

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 1272

SPONSOR: Governmental Oversight and Productivity Committee, Education Committee and Senator Wise

SUBJECT: Commission for Independent Education Public Records Exemption

DATE: April 20, 2005

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|------------------|-----------|------------------|
| 1. | <u>Woodruff</u> | <u>O'Farrell</u> | <u>ED</u> | <u>Fav/CS</u> |
| 2. | <u>Cellon</u> | <u>Cannon</u> | <u>CJ</u> | <u>Favorable</u> |
| 3. | <u>Rhea</u> | <u>Wilson</u> | <u>GO</u> | <u>Fav/CS</u> |
| 4. | _____ | _____ | <u>RC</u> | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The Committee Substitute for Committee Substitute creates a public records and public meetings exemption for investigations by the Commission for Independent Education. A complaint, information obtained during the resultant investigation, and the minutes and findings of a probable cause panel are exempted from the public records requirements for a maximum of 10 days after the probable cause panel makes a determination regarding probable cause. Only the portion of the meeting of a probable cause panel in which the exempt information is discussed is exempted from the public meetings requirements under the provisions of the Committee Substitute.

The Committee Substitute provides a public necessity statement for the exemptions and provides for the future review and repeal of the exemption provisions.

The Committee Substitute is linked to SB 1250, a bill relating to Independent Postsecondary Education which includes provisions relating to the investigation of acts that might constitute violations of law.

Pursuant to the requirements of s. 24, Art. I of the State Constitution, a general law creating an exemption must pass by a two-thirds vote of the members present and voting in each house of the Legislature.

This Committee Substitute substantially amends section 1005.38 of the Florida Statutes.

II. Present Situation:

The Commission for Independent Education is authorized to “conduct disciplinary proceedings through an investigation of any suspected violation” of ch. 1005, F.S., “including a finding of probable cause and making reports to any law enforcement agency or regulatory agency.” Other regulatory agencies, such as those governed by ch. 455, F.S., have record and meeting exemptions relating to investigatory proceedings. The Commission for Independent Education does not currently have a public meetings or public records exemption.

Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a), 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. 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.

The Public Records Law¹ also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term “public record” to include:

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 the official business by any agency.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”² Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

Under Article I, s. 24(c), of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

¹ Chapter 119, F.S.

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

³ *See Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

Public records law also recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.⁴ If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to the persons or entities designated in statute.⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. 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.”⁶

Under s. 119.15(2), F.S., an exemption may be maintained only if: “(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals; (b) The exemption is necessary for the effective and efficient administration of a governmental program; or (c) The exemption affects confidential information concerning an entity.”

Section 119.15(4) (a), F.S., requires, as part of the review process, the consideration of the following questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that 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 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 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, only information that would identify the individual is exempted.

⁴ See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So.2d 289 (Fla. 1991).

⁵ See Inf. Op. to Chiaro, January 24, 1997.

⁶ Section 119.15(3)(b), F.S.

- 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 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.”

Background

In the 2000 Session, the Legislature reorganized the Department of Education to implement a constitutional amendment and create a seamless K-20 education system for the state. As part of the reorganization, the powers and duties of the State Board of Nonpublic Career Education and the State Board of Independent Colleges and Universities were combined and transferred to a new board – the Commission for Independent Education. With the exception of those colleges that participate in the Florida Resident Access Grant (FRAG) program and certain religious colleges, the commission was given jurisdiction over all of the institutions that were under the two previous boards.

The State Board of Nonpublic Career Education was responsible for administering the statutory provisions relating to nonpublic postsecondary career schools. Included in the administrative duties was the requirement to investigate any suspected violation of law or rule relating to such institutions. A public records exemption from s. 119.07(1), F.S., was granted for a maximum of 10 days after a probable cause panel declared a finding of probable cause relating to a complaint and the information obtained by the board during the course of an investigation of the complaint. A public meetings exemption from s. 286.011, F.S., was provided for the proceedings of the probable cause panel. These exemptions were not continued when the new commission was created.

