

# 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.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/SB 896

SPONSOR: Governmental Oversight and Productivity Committee and Education Committee

SUBJECT: Open Government Sunset Review/College Savings Program

DATE: April 20, 2005

REVISED: \_\_\_\_\_

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

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## I. Summary:

This bill narrows and reenacts the public records exemptions contained in the Florida College Savings Program.

The bill maintains the exemption for information that identifies the benefactors or the designated beneficiary of any account initiated under the section. The exemption is narrowed by deleting that portion of the exemption that protects "individual account activities" conducted through the savings program as that term is undefined and because the exemption still protects the identity of the benefactors or designated beneficiaries of those accounts.

This bill substantially amends section 1009.981 of the Florida Statutes.

## II. Present Situation:

### 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 Law<sup>1</sup> 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.”<sup>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

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.

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.<sup>4</sup> 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.<sup>5</sup>

### **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.”<sup>6</sup>

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

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<sup>1</sup> Chapter 119, F.S.

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

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

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

<sup>5</sup> *See Inf. Op. to Chiaro*, January 24, 1997.

<sup>6</sup> Section 119.15(3)(b), F.S.

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.
- 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.”

### **The Florida College Savings Program**

The 1999 Legislature enacted the Florida College Savings Program to allow individuals to make contributions to an account to meet qualified education expenses of a designated beneficiary consistent with federal law authorizing these accounts under s. 529 of the Internal Revenue Code.<sup>7</sup> Unlike the Florida Prepaid College Program<sup>8</sup>, which locks in tuition through an advance payment contract, the Florida College Savings Program does not provide any qualified guarantees that the contributions will be sufficient to meet tuition requirements. In providing the qualified guarantee under the Florida Prepaid College Program, the Florida Prepaid Board manages the contributions of account holders for the benefit of all program participants. In the Florida College Savings Program, the benefactor makes the investment decisions and the contributions and returns are maintained in a specific account for the benefit of the beneficiary.

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<sup>7</sup> Section 1, ch. 99-220, L.O.F.

<sup>8</sup> Section 1009.98, F.S.

The Florida College Savings Program prohibits the public disclosure of information that identifies the benefactors or designated beneficiary of any account initiated under the program as well as any information regarding individual account activities.<sup>9</sup> These records are confidential and exempt.<sup>10</sup>

This exemption is scheduled to repeal on October 2, 2005, unless saved from repeal through reenactment by the Legislature.

### **Open Government Sunset Review Report**

The Open Government Sunset Review Report of s. 1009.981, F.S., by the Committee on Education<sup>11</sup> found that the Florida College Savings Program public records exemption protects sensitive personal information about individuals participating in the program. Information that identifies account participants and their account activities is not typically accessible to the public and may be used by individuals or entities to commit fraud or visit economic harm upon program participants and their families.

Accordingly, the report recommended reenactment of the exemption. However, the Open Government Sunset Review Act authorizes the reenactment of a public records exemption on the basis of protecting sensitive personal information concerning individuals, if the exemption only prohibits the disclosure of information that would identify the individuals involved.<sup>12</sup> The Florida College Savings Program public record exemption may protect from public disclosure information that does not solely identify individuals. Therefore, the report recommended a narrowing of the public records exemption to conform with the Open Government Sunset Review Act by limiting the exemption to information that identifies program participants.

### **III. Effect of Proposed Changes:**

The bill saves from repeal and narrows an existing public records exemption, codified in s. 1009.981(6), F.S., for information that identifies the benefactor or the designated beneficiary of any account initiated under the Florida College Savings Program. The bill is based upon the findings and recommendations of Interim Project 2005-207 of the Committee on Education, which is an Open Government Sunset Review of the public records exemption.

The bill narrows the public records exemption to conform to the Open Government Sunset Review Act, which authorizes the reenactment of a public records exemption on the grounds of protecting sensitive personal information concerning individuals, if the exemption only prohibits public disclosure of any information that identifies the individuals concerned. The bill removes from the exemption “individual account activities” as this is an undefined term<sup>13</sup> and because account activities are not associated with individuals given the exemption for the benefactor and

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<sup>9</sup> Section 1009.981(6), F.S.

<sup>10</sup> Id.

<sup>11</sup> Committee on Education, The Florida Senate, Interim Project Report 2005-207, *Open Government Sunset Review of the Public Records Exemption of the College Savings Program (s. 1009.981(6), F.S.)*, available at [http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim\\_reports/pdf/2005-207ed.pdf](http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-207ed.pdf)

<sup>12</sup> Section 119.15(4)(b)2., F.S.

<sup>13</sup> Although the terms, “benefactor” and “beneficiary” are defined in s. 1009.97, F.S., the term “individual account activities” is not defined.

the designated beneficiary. The bill eliminates the sunset provision and reenacts the exemptions in all other aspects. The bill takes effect October 1, 2005.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption also has the potential to uniquely affect qualified tuition plans in other states, which, absent the exemption, would be able to contact and solicit program participants to their benefit and to the potential detriment of the Florida College Savings Program.

C. Government Sector Impact:

The public records exemption has the potential to uniquely affect qualified tuition plans in other states, which, absent the exemption, would be able to solicit program participants to the potential detriment of the Florida College Savings Program.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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

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