necessary to protect a business from injury that may be caused if a competitor obtained detailed insight into the trade secrets, financial status and strategic plans of the business, thereby diminishing the advantage that the business maintains over others who do not have this information. Moreover, private businesses are unaccustomed to such disclosure. Requiring them to disclose documents that they usually keep private may have a chilling effect on the number of businesses that wish to participate in economic development programs created under the Florida Capital Formation Act. Finally, the statement indicates that the harm to businesses in the state and to the effective administration of the Florida Opportunity Fund which may result from such disclosure far outweighs the public benefits that may be derived from that disclosure.

**Section 3** provides that this CS will take effect on July 1, 2006, if CS/SB 2668, creating the Florida Capital Formation Act or other similar legislation is adopted in the same legislative session and becomes law.

### IV. Constitutional Issues:

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

None.

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

This CS creates an exemption from Florida's public record law for trade secrets and other information related to portfolios of venture capital fund investments when held by the Florida Opportunity Fund under the Florida Capital Formation Act created by CS/SB 2668 (2006).

#### C. Trust Funds Restrictions:

None.

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

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be some costs associated with maintaining this public records exemption.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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

None.

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