

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 2374

INTRODUCER: Education Pre-K-12 Committee and Senator Detert

SUBJECT: Public Records Exemption/Education Records

DATE: April 7, 2009 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|------------------|
| 1. | deMarsh-Mathues | Matthews | ED | Fav/CS |
| 2. | Naf | Wilson | GO | Favorable |
| 3. | | | EA | |
| 4. | | | RU | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill provides a new public records exemption for education records, as defined by the Family Educational Rights and Privacy Act (FERPA) and the implementing regulations, for K-12 students and public postsecondary students and applicants. These records are confidential and exempt. The exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will sunset on October 2, 2014, unless saved from repeal through reenactment by the Legislature.

This bill creates a new public records exemption and therefore requires a two-thirds vote of each house of the Legislature pursuant to s. 24(c), Art. I of the State Constitution.

This bill substantially amends s. 1006.52 and creates s. 1002.221 of the Florida Statutes.

II. Present Situation:

Public Records

Article I, s. 24 of the State Constitution,¹ 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.

The Public Records Act² 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 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.

Unless specifically exempted, all agency³ 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.⁴

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.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ 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.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

¹ Article I, s. 24 of the State Constitution.

² Chapter 119, F.S.

³ 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.”

⁴ Section 119.011(11), F.S.

⁵ *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁶ *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ *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).

The Open Government Sunset Review Act of 1995¹¹ establishes a review 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 may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one the following purposes and 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:

- 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;
- The exemption protects 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
- 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 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.¹²

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?
- 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?

Finally, 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.¹³ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁴

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Article I, s. 24(c) of the State Constitution.

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(b), F.S.

¹³ Attorney General Opinion 85-62.

¹⁴ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

Education Records

Federal Law

The Family Educational Rights and Privacy Act (FERPA) protects the privacy of student education records.¹⁵ The law applies to any educational agency or institution that receives funds under any program administered by the U.S. Department of Education (U.S. DOE).¹⁶

Parents have specific rights with respect to their children's education records, including the right to inspect and review education records, to seek to have education records amended in certain circumstances, and to consent to the disclosure of education records.¹⁷ These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."¹⁸

The law does allow schools and postsecondary institutions to disclose education records, without consent, to comply with a judicial order or lawfully issued subpoena and to third parties that include the following:¹⁹ school officials, including teachers, within the agency or institution who have a legitimate educational interest; officials at other schools to which a student is transferring; appropriate parties in connection with financial aid to a student; and appropriate officials in cases of health and safety emergencies.²⁰

Additionally, even after a student has become an "eligible student" under FERPA, postsecondary institutions and high schools, for students over 18 years of age, may allow parents to have access to their child's education records, without the student's consent.²¹ A school may disclose education records under any circumstances to a parent of student who is a dependent for federal income tax purposes.²² Even if a student is not a dependent, a postsecondary institution may disclose education records to a student's parent if the disclosure is in connection with a health or safety emergency and is needed to protect the health or safety of the student or other individuals, and if a postsecondary student has violated any federal, state or local law, or any rule or policy of the institution governing the use or possession of alcohol or a controlled substance.²³

Florida Law

Current law provides a public records exemption for personally identifiable records or reports of a student, including any personal information within the records.²⁴ While the law protects student records that are created, maintained and used by public educational institutions and codifies

¹⁵ 20 U.S.C. § 1232g and 34 CFR Part 99. Education records are those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

¹⁶ 20 U.S.C. § (a)(3) and 34 CFR Part 99.1(a), December 2008.

¹⁷ 20 U.S.C. § 1232g

¹⁸ 20 U.S.C. § 1232g (d) and 34 C.F.R. § 99.5

¹⁹ 20 U.S.C. § 1232g(b)(1) and 34 C.F.R. § 99.31

²⁰ 34 C.F.R. § 99.36(b) provides that educational information in connection with an emergency to protect the health and safety of a student may be released to teachers in the school and at other schools.

²¹ 34 C.F.R. § 99.5

²² Department of Education, *Final Rule, 34 CFR Part 99, Section-by-Section Analysis*, December 2008, See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. (last visited March 21, 2009).

²³ *Id.*

²⁴ s. 1002.22(3)(d), F.S.

many of the provisions in FERPA, it has not been amended to incorporate many of the changes to the federal law.²⁵ Consequently, the law contains provisions that are substantially dated and inconsistent with FERPA and recent changes to the implementing regulations.²⁶ The new regulations include provisions to implement the USA Patriot Act, P. L. 107-56, and the Campus Sex Crimes Prevention Act in P. L. 106-386. The regulations also revise the definitions of attendance, disclosure, and education records and add the term "biometric record" to the list of personal identifiers that constitute personally identifiable information.²⁷

III. Effect of Proposed Changes:

The bill creates a new public records exemption for education records, as defined by FERPA and the implementing regulations, for K-12 students and public postsecondary students and applicants. These records are confidential and exempt.

