

**The Florida Senate**  
**PROFESSIONAL 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 Committee

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BILL: CS/SB 2422

INTRODUCER: Commerce Committee and Senator Ring

SUBJECT: Public Records/SURE Ventures Capital Fund

DATE: March 20, 2007

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

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

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**I. Summary:**

CS/SB 2422 creates an exemption from Florida’s public records and public meetings laws for proprietary confidential business information held by the SURE Venture Capital Fund or the Institute for Commercialization of Public Research. It is a companion bill to CS/SB 2420, which creates the SURE Venture Capital Act.

This committee substitute creates s. 288.9630, F.S., which lists a series of documents and descriptions of meetings that would be considered confidential and exempt from the public. It specifies that public employees may view the confidential and exempt documents as necessary for their duties, but must maintain their confidentiality. The exemption is repealed Oct. 2, 2012, unless reenacted by the Legislature.

CS/SB 2422 also provides a statement of public necessity for the exemptions.

Because CS/SB 2422 creates a new public record and public meeting exemption, it is subject to Art. I, s. 24(a), of the State Constitution, which requires that two-thirds of the members present and voting in each chamber must pass the bill.

**II. Present Situation:**

Florida’s Public Records Law

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, Floridians voted to adopt an amendment to the Florida

Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24(a), 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 there under; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the Florida Constitution, the Public Records Law<sup>1</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental 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.

Unless specifically exempted, all agency<sup>2</sup> records are available for public inspection. The term “public records” is defined in s. 119.011(11), 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 the 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>3</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>4</sup>

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c), of the

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

<sup>2</sup>The term “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.”

<sup>3</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

State Constitution, the Legislature may provide by general law for the exemption of records provided that: (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 is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.<sup>5</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>6</sup>

#### Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. 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 re-enacts the exemption. Section 119.15(4)(a), F.S., requires a law that enacts a new exemption, or substantially amends an existing exemption, to 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. Paragraph (b) provides that 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.”

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

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

Section 119.15(6)(b), F.S., provides that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot

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<sup>5</sup> Attorney General Opinion 85-62.

<sup>6</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

be accomplished without the exemption:

1. 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;
2. The exemption protects 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 jeopardize the safety of such individuals. However, in exemptions under this provision, only information that would identify the individuals may be exempted; or
3. The exemption protects 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.

While the standards in the Open Government Sunset Review Act of 1995 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.<sup>7</sup> The Legislature is only limited in its review process by constitutional requirements.

#### The SURE Venture Capital Act

CS/SB 2420, the companion bill to CS/SB 2422, creates the SURE Venture Capital Act, a program of tax credits intended to energize venture capital investment opportunities for emerging Florida businesses.

Under that bill, \$50 million in tax credits is set aside to promote investment in seed capital and early stage venture capital equity for Florida-based companies. The tax credits may be applied against the sales and use tax, the corporate income tax, the premium insurance tax, and the wet marine and transportation insurance tax.

CS/SB 2420 creates a three-tiered structure to manage and implement the program:

- The SURE Trust and its board of directors receive and manage the tax credits, and are responsible for the overall direction of the program.
- The Sure Venture Capital Fund (fund) and its board of directors are responsible for hiring the investment fund allocation manager, making the actual investments, and attracting other co-investors.
- The Institute for Commercialization of Public Research (institute), operated by south Florida public university in a major metropolitan area with extensive commercial air service, selects companies that will be eligible to receive the SURE investments, and helps mentor those companies.

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<sup>7</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Both the fund and the institute will have access to candidate companies' business plans, potential trade secrets<sup>8</sup>, and other sensitive proprietary information.

### III. Effect of Proposed Changes:

**Section 1** creates s. 288.9630, F.S., which specifies the public records exemptions pertaining to the aforementioned fund and institute. They are:

- Materials that relate to methods of manufacture or production; potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida, and which are held by the fund or the institute.
- Applications, agreements and proposals to receive grants or funding. However, those portions of these documents that do not contain information made exempt by the previous provision are not confidential and exempt upon issuance of the report made after the conclusion of the project for which funding was provided.
- Materials that relate to the identity of other investors or potential investors in projects reviewed by the fund.
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt that governmental entity's laws.
- Any proprietary information held pertaining to investment or planned investment in a company by the SURE Venture Capital Fund or received by the Institute for the Commercialization of Public Research as a result of its solicitation of investment into a company, including information such as company capital structure, key customers, strategic partners or relationships, financial statements and employee lists, but excepting information publicly disclosed by any such company.

The term "proprietary confidential business information" is defined as information that is owned or controlled by the corporation, partnership, or person requesting confidentiality under s. 288.9630, F.S.; that is intended to be and is treated by the corporation, partnership, or person as private in that the disclosure of the information would cause harm to the business operations; and that has not been disclosed unless pursuant to a statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public. Generally, this is information concerning business plans; internal auditing controls and reports of internal auditors; and reports of external auditors for privately held companies.

Any part of a meeting of the fund or the trust, at which information considered confidential and exempt by other provisions in this bill, is presented or discussed is closed to the public, pursuant to s. 24(b), Art. I of the State Constitution and s. 286.011, F.S. Any records generated during those closed portions of meetings, such as minutes, tape recordings, videotapes, transcriptions, or notes, also are confidential and exempt.

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<sup>8</sup> 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."

CS/SB 2422 allows public employees to inspect and copy records of the trust or the institute that are exempt and confidential, but exclusively for the performance of their public duties. These public employees must maintain the confidentiality of the information. Violating this provision is a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.

Once a confidential and exempt record becomes legally available or subject to public disclosure for any reason, that record is no longer confidential and exempt, and shall be made available for inspection and copying.

This section is subject to the Open Government Sunshine Review Act in accordance with s. 119.15, F.S., and shall be repealed on October 2, 2012, unless reviewed and reenacted by the Legislature.

**Section 2** is the statement of public necessity. The exemptions are determined to be necessary because disclosure of the confidential and exempt information could: give competitors an unfair advantage; result in inadequate returns on investment; and ultimately frustrate the investment goals of the fund and the institute.

**Section 3** contains an effective date of July 1, 2007, contingent on passage of CS/SB 2420 or similar legislation during the same session.

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

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

None.

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

CS/SB 2422 creates public records exemption for certain documents, records, and descriptions of meetings related to project investment by the fund and the institute. It further creates a public meetings exemption for that portion of meetings held by the fund or the institute to discuss the information contained in the confidential documents.

Because CS/SB 2422 creates a public records/public meeting exemption it is subject to Art. I, s. 24(a), of the State Constitution, which requires that two-thirds of the members present and voting in each chamber must pass the bill.

**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 minimal costs of complying with the confidentiality and exemption requirements; however, these costs are indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



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

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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