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/SB 1308
INTRODUCER:	Governmental Oversight and Productivity Committee and Senator Garcia
SUBJECT:	Public Records Exemption; Alternative Investments; State Board of Administration
DATE:	March 15, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	**Fav/CS**
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

The committee substitute makes confidential and exempt proprietary confidential business information held by the State Board of Administration (SBA) regarding alternative investments for 10 years after the termination of the alternative investment, with exceptions. The exemption is made retroactive in effect.

The committee substitute defines "proprietary confidential business information," as well as specifically provides exceptions to the definition. The committee substitute also requires verification by the proprietor that information is still proprietary confidential business information upon the receipt by the SBA of a public records request. Failure of the proprietor within a reasonable time to submit a verified written declaration that the information is proprietary confidential business information results in the loss of confidential and exempt status and permits the release of that information.

The bill also establishes a process by which any person may petition a court for an order for the release of the information. In order for such information to be made public, the court must find that the information is not a trade secret as defined in s. 688.002, F.S., that a compelling public interest is served by the release of the record which interest exceeds the public necessity for maintaining the confidentiality of the information, and that the release will not have specified adverse effects.

This bill amends section 215.44 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] 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. . . .

Unless specifically exempted, all agency[5] records are available for public inspection. The term "public record" is broadly defined to mean:

> 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 official business by any agency.[6]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "… any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

> 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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] Further, the confidentiality of that record must be preserved by the statutorily-named entity that is authorized to receive it.[19]

If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[20] For example, active criminal investigative information is exempt pursuant to s. 119.071(2)(c)1., F.S.[21] Nevertheless, a law enforcement agency may release the description of an alleged perpetrator of a crime to the public. That portion of the exempt criminal investigative information would lose its status as exempt upon release to the public. If, however, a law enforcement agency were to provide exempt information to another law enforcement agency, that would not be released to the public and the information would retain its exempt status in the hands of the receiving entity.[22]

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[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53; *see also*, Attorney General Opinion 85-62.
[19] Ragsdale v. State, 725 So.2d 203 (Fla. 1998).
[20] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[21] Criminal investigative information in considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. In addition, it is considered "active" while it is directly related to pending prosecutions or appeals.
[22] *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla 4th DCA 1994).

The Open Government Sunset Review Act - The Open Government Sunset Review Act[23] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[24]

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[25] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

[23] Section 119.15, F.S.
[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

State Board of Administration – The State Board of Administration is composed of the Governor as chair, the Chief Financial Officer, and the Attorney General.[26] The board is required to invest all funds in the System Trust Fund[27] ". . . to the fullest extent that is consistent with the cash requirements, trust agreement, and investment objectives of the fund."

Verification of documents and perjury by false written declaration – Section 92.525, F.S., provides a process for verification of documents.[28] The provision is contingent upon an authorization or requirement of law, rule of administrative agency, or by rule or order of court that a document be verified by a person. If such authorization or requirement exists, the section provides for verification of the document under oath or affirmation taken or administered by a judge, clerk, or deputy clerk of any court of record in Florida, including a federal court, or any U.S. commissioner or notary public in the state.

Subsection (2) of the section provides that a written declaration means the following statement:

> Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true.

The signature of the person making the declaration is required, except when verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The requirement that document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true or words of that effect.

Subsection (3) of the section provides that a person who knowingly makes a false declaration is guilty of the crime of perjury by false written declaration, a felony of the third degree, punishable as provided in ss. 775.082,[29] 775.083,[30] or 775.084,[31] F.S.

III. Effect of Proposed Changes:

The bill makes confidential and exempt proprietary confidential business information held by the SBA regarding alternative investments for 10 years after the termination of the alternative.

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[26] Section 215.44(1), F.S.
[27] Section 121.021(36), F.S.
[28] Section 92.525(4)(b), F.S., defines "document" to mean any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.
[29] Section 775.082(3)(d)., provides for a term of imprisonment not exceeding 5 years for a felony of the third degree.
[30] Section 775.083(1)(c), F.S., provides for a fine not to exceed $5,000.
[31] Section 775.084, F.S., provides additional penalties for violent career criminals and habitual felony offenders.

The bill provides an extensive definition of "proprietary confidential business information," as well as provides exceptions to that definition. "Proprietary confidential business information" is defined to mean

> . . . information that has been designated by the proprietor when provided to the State Board of Administration as information that is owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private, the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:
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> - Trade secrets as defined in s. 688.002.
> - Information provided to the State Board of Administration regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information.
> - Financial statements and auditor reports of an alternative investment vehicle.
> - Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle.
> - Capital call and distribution notices to investors of an alternative investment vehicle.
> - Alternative investment agreements and related records.
> - Information concerning investors, other than the State Board of Administration, in an alternative investment vehicle.

