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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: HB 387 (PCB SA 01-06)

RELATING TO: Public Records Exemption for Certain Information Obtained by the Direct-Support Organization Authorized to Assist in the Promotion of Sports-Related Industries

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws may be created 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 288.12295, F.S., provides that any information identifying a donor or prospective donor to the direct-support organization, the "Florida Sports Foundation", who wants to remain anonymous, is confidential and exempt from public disclosure. This section was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

The exemption enables the Florida Sports Foundation to effectively and efficiently administer sport-marketing and promotion activities on behalf of the State of Florida. Without the exemption, potential donors may be dissuaded from contributing to the Florida Sports Foundation because such donors fear being harmed by the release of sensitive financial information. Difficulty in soliciting donations could hamper the ability of the direct-support organizations to carry out their marketing and promotion activities. Therefore, this bill reenacts 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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created 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 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 288.12295, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.² Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.³

¹ 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. s. 119.15(3)(b), F.S.

² The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* [Florida Constitution](#).

³ Please note that the effective date of this bill is prior to the repeal date of October 2, 2001.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁴

The Florida Sports Foundation

Section 288.1229, F.S., authorizes the creation of a direct-support organization within the Governor's Office of Tourism, Trade, and Economic Development (OTTED) for the purpose of promoting and developing the sports industry and related industries in the state. In Florida, this direct-support organization is the Florida Sports Foundation (Foundation).

In its role as the state's official sports promotion office, the Foundation serves as the primary source of information on sports and sporting opportunities in the state. Other duties of the Foundation include the promotion of physical fitness and amateur sports for the citizens of Florida, the promotion of Florida as a host for national and international amateur sports competitions, and the administration of the Sunshine State Games. The Foundation is responsible for the Sunshine State Games, programs to encourage participation in Florida's youth in Olympic sports and competitions, Seniors State Games, and support for Florida bid-cities or communities seeking to host the summer Olympic or Pan American Games. Interim Project Report 2001-033, Florida Senate Committee on Commerce and Economic Opportunities (November 2000).

Section 288.12295, F.S.

Section 2 of ch. 96-326, L.O.F., created a public records exemption for certain records held by the foundation.¹ Specifically, s. 288.12295, F.S., provides:

The identity of a donor or prospective donor to the direct-support organization authorized under s. 288.1229 who desires to remain anonymous and all information identifying such donor or prospective donor are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such anonymity shall be maintained in audit reports. This section expires October 2, 2001, and is subject to review by the Legislature under the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 before that date.

Further, in creating the exemption, the Legislature provided a public necessity statement, as required by Art. 1, s. 24 of the Florida Constitution:

The Legislature finds a public necessity in protecting the identity of donors and prospective donors to the direct-support organizations authorized to promote

⁴ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

¹ Florida laws relating to Government in the Sunshine have "been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties" Office of the Attorney General/First Amendment Foundation, Government-In-The-Sunshine Manual, 2001 Edition, p. 4.

entertainment² and sports-related industries in order to enable these entities to effectively and efficiently administer marketing and promotion programs on behalf of the state. The purpose of the exemptions is to honor the request for anonymity of donors or prospective donors to the not-for-profit corporations and thereby encourage donations from individuals and entities that might otherwise decline to contribute. Without the exemptions, potential donors may be dissuaded from contributing to the entertainment and sports-related direct-support organizations because such donors fear being harmed by the release of sensitive financial information. Difficulty in soliciting donations would hamper the ability of the direct-support organizations to carry out their marketing and promotion activities and would hinder fulfillment of the goal of establishing marketing and promotion operations for the state that are funded by both the public sector and the private sector.

s. 3, ch. 96-326, L.O.F.

Public records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.³ The exemption is narrowly drawn to apply only to those donors who desire anonymity and, therefore, appears to comply with the constitutional and statutory standards for such exemptions. The exemption provided to the Florida Sports Foundation under s. 288.12295, F.S., affects donors or prospective donors of the foundation who desire to remain anonymous. The privilege and confidentiality provided would apply to any record revealing the identity of such donor, and such anonymity would have to be maintained in audit reports.

The exemption enables the Florida Sports Foundation to effectively and efficiently administer sport-marketing and promotion activities on behalf of the State of Florida (s. 119.15(4)(b), F.S.). To the extent that donors might be dissuaded from contributing to the foundation's activities in the absence of the exemption, the ability of the foundation to raise private funds would be limited. The authorizing statute for the direct-support organization provides that one of its purposes is to raise funds and receive gifts and property (s. 288.1229(2)(c), F.S.).

The exemption protects information of a confidential nature concerning entities, release of which could injure business donors in the marketplace (s. 119.15(4)(b)3., F.S.). For example, competitors might be able to use information about a business's corporate giving to gain insight into the financial status and strategic interests of the business, which could harm an advantage that the business maintains in the marketplace.

It is possible that a future donor to the foundation might desire anonymity. If the exemption were not in place and a donor were to request anonymity, the foundation could be forced to postpone the donation and request a public records exemption from the Legislature.

² Chapter 96-326, L.O.F., also created a public records exemption for the identity of donors or prospective donors to a direct-support organization authorized to promote and develop the entertainment industry in Florida. (See ss. 288.1228 and 288.12285, F.S. (1997).) The statutory authority for the entertainment direct-support organization and its public records exemption were repealed effective July 1, 1999, by s. 12, ch. 99-251, L.O.F.

³ See, e.g., Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); Historic Pensacola Preservation Board of Trustees direct-support organization (s. 266.0018(8), F.S.); Florida Prepaid College Board direct-support organization (s. 240.551(22)(d), F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 288.12295, F.S., to remove the sentence that requires its repeal. This bill, further, reenacts verbatim the public records exemption in s. 288.12295, F.S., which provides that “[t]he identity of a donor or prospective donor to the direct-support organization authorized under s. 288.1229 who desires to remain anonymous and all information identifying such donor or prospective donor” are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

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:

None.

D. FISCAL COMMENTS:

None.

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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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