Under state law and FERPA, an individual who has not been in attendance at a school or postsecondary institution is not included in the definition of a student.²⁸ Federal regulations permit a school district or postsecondary institution to disclose education records, without consent, to officials at another school or postsecondary institution where a student seeks or intends to enroll.²⁹ The current public records exemption for student records does not include an individual who has not been in attendance as an enrolled student at the institution.³⁰ Under the bill, the records of applicants for admission to a postsecondary institution are included in the public records exemption. These records directly relate to an applicant for admission to a public postsecondary institution who has not been in attendance at the institution and are maintained by the institution or by a party acting on its behalf.

The bill prohibits agencies,³¹ public schools, centers, institutions or other entities that are part of Florida's education system³² from releasing information without the written consent of the student, except in the circumstances permitted by FERPA. Education records released by agencies, public schools, centers, and public postsecondary institutions to the Office of Program Policy Analysis and Government Accountability (OPPAGA) or the Auditor General that are used to perform their official duties and responsibilities must be used and maintained in accordance with FERPA.³³

²⁵ DOE bill analysis, March 20, 2009. The law was last amended in 2004. *See also* ss. 1002.21 and 1006.52, F.S., relating to the records of postsecondary students. Current administrative rule (6A-1.0955, F.A.C.), relating to the education records of pupils and adult students, has not been amended since 1995.

²⁶ For example, the definition of a student's "record" in Florida law (s. 1002.22(2)(c), F.S.) is inconsistent with the definition in FERPA (20 U.S.C. § 1232g). Additional inconsistencies were identified by a legal work group comprised of state university, community college, and executive branch attorneys.

²⁷ 34 C.F.R. § 99.3. "Biometric record" means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual, including fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

²⁸ 20 U.S.C. § 1232g(a)(6), 34 C.F.R. § 99.3, and s. 1002.22(2)(d), F.S.

²⁹ 34 C.F.R. § 99.31(a)(2)

³⁰ s. 1002.22(2)(d), F.S.

³¹ These agencies are defined in s. 1022.22(1)(a), F.S.

³² This prohibition applies to public K-12 schools, the Florida School for the Deaf and the Blind, the Florida Virtual School, and public postsecondary educational institutions. *See* s. 1000.04, F.S.

³³ The U.S. Department of Education did not include in the final regulations proposed amendments concerning the disclosure of education records without consent to state auditors. The department is currently seeking further public comment to help

The exemptions will sunset on October 2, 2014 unless they are reenacted by the Legislature.

Other Potential Implications:

The bill ensures that the state complies with federal FERPA requirements, which protects the state's grant of federal funds.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption that will limit public access to certain information relating to student and applicant records. This bill meets the requirements of s. 24, Art. I of the State Constitution by containing a statement of public necessity to justify the exemption, by relating to only one subject, and by containing only one exemption. This bill requires a two-thirds vote of each house of the Legislature for enactment.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Department of Education, there is no fiscal impact associated with the provisions of the bill. Failure to comply with FERPA may result in the withholding of funds under any program administered by the U.S. DOE.³⁴ The bill may provide a way to demonstrate compliance with federal requirements and ensure that federal funds are not jeopardized.

VI. Technical Deficiencies:

None.

develop guidance or new regulations on the issue, and will provide guidance on a case-by-case basis in the interim. See <http://www.ed.gov/policy/gen/reg/ferpa/stateauditor.html> (last visited March 21, 2009).

³⁴ 20 U.S.C. § 1232g(f), 34 C.F.R. § 99.67

VII. Related Issues:

This bill is linked to CS/SB 2426, which requires the State Board of Education (SBE) and public postsecondary institutions to comply with the federal Family Educational Rights and Privacy Act (FERPA) and federal regulations. CS/SB 2426 also conforms current Florida law with FERPA with respect to the parties who may access otherwise confidential and exempt personally identifiable records about a student without parental and student consent, the manner in which student and parental rights are implemented, and the definition of “directory information,” “records and reports,” and “student.”

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Education Pre-K-12 on March 26, 2009:

- Provides a new public records exemption for education records for K-12 students and public postsecondary students and applicants;
- Provides that the records are confidential and exempt; and
- Sunsets the exemption on October 2, 2014, unless it is reenacted by the Legislature.

- B. **Amendments:**

None.