The committee substitute also specifically excludes certain records from the definition of "proprietary confidential business information." The following records are excluded:

- The name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.
- The dollar amount of the commitment made by the State Board of Administration to each alternative investment vehicle since inception.
- The dollar amount and date of cash contributions made by the State Board of Administration to each alternative investment vehicle since inception.
- The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration from each alternative investment vehicle.
- The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration plus the remaining value of alternative-vehicle assets that are attributable to the State Board of Administration's investment in each alternative investment vehicle.
- The net internal rate of return of each alternative investment vehicle since inception.
- The investment multiple of each alternative investment vehicle since inception.
- The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the State Board of Administration to each alternative investment vehicle.

- The dollar amount of cash profit received by the State Board of Administration from each alternative investment vehicle on a fiscal-year-end basis.

The committee substitute also provides for a verification process upon receipt of a public records request by the SBA. The proprietor is required, within a reasonable period of time after receipt of the request by the board, to verify the following through a written declaration in the manner provided by s. 92.525, F.S.

- The identity of the proprietary confidential business information and its specific location in the requested record;
- If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002, F.S.
- That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and
- That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

Any person is authorized to petition a court of competent jurisdiction for an order for the public release of those portions of any record made confidential and exempt by the bill. The bill limits venue to Leon County, Florida, and requires the petition or another initial pleading to be served on the State Board of Education and, if determinable upon diligent inquiry, on the proprietor of the information sought to be released.

The court may not order the release of the information unless it makes a finding that:

- The record is not a trade secret as defined in s. 688.002, F.S.;
- A compelling public interest is served by the release of the record or a portion thereof which exceeds the public necessity for maintaining confidentiality; and
- The release of the record will not cause damage to or adversely affect the interests of the proprietor, other private persons or business entities, the State Board of Administration, or any trust fund the assets of which are invested by the State Board of Administration.

The public necessity statement for the exemption provides that disclosure of such information would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information. Maintaining the information advantage of private equity investment managers is necessary in order for the SBA to generate an adequate return from its assets committed to this high-risk segment of the market because only those managers having a strong information advantage have generated adequate risk-adjusted returns. The Legislature finds that the exemption used in or implying how private equity investments are made or managed is necessary for the effective and efficient administration of the SBA's asset-management program.

The exemption is made subject to the Open Government Sunset Review Act and will expire October 2, 2011, unless the Legislature reviews the exemption and saves it from repeal.

The bill has an effective date of October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

See, *supra*.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption will protect certain propriety records of private entities for a specified time, which will encourage partnership with the SBA on high risk investments. These high-risk investments could result in substantial profits for the private entities.

C. Government Sector Impact:

The exemption will protect certain propriety records of private entities for a specified time, which will encourage partnership with the SBA on high risk investments. These high-risk investments could result in substantial profits for the SBA and the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Public pension plan managers are increasingly turning to non-mainstream investments to generate returns for their beneficiaries. The FRS has maintained a separate alternative investment class for a number of years. Included in this class are investments in distressed debt, private equity, or thinly traded securities; such investments are usually illiquid. They principally take the form of the FRS as a limited partner in a larger engagement with a managing general partner. Invested capital may be directed toward a direct ownership or an investment in a fund with subordinate funds, or fund of funds. The alternative investment class is expected to produce gains of 600 basis points, or 6.00%, greater than the overall equity class. The return is greater but so is the risk.

Frequently, these engagements assume the attributes of a hedge fund, that is, an investment pool of sophisticated investors. There are more than 8000 hedge funds with some $1.1 trillion in assets worldwide. Hedge funds are regulated differently from mutual funds. The principals are not held to the same licensure standards,[32] disclosures to the underlying beneficiaries are abbreviated, and the principals may engage in conflicting situations by trading on their own accounts. All of these non-traditional methods are fully disclosed to the limited partners. While the opportunity for gain is great there have been some notable collapses. Wood River Capital Management, Bayou Management and Long Term Capital Management all experienced full or partial collapses due to the highly leveraged (borrowed capital) positions in which they were situated or business management failures. Conversely, as western economies mature and the requirements for the payments of larger streams of retirement benefits increase, fund managers are looking at an investment horizon in which generating easy returns in a negative growth hiring market has never been more challenging. Such financial combinations can often act as tools of improved corporate governance, normally the province of traditional investment methods. There have been many recent examples of alternative investment syndicates challenging corporate boards of directors and executive management on their stewardship of their firms. These have resulted in improved shareholder value, operations, and business management.[33]

Private equity engagements are accompanied by high fees. In one solicitation provided to the SBA in 2003, the principals identified their management fee at 2 percent of assets with a 20 percent retention of investment returns. The limited partners also contractually commit to capital calls, that is, mandatory infusions of paid-in capital, when so notified by the general partner.

[32] Principally they are the Securities Act of 1933 and the Investment Company Act of 1940.

[33] Wendys International and Trian Capital Management/Pershing Square Capital Management; McDonalds Corporation and Pershing Square Capital Management; General Motors and Tracinda Corporation; Sovereign Bank/Relational Investors.

VIII. Summary of Amendments:

None.