

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 Education Pre-K - 12 Committee

BILL: CS/SB 2144

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

SUBJECT: Open Government Sunset Review/Voluntary Prekindergarten Education Program

DATE: March 19, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	deMarsh-Mathues	Matthews	ED	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Section 1002.72, F.S., provides a public records exemption for the individual records of a child enrolled in the Voluntary Prekindergarten Education Program held by an early learning coalition, the Agency for Workforce Innovation, or a Voluntary Prekindergarten Education Program provider. These records include assessment data, health data, records of teacher observations, and personal identifying information of the enrolled child and his or her parent. 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, 2010, unless reenacted by the Legislature. This bill reenacts the exemption and authorizes agents or authorized representatives of a party to an interagency agreement to access confidential and exempt information, provided that they meet two requirements. The agent must perform a service for which the party to the agreement would otherwise use employees and must be under the direct control of the party to the agreement.

This bill substantially amends section 1002.72 of the Florida Statutes.

II. Present Situation:

Public Records

Article I, s. 24 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.

The Public Records Act¹ 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 agency² 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.³

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.⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁹ The Open Government Sunset Review Act of 1995¹⁰ establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial

¹ Chapter 119, F.S.

² 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.”

³ Section 119.011(12), F.S.

⁴ *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁵ *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *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).

⁸ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

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

¹⁰ Section 119.15, F.S.

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.¹¹

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

Voluntary Prekindergarten (VPK) Education Program

In 2002, the State Constitution was amended to require the establishment of a prekindergarten program for every 4-year-old child in the state which is voluntary, high-quality, free, and

¹¹ Section 119.15(6)(b), F.S.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

delivered according to professionally accepted standards.¹⁴ The Legislature created the VPK program, which became effective in the 2005 school year, and provided the parents of eligible children a choice among three program options:¹⁵ a school-year VPK program delivered by a private prekindergarten provider; a school-year VPK program delivered by a public school; or a summer VPK program delivered by a public school or private prekindergarten provider.

The VPK program is administered at the local level by school districts and early learning coalitions.¹⁶ At the state level, the Department of Education (DOE) administers the educational accountability requirements of the program and the Agency for Workforce Innovation (AWI) administers the operational requirements of the program.¹⁷ The AWI's specific operational requirements are enumerated in s. 1002.75, F.S., and include determining the eligibility of private providers to deliver the VPK program.

All VPK providers must register with an early learning coalition, comply with federal antidiscrimination requirements, and may not discriminate against a parent or child, including the refusal to admit a child for enrollment in the VPK program, in violation of the antidiscrimination requirements.¹⁸

In 2008-2009, there were 5,660 providers that participated in the VPK program, 657 offered the summer program and 5,472 offered the school year program.¹⁹ Most of the VPK providers (84 percent) were private centers.²⁰ For 2008-2009, the VPK program enrollment is estimated to be 63.5 percent of the 4-year old population.²¹

Public Records Exemptions

Under s. 1002.72, F.S., the individual records of a child enrolled²² in the Voluntary Prekindergarten Education Program held by an early learning coalition, the Agency for Workforce Innovation, or a Voluntary Prekindergarten Education Program provider are exempt from public records requirements. The statute also provides that such records include assessment data, health data, records of teacher observations, and personal identifying information of the enrolled child and his or her parent.²³

Section 1002.72(3), F.S., only authorizes the sharing of confidential and exempt information with specific agencies, organizations, and individuals in the furtherance of their duties and

¹⁴ Art. IX, s. 1(b) and (c) of the State Constitution.

¹⁵ Chapter 2004-484, L.O.F. See ss. 1002.55, 1002.61, and 1002.63, F.S.

¹⁶ Pursuant to s. 1002.51(2), F.S., early learning coalitions are created under s. 411.01(5), F.S.

¹⁷ Sections 1002.73 and 1002.75, F.S.

¹⁸ Sections 1002.53(6)(c) and 1002.75(2), F.S., and 42 U.S.C. s. 2000d.

¹⁹ Correspondence with AWI, March 12, 2010, on file with the committee.

²⁰ *Id.*

²¹ Correspondence with Office of Economic and Demographic Research, Florida Legislature, March 12, 2010, on file with the committee. See http://edr.state.fl.us/conferences/earlylearning/VPK%20Results_3-8-10.pdf.

²² Rule 60BB-8.100(7), F.A.C., defines "enrollment" as the final step in the process of entering (or enrolling) a child in the VPK program. It means officially entering the child's name in the statewide information system as a VPK student. Registration is a step in the enrollment process.

²³ Under s. 1000.21(5), F.S., and administrative rule for the VPK education program (Rule 60BB-8.100(10), F.A.C.), a parent is either or both parents of a student, any guardian of a student, any person in a parental relationship to a student, or any person exercising supervisory authority over a student in place of the parent.

responsibilities.²⁴ Agencies, organizations, or individuals receiving such confidential and exempt records in order to carry out their official functions must protect the records in a manner that will not permit the personal identification of an enrolled child or his or her parent by persons other than those authorized to receive the records. The AWI reports that it enters into interagency data sharing agreements with the DOE and the Department of Children and Family Services (DCF) to allow for the release of VPK child demographic information and information required for the DOE to calculate VPK readiness rates as required by statute.²⁵ These agreements address the requirements and responsibilities of the parties for maintaining confidential and exempt information and provide time frames that encompass one year.²⁶

