

STORAGE NAME: h0439.go
DATE: January 25, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 439

RELATING TO: Public Records/Certified Capital Companies

SPONSOR(S): Representative Crow

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) FINANCIAL SERVICES YEAS 9 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS
 - (3) FINANCE & TAXATION
 - (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. Additionally, the personal financial records of the principals of such companies are also generally protected under the private sector corporate veil.

The Department of Banking and Finance (department) was charged with administering the application process for the CAPCO program which necessitated the collection of detailed financial information of the business applicant, its potential investors, and their principals. The department initially certified 14 of the CAPCO applicants. Three of these applicants secured the required level of investment commitments by the statutory deadline and consequently qualify to have tax credits allocated to their certified investors over a period of 10 years. 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. Generally, information held by a state agency is open to the public under the state's public records requirements.

This bill provides a limited exemption from public records requirements for certain information submitted by or collected from CAPCOs. The bill provides that any information, even that exempted by this bill, will be open to the public if it is released by the CAPCO or the applicant itself. This bill also provides a public necessity statement outlining the reasons for the exemption.

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Article I, section 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, section 24, Florida Constitution, also provides that the Legislature may, by general law, exempt public records from the requirements of section 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.

The Legislature has previously granted exemptions from the public records requirements to the Department of Banking and Finance for investigative records and other financial records relating to the banking, securities, and money transaction industries, see ss. 517.2015, 560.129 and 655.057, F.S.

Certified Capital Companies

The Certified Capital Company program (CAPCO) was established under s. 288.99, F.S. (sec. 2, ch.98-259, L.O.F.), to provide a one-time stimulus for venture capital creation for investment in Florida businesses. The purpose of the program is to incentivise 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 3 approved entities.

CAPCOs 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.

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. The primary functions of a CAPCO require the writing of investment contracts and the complex structuring of investments with these private sector businesses. Since the department is authorized to annually review the activities of each CAPCO and to conduct investigations if necessary, proponents have expressed a concern that the possibility of proprietary information becoming public through an investigation and/or subsequent report could dissuade a potential investor from doing business with a Florida CAPCO. The department itself asserts that companies are generally more willing to release a greater variety of records if the department can assure the confidentiality of the information it seeks.

C. EFFECT OF PROPOSED CHANGES:

The specific exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I, Fla. Const., created by this bill provides confidentiality for information the department gathers from a CAPCO during an administrative investigation or review. This exemption is extended to related working papers and information included in any subsequently prepared reports produced for the department or any other governmental agency. The exempted information would be opened to the public upon release by the CAPCO. Proponents assert that the provisions of this bill will help to ensure that Florida's CAPCOs remain competitive in the private sector business arena in which they operate.

The bill also provides a public records exemption for personal financial matters which may be submitted by the principals of an applicant for certification or the principals of a CAPCO. Again, this information would be open to the public upon release by the applicant or the CAPCO. Additionally, this bill provides that this information may be made available to a law enforcement agency or an administrative agency with responsibilities related to the CAPCO program, however, that entity is charged with maintaining the confidentiality of the imparted information.

The public necessity statement provided in the bill indicates that having successful CAPCOs operate in Florida is an economic benefit to the state, measured in terms of expanding employment and tax bases. Consequently, the assertion is made that preserving the competitive environment for these entities, through public records exemptions, serves a greater public purpose than would be served if the records were released.

D. SECTION-BY-SECTION ANALYSIS:

(See Effect of Proposed Changes)

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The ability of Florida CAPCOs to maintain their competitive advantage will enable them to continue to provide capital investments for emerging small businesses in Florida.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill will not reduce the authority of counties and municipalities to raise revenues.

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C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill will not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None noted.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

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