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DATE: February 14, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 935

RELATING TO: Public Records

SPONSOR(S): Representative(s) Rubio

TIED BILL(S): HB 933

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

- (1) STATE ADMINISTRATION
 - (2) FISCAL POLICY & RESOURCES
 - (3) FISCAL RESPONSIBILITY COUNCIL
 - (4)
 - (5)
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I. SUMMARY:

This bill creates a public records exemption for all records identifying participants in the "Florida Retirement System" (FRS) and their account activities. However, the public necessity statement justifying the exemption states that the exemption is necessary because revealing records that identify FRS participants and their account activities would discourage participation in the Public Employee Optional Retirement Program (PEORP). The public necessity statement is more narrow than the actual language of the exemption. The exemption is for all records identifying FRS participants and their account activities, which includes PEORP participants and defined benefit program participants. The public necessity statement only runs to an individual participant's account activity within PEORP.

Additionally, this exemption appears overly broad in that it exempts all records identifying FRS participants and their account activities. It is unclear as to why the entire record should be made exempt from public disclosure because the only need addressed in the public necessity statement is not to discourage participation in PEORP. The exemption could accomplish that same purpose, and be more narrowly drafted, by only exempting the personal identifying information contained in records regarding PEORP participants.

This bill does *not* provide for future review and repeal of the public records exemption.

See "Effect of Proposed Changes" and "Constitutional Issues" sections for concerns with the bill.

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

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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 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:

Florida Retirement System

Chapter 2000-169, L.O.F., created s. 121.4501, F.S., which regulates an optional defined contribution retirement program, the Public Employee Optional Retirement Program (PEORP), within the Florida Retirement System. The plan is non-contributory, meaning the employer pays the full cost of the retirement benefit. Public employees have the opportunity to choose to participate in either the defined benefit retirement program¹ or the defined contribution program.

Each participant in PEORP directs the investment of the contributions in the participant's account. The main distinction between the defined benefit retirement program and the PEORP is that the PEORP offers retirement payments that are not fixed for a lifetime. Rather, a participant may elect to receive the benefits in a lump-sum, in a lump-sum distribution that is rolled over to another qualified investment, or in periodic distributions. However, both plans are specifically regulated under the Internal Revenue Code.

Section 121.031(5), F.S.

Section 121.031(5), F.S., provides a public records exemption for the names and addresses of retirees to the extent that such information may not be provided in aggregate, compiled, or list form. However, a state or local agency may provide such information to another public agency engaged in official business; to a bargaining agent²; or to a retiree organization for official business use. The subsection also provides that any person may view or copy any individual's retirement records at the Department of Management Services, so long as that person only views or copies one record at a time. Any person may obtain information pursuant to a separate written request for a particular person.

¹ In the defined benefit program, all employer retirement contributions for all retirement system participants are placed in a single trust fund. The monies in that trust fund are managed and invested by the State Board of Administration.

² Section 447.203(12), F.S., defines "bargaining agent" as "the employee organization which has been certified by the commission as representing the employees in the bargaining unit, as provided in s. 447.307, or its representative." "Commission" means the Public Employees Relations Commission.

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.

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.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a public records exemption for all records identifying participants in the Florida Retirement System (FRS) and their account activities. The bill also states that such records must be "confidential" to the "extent such records need not be revealed in the administration of the Florida Retirement System" or "in connection with a legal or administrative proceeding."

This exemption appears overly broad in that it exempts *all* records identifying FRS participants and their account activities. It is unclear as to why the entire record should be made exempt from public disclosure because the only need for the exemption addressed in the public necessity statement is not to discourage participation in the Public Employee Retirement Program (PEORP). The exemption could accomplish that same purpose, and be more narrowly drafted, by only exempting the personal identifying information contained in records regarding PEORP participants.

When reading the exemption, it is unclear as to whether the records are "exempt"³ or "confidential and exempt"⁴. The language makes the records "exempt", but later states that the records should be "confidential". Clarification needs to be made regarding this discrepancy.

This bill provides a public necessity statement, as required by s. 24, Art. I of the State Constitution, which states that

the exemption from public records requirements provided for in this act for identifying individual participants in the Florida Retirement System and their account activities within the Public Employee Optional Retirement Program is a public necessity and that to reveal such information would discourage participation in the Public Employee Optional Retirement Program.

The public necessity statement leads one to believe that the exemption for FRS participants' account activities only applies to those participants who are enrolled in PEORP. The public necessity statement is more narrow than the actual language of the exemption. The exemption is for all records identifying FRS participants and their account activities, which includes PEORP participants and defined benefit program participants. The public necessity statement only runs to an individual participant's account activity within PEORP. Additionally, the public necessity statement does not state the necessity for closing access to the entire record.

This exemption is *not* made subject to the Open Government Sunset Review Act of 1995.⁵ The Open Government Sunset Review Act of 1995 established a review and repeal process for public records and meetings exemptions created after 1995. That process requires that in the fifth year

³ Information and records that are simply made "exempt" from public disclosure are still permitted to be disclosed under certain circumstances. An agency is permitted to share exempt information with another agency if it is necessary for the furtherance of official business. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994).

⁴ Information and records that are made "confidential and exempt" may not be released to anyone other than to the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62, August 1, 1985.

⁵ Section 119.15, F.S.

after enactment of a new exemption, the exemption will repeal unless the Legislature reviews and reenacts it.⁶

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:

This 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.

⁶ The review and repeal date for this exemption should be October 2, 2007.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill may raise a constitutional concern. The public records exemption appears overly broad in that it creates an exemption for *all* records that identify an FRS participant and the participant's account activities. It is unclear as to why the entire record should be made exempt from public disclosure because the only need addressed in the public necessity statement is not to discourage participation in PEORP. The exemption could accomplish that same purpose, and be more narrowly drafted, by only exempting the personal identifying information contained in records regarding PEORP participants. Additionally, the exemption is for *all* records identifying FRS participants⁷ and their account activities while the public necessity statement only runs to an individual participant's account activity within PEORP.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Some argue that because all records which identify participants in the deferred compensation program and their account activities are confidential and exempt⁸, that the same exemption should be provided to participants in PEORP. The difference between those two programs is that the money being invested in the optional retirement program for a participant is employer contributed money required by law, for retirement purposes, and the agencies overseeing that program are accountable for its operation. The deferred compensation program is an optional program in which employees may participate. The money being invested in the deferred compensation program is employee-contributed money. Such money is deducted from the employee's salary and is non-taxable. Although participants often use deferred compensation program money for retirement, such program has nothing to do with the required retirement program.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

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⁷ Which includes both PEORP and defined benefit program participants.

⁸ Section 112.215(7), F.S., provides a public records exemption for all records identifying individual participants in the deferred compensation program and their personal account activities.