During the 2003-2004 fiscal year, the Commission for Independent Education received 156 complaints. Of these, 100 cases were taken to a probable cause panel for review and action. In 92 of the cases, the panel found no probable cause for the complaint. Probable cause for a violation was found by the panel in eight cases. A number of cases are still pending.

III. Effect of Proposed Changes:

The Committee Substitute creates a public records and public meetings exemption for investigations by the Commission for Independent Education. A complaint, information obtained during the resultant investigation, and the minutes and findings of a probable cause panel are exempted from the public records requirements for a maximum of 10 days after the probable cause panel makes a determination regarding probable cause.

That portion of the meeting of a probable cause panel in which the exempt information is discussed is exempted from the public meetings requirements. Currently, the Commission for Independent Education does not have a public records or public meetings exemption.

The Committee Substitute provides a public necessity statement for the exemptions. The Committee Substitute provides for the future review of the exemption pursuant to the Open

Government Sunset Review Act of 1995. The exemptions shall stand repealed on October 2, 2010, unless reviewed and saved from repeal by reenactment by the Legislature.

The effective date of the Committee Substitute is to be the same date that SB 1250 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. Senate Bill 1250 has an effective date of July 1, 2005.

Linked Bill – Senate Bill 1250

In Senate Bill 1250, ch. 1005, F.S., is amended to allow the Commission for Independent Education to investigate suspected violations either of law or of the rules of the commission. Protectionary and disciplinary actions which the commission may take are identified. The imposition of an administrative fine of between \$100 and \$5,000 is authorized for commission disciplinary actions. Assessments to recover the costs of cases before the commission are authorized. The commission is also authorized to issue an emergency order suspending or limiting the license of an institution if there is a finding that an immediate danger to the public health, safety, or welfare exists.

Currently it is a second degree misdemeanor under ch. 1005, F.S., for an owner, director, or administrator of a licensed private postsecondary institution to fail to provide proper notification about the institution's closing or to fail to provide an organized and orderly closure of the institution. (A second degree misdemeanor is punishable by imprisonment not exceeding 60 days and/or a fine not exceeding \$500.) A civil penalty not exceeding \$10,000 may be imposed upon an owner, director, or administrator of an institution that has ceased operating who knowingly destroys, abandons, or fails to provide for school and student records. s. 1005.36, F.S. An administrative fine not exceeding \$5,000 may be assessed by the commission if an institution is on probation and requires oversight. s. 1005.38, F.S.

A newly created section under SB 1250 provides a third degree felony penalty for the following: operating an independent postsecondary institution without a valid, active license; obtaining a license by fraudulent misrepresentation; or using a suspended or revoked license. (A third degree felony is punishable by imprisonment not exceeding 5 years and/or a fine not exceeding \$5,000.) It also provides a second degree misdemeanor penalty when a person knowingly conceals information relating to violations under this chapter, or willfully makes any false oath when required to make an oath under this chapter. (A second degree misdemeanor is punishable by imprisonment not exceeding 60 days and/or a fine not exceeding \$500.)

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the

law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. The Committee Substitute appears to relate to one subject and contains only provisions relating to exemptions.

In 2002, the voters approved a revision to this section of the constitution to provide that general laws granting exemptions from the constitutional open-government requirements must pass by a two-thirds vote of each house of the Legislature.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Committee Substitute will have an indeterminate impact. In those instances where a complaint is unfounded, there will be no damage to the good name of, nor will there be economic harm to, an institution or an individual.

C. Government Sector Impact:

The Committee Substitute will allow the Commission for Independent Education to be more effective in the administration of the program because the Committee Substitute will shield information until the investigation is complete.

VI. Technical Deficiencies:

The statement of public necessity does not completely parallel the exemption as modified in the committee substitute. The committee substitute narrows the exemption by limiting it to “those portions of meetings . . . at which exempt investigatory records are discussed.” The statement of public necessity still refers to all “proceedings” and should be corrected.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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