

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1872

SPONSOR: Banking and Insurance Committee and Senator Sullivan

SUBJECT: Public Records Exemptions for Certified Capital Companies

DATE: April 10, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>RC</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Certified capital companies (CAPCOs) are statutorily authorized entities designed to provide venture capital for investment in new and expanding Florida businesses. The main function of a CAPCO requires the writing of investment contracts and complex structuring of investments with private sector businesses whose financial and tax records are generally not open to the public for competitive reasons.

Committee Substitute for Senate Bill 1872 provides an exemption from public records requirements for any information relating to an investigation or review of a CAPCO by the Department of Banking and Finance, including consumer complaints, until the investigation or review is complete or ceases to be active. However, certain information remains confidential and exempt even after the investigation is complete or ceases to be active under specified circumstances. It exempts personal information relating to departmental investigatory personnel and their families under certain circumstances. It exempts the social security numbers of customers, complainants, and other persons involved in a CAPCO.

The bill provides broad authority for confidentiality of information provided to the department which is only given to the department on a confidential basis. It further provides, with certain exceptions, that confidential information offered in evidence at any administrative, civil or criminal proceeding may remain confidential if the presiding officer makes such determination. The bill additionally grants a privilege against civil liability to persons in regard to information or evidence furnished to the department, unless such persons act in bad faith. Finally, the bill provides a public necessity statement outlining the reasons for the exemptions and confidentiality.

This bill does not appear to have a fiscal impact on state or local governments.

This bill amends section 288.99, Florida Statutes.

II. Present Situation:

Public Records Law

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records. This section provides that:

Every person has the right to inspect or copy any public records 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.

Article I, s. 24, Florida Constitution, also provides that the Legislature may, by general law, exempt public records from the requirements of s. 24(a). Such a general law exempting records from public disclosure must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, states that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to meet that public purpose. 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 that such purpose cannot be accomplished without the exemption:

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

Exemptions are analyzed using the following definition of public necessity: A public necessity justifying an exemption exists when, after considering the public good served by access to the record or meeting and the public or private harm that could be caused by allowing or denying access to the record or meeting, it is determined that the presumption in favor of open records and meetings is overcome because the public's interests are best served by denying access in whole or in part to the record or meeting; and, access is denied to as little of the record or meeting as is practicable.

Certified Capital Companies

The Certified Capital Company program (CAPCO) was established under s. 288.99, F.S. (ch. 98-257, Laws of Florida), to provide a one-time stimulus for venture capital creation for investment in Florida businesses. The primary functions of a CAPCO require the writing of investment contracts and the complex structuring of investments with these private sector businesses. The purpose of the program is to encourage insurance companies to invest in entities known as certified capital companies which in turn provide capital for new or expanding businesses in the state. The Department of Banking and Finance has been charged with administering the certification of the CAPCOs. Included in this process is an initial application period, which has expired, and oversight of continued certification by each of the three approved entities.

Such companies certified by the department are authorized to receive contributions of capital from insurance companies (defined in the act as "certified investors"), who in turn would receive a credit against state premium taxes for each dollar contributed to a CAPCO. Investors who contribute to a CAPCO may utilize premium tax credits at a rate not to exceed 10 percent annually if the CAPCO invests at least 20 percent of its certified capital in qualified businesses beginning with premium tax filings for calendar year 2000. Investment in CAPCOs is not limited to insurance companies, however, only those entities defined as "certified investors" are eligible to receive tax credit allocations.

To remain certified, CAPCOs are required to meet a series of investment benchmarks so that by December 31, 2003, at least 50 percent of CAPCO funds must be invested in small businesses headquartered in and with their principal business operations in Florida ("qualified businesses"). Of the 50 percent required to be invested in qualified businesses, at least one-half of those investment funds must be invested in early stage technology businesses. If those investment benchmarks are not met the CAPCO would risk decertification. Decertification could result in the forfeiture or recapture of some, or all, of the premium tax credits earned by a CAPCO's certified investors.

The department has been charged with administering the continued certification of the CAPCOs during this time period and has been authorized to collect information through certain periodic investigations and reviews and to produce subsequent reports. In general, private sector businesses carefully preserve the confidentiality of their tax records, corporate financial records, and contractual agreements in order to remain competitive. Additionally, these businesses protect the privacy of their principals by keeping their personal financial records confidential.

III. Effect of Proposed Changes:

Section 1. Amends s. 288.99, F.S., to provide an exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I, Florida Constitution, for any information the Department of Banking and Finance gathers from a CAPCO during an administrative investigation or review, including any consumer complaint, until the investigation or review is completed or ceases to be “active.” An investigation or review is active so long as the department or other agency is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation may lead to the filing of a proceeding. However, certain information relating to investigations and reviews remains confidential after an investigation is no longer active or complete under specified circumstances. Information relating to an investigation or review may be made available to a law enforcement or an administrative agency with responsibilities related to the CAPCO program, however, that entity is charged with maintaining the confidentiality of the imparted information.

This bill provides an exemption from public records requirements for personal information relating to departmental investigatory personnel and their families under certain circumstances. It exempts the social security numbers of customers, complainants, and other persons involved in a CAPCO.

The bill provides broad confidentiality for information only given to the department on a confidential basis. It further provides, with certain exceptions, that confidential information offered in evidence at any administrative, civil or criminal proceeding may remain confidential if the presiding officer makes such determination. Finally, it provides a privilege against civil liability for a person with regard to information or evidence furnished to the department, unless such a person acts in bad faith.

The bill provides that it is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Provides for a public necessity statement which states that having successful CAPCOs operate in Florida is an economic benefit to the state, measured in terms of expanding employment and tax bases. Consequently, preserving the competitive environment for these entities, protecting the safety of investigatory personnel, and protecting the privacy of complainants and customers, through public records exemptions, serve a greater public purpose than would be served if such records were released.

Section 3. Provides that the act shall take effect upon becoming a law.

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

None.

B. Public Records/Open Meetings Issues:

The First Amendment Foundation has raised concerns that the bill is unconstitutionally overbroad. In a letter to the bill's sponsor from the Foundation's executive director, Barbara Petersen, dated March 30, 2000, Ms. Petersen states that paragraph (e) in the bill is an example of an unconstitutionally overbroad provision because it allows an exemption for "all information obtained by the Department of Banking and Finance from *any* person made available to DBF on a confidential or similarly restricted basis." The letter states further that if the intent of the legislation is to protect confidential, proprietary information, then the exemption for "all information" violates the constitutional standard for the creation of new exemptions under Art. I, s. 24, of the State Constitution. Ms. Petersen offers a possible solution which is found in Senate Bill 1690, creating an exemption for trade secret information provided to a government agency during the procurement process. In Senate Bill 1690, the exemption is allowed "if the person or company seeking protection for the trade secret information files an affidavit making certain, specified claims."

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The business and financial interests of CAPCOs and related businesses are protected under the public records exemptions provided by this bill during the pendency of investigations and reviews by the department. Additionally, confidential material provided to the department as confidential remains as such under specified circumstances.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Although the Legislature has previously granted similar exemptions from the public records requirements for investigative materials and financial records relating to banking and securities industries, CAPCOs differ from these highly regulated entities. Certified capital companies are essentially private entities which invest in private companies, by receiving contributions of capital from insurers, who in turn receive a credit against state premium taxes for each dollar contributed to a CAPCO.

VIII. Amendments:

None.

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