Coalitions may use contract service providers to assist in carrying out the coalitions' local or regional VPK program administrative responsibilities.²⁷ Pursuant to AWI rules, when a contract service provider is used, the coalition is ultimately responsible for ensuring that the contractor performs its duties in accordance with applicable laws, rules, and AWI procedures.²⁸ The types of services provided by the contractors include determining a child's eligibility, registering a child, and enrolling a child in the statewide information system. According to AWI, some of the contract service providers are local governmental agencies (e.g., local children's services councils), private not-for-profit corporations (e.g., Community Coordinated Care for Children) and for-profit organizations (e.g., Arbor Education & Training).²⁹

The Purpose and Public Necessity for the Exemptions

The 2005 law creating the exemption stated that, without the exemption, the disclosure of confidential and exempt information would cause an unwarranted invasion into the life and privacy of enrolled children and their parents thereby significantly decreasing the number of program enrollees.³⁰ Disclosure of such information would significantly impair the administration of the program, since parents would be less inclined to allow their children to participate in the program because sensitive, personal information would be made available to the public.³¹ The 2005 Legislature also found that:³²

²⁴ The Secretary of the U.S. Department of Education, the Secretary of the Department of Health and Human Services, and the U.S. Comptroller General for the purpose of federal audits; individuals or organizations conducting studies for institutions to develop, validate, or administer assessments or improve instruction; accrediting organizations in order to carry out their accrediting functions; appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the child or other individuals; the Auditor General in connection with his or her official functions; a court of competent jurisdiction in compliance with an order of that court pursuant to a lawfully issued subpoena; and parties to an interagency agreement among early learning coalitions, local governmental agencies, VPK providers, or state agencies for the purpose of implementing the VPK program.

²⁵ Correspondence with AWI, July 17, 2009, on file with the committee.

²⁶ Correspondence with AWI, August 5, 2009, on file with the committee. The draft AWI agreement with DCF is for 2009-2010. The current AWI agreement with DOE is under review.

²⁷ Rule 60BB-8.100(13), F.A.C. The definition of contractor does not include certain private entities, a school district, or public school. According to the AWI, many of the early learning coalitions have chosen to carry out their local responsibilities through a subcontractor. The AWI notes that the grant agreement between the AWI and the coalitions recognizes this fact and makes coalitions ultimately responsible for providing services in its service area and ensuring that subcontractors comply with the requirements placed on coalitions. However, the AWI does not provide a standard contract for coalitions to use with their contracted service providers. Rather, the coalitions establish their own contracts.

²⁸ *Id.*

²⁹ Correspondence with AWI, September 1, 2009, on file with the committee. The AWI further notes that the majority of coalitions use governmental or not-for-profit contract service providers. Only one coalition uses a for-profit corporation.

³⁰ Chapter 2005-88, L.O.F.

³¹ *Id.*

- Personal identifying information of a child enrolled in the VPK Education Program and the personal identifying information of the child's parent must be made confidential and exempt from public disclosure. Disclosure of such information could endanger the safety and welfare of 4-year-old children, and the availability of such information could lead to increased opportunities for child abduction or identity theft;
- Assessment data and records of teacher observations contain sensitive, personal information regarding an enrolled child and the child's progress in the program. Disclosure of such information could cause embarrassment to the child and could stifle the child's progress in the program; and
- An enrolled child's health data is of a sensitive and personal nature. Matters of personal health are traditionally private and confidential concerns between a patient and a health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors. For these reasons, an individual's expectation of a right to privacy in all matters regarding his or her personal health necessitates the exemption.

The Open Government Sunset Review of s. 1002.72, F.S.

Senate professional staff reviewed the public records exemptions in s. 1002.72, F.S., and found that the exemptions meet the requirements for reenactment in that they protect information of a sensitive personal nature concerning children and their parents and is no broader than is necessary to allow the AWI, early learning coalitions, and VPK providers to carry out their responsibilities for implementing the VPK education program.

Accordingly, professional staff recommended that the Legislature reenact the public records exemptions in s. 1002.72, F.S., with a modification to specifically authorize early learning coalitions to share confidential and exempt records of children enrolled in the VPK education program with contract service providers.³³

III. Effect of Proposed Changes:

The bill reenacts the public records exemption for the individual records of a child enrolled in the Voluntary Prekindergarten Education Program held by an early learning coalition, the Agency for Workforce Innovation, or a Voluntary Prekindergarten Education Program provider. This bill also modifies the public records exemption to authorize agents or authorized representatives of a party to an interagency agreement to access confidential and exempt information, provided that they meet two requirements. The agent must perform a service for which the party to the agreement would otherwise use employees and must be under the direct control of the party to the agreement.³⁴

³² *Id.*

³³ The Florida Senate, *Interim Report 2010-213, Open Government Sunset Review of Voluntary Prekindergarten Education Program*, September 2009. See http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-213ed.pdf.

³⁴ An educational agency or institution may disclose personally identifiable information from an education record of a student without consent, to school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests. A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions are considered to be a school official if they meet certain requirements. See 34 C.F.R. s. 91.31(a)(1)(i)(B).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

Article I, section 24, of the State Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the law. The exemption appears to meet the constitutional criteria.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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 Committee on March 17, 2010:**

The committee substitute:

- Allows agents or authorized representatives of a party to an interagency agreement to access confidential and exempt information if they:

- Perform a service that the party to the agreement would otherwise use employees; and
- Are under the direct control of the party to the agreement.

B. Amendments:

None.

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