

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 2656

INTRODUCER: Governmental Oversight and Productivity Committee, Commerce and Consumer Services Committee and Senator Atwater

SUBJECT: Public Records/Florida Opportunity Fund

DATE: April 20, 2006

REVISED: _____

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

I. Summary:

This bill creates an exemption from Florida's public record law for proprietary confidential business information held by the Florida Opportunity Fund regarding alternative investments under the Florida Capital Formation Act created by CS/SB 2668 (2006).

This bill creates section 288.9961 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

... to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

³ Article I, s. 24 of the State Constitution.

(a) Every person⁴ 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. . . .

Unless specifically exempted, all agency⁵ records are available for public inspection. The term “public record” is broadly defined to mean:

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.⁶

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

The Public Records Act¹⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

¹⁴ Chapter 119, F.S.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ The records custodian must state the basis for the exemption, in writing if requested.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53, *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So.2d 203 (Fla. 1998).

²¹ 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

simply because it was provided to the State during the course of its criminal investigation.²²

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if 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;
- [p]rotects 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
- [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 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.²⁴

The act also requires consideration of the following:

- 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?

²² *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

²³ Section 119.15, F.S.

²⁴ Section 119.15(4) (b), F.S.

- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²⁵ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

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.²⁶ 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."

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

²⁶ Enterprise Florida, *Create the Florida Capital "Venture Capital" Formation Program—\$75Million*, www.eflorida.com/pressroom/pubs/Innovation%20Economy%20Proposal%20-%20Venure%20Capital.pdf. 29 March 2006.

III. Effect of Proposed Changes:

This bill creates an exemption from public records requirements proprietary confidential business information held by the Florida Opportunity Fund regarding alternative investments. The bill defines proprietary confidential business information to mean

. . . information that has been designated by the proprietor when provided to the Florida Opportunity Fund as information that is owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private, the disclosure of which would harm the business operations of the proprietor and has not 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; and that concerns:

- a. Trade secrets as defined in s. 688.002.
- b. Information provided to the Florida Opportunity Fund regarding a prospective investment in a private equity fund, venture fund, angel fund, or portfolio company which is proprietary to the provider of the information.
- c. Financial statements and auditor reports of an alternative investment vehicle.
- d. Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle.
- e. Information regarding the portfolio positions in which the alternative investment vehicles invest.
- f. Capital call and distribution notices to investors of an alternative investment vehicle.
- g. Alternative investment agreements and related records.
- h. Information concerning investors, other than the Florida Opportunity Fund, in an alternative investment vehicle.

The definition expressly does not include the following:

- 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.
- The dollar amount of the commitment made by the Florida Opportunity Fund to each alternative investment vehicle since the inception.
- The dollar amount and date of cash contributions made by the Florida Opportunity Fund to each alternative investment vehicle since inception.
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the Florida Opportunity Fund from each alternative investment vehicle.
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the Florida Opportunity Fund plus the remaining value of alternative-vehicle assets that are attributable to the Florida Opportunity Fund's investment in each alternative investment vehicle.
- The net internal rate or return of each alternative investment vehicle since inception.

- The investment multiple of each alternative investment vehicle since inception.
- The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the Florida Opportunity Fund to each alternative investment vehicle.
- The dollar amount of cash profit received by the Florida Opportunity Fund from each alternative investment vehicle on a fiscal-year-end basis.

The bill also requires a proprietor of confidential business information to provide a written declaration in the manner provided by s. 92.525, F.S., upon a public records request for that information, that:

- The requested record contains proprietary confidential business information and the specific location of such information within the record;
- If the proprietary confidential business information is a trade secret, that it is a trade secret as defined in s. 688.002, F.S.
- 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
- That the disclosure of the information to the public would harm the business operations of the proprietor.

If the proprietor fails to submit the declaration in a reasonable time, the information will be released to the requestor.

Under the bill, any person may petition a court of competent jurisdiction for an order for the public release of those portions of any record made confidential and exempt by the bill. The court may release the information if it makes certain findings.

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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

See *supra*.

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.

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

VIII. Summary of Amendments:

None.

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