

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1469 CS Public Records
SPONSOR(S): Grant
TIED BILLS: HB 1467 **IDEN./SIM. BILLS:** SB 2656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Economic Development, Trade & Banking Committee</u>	<u>10 Y, 0 N, w/CS</u>	<u>Carlson</u>	<u>Carlson</u>
2) <u>Governmental Operations Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Williamson</u>	<u>Williamson</u>
3) <u>Commerce Council</u>	<u>14 Y, 0 N</u>	<u>Carlson</u>	<u>Randle</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill creates a public records exemption for certain information relating to venture capital investment in Florida businesses under the Florida Capital Formation Act created by HB 1467. Specifically, the bill makes confidential and exempt for 10 years proprietary confidential business information held by the Florida Opportunity Fund regarding alternative investments. It defines proprietary confidential business information and specifically excludes certain information from this definition.

The bill authorizes access to inspect or copy a particular public record if requested and if a proprietor fails to verify certain required information through a written declaration. In addition, any person may petition the appropriate court in Orange County, Florida, for the public release of any record made confidential and exempt by the bill.

The bill provides for future review and repeal of the exemption, provides a statement of public necessity, and provides a contingent effective date.

The bill does not grant rulemaking authority to any administrative agency.

The bill could have a minimal fiscal impact on state and local governments.

The bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Florida Capital Formation Act

HB 1467 creates the Florida Capital Formation Act, which is intended to enhance venture capital investment in Florida businesses. The bill creates the following entities:

- The Florida Opportunity Fund, which will invest on a “fund of funds” basis in venture capital firms that invest in Florida startup businesses. The Fund will not make direct investments in Florida businesses;
- The Florida Opportunity Fund Management Corporation, a subsidiary non-profit corporation of Enterprise Florida, Inc., which will manage the Florida Opportunity Fund; and
- The Florida Capital Investment Trust, which will hold \$75 million in sales, corporate income and insurance premium tax credits to secure private investments in the Florida Opportunity Fund.

The Management Corporation is charged with:

- Selecting an early stage venture capital investment fund allocation manager;
- Negotiating the terms of a contract with the venture capital investment fund allocation manager;
- Executing the contract with the selected venture capital investment fund allocation manager on behalf of the Florida Opportunity Fund;
- Managing the business affairs of the Florida Opportunity Fund such as accounting, audit, insurance, and related requirements;
- Receiving investment returns from the Florida Opportunity Fund; and
- Reinvesting the investment returns in the Florida Opportunity Fund in order to provide additional venture capital investments in Florida.

Public Records Law

Article I, s. 24(a), Florida Constitution, sets forth the state’s public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida Constitution. 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. Public policy regarding access to government records also is addressed in the Florida Statutes.

Chapter 119, F.S., more completely addresses the issue of public records. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record.

Open Government Sunset Review Act

Section 119.15, F.S., the “Open Government Sunset Review Act,” sets forth a legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption. It provides that a public records or public meetings exemption may

be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or
- Protecting trade or business secrets.

Public Records Exemption for Alternative Investments: Definitions

The bill provides definitions for a new public records exemption for the Florida Opportunity Fund.

The bill defines an alternative investment as “an investment...in a private equity fund, venture fund, or angel fund or a direct investment in a portfolio company through a distribution of securities to its partners or shareholders by an alternative investment vehicle.”

The bill also defines “proprietary confidential business information” as information which has been designated by a proprietor as meeting all three of the following criteria:

Proprietary Confidential Business Information Criteria	Elements of the Criteria
1. <i>Owned or controlled by a proprietor.</i>	A proprietor is defined as “an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the Florida Opportunity Fund.”
2. <i>Intended to be and is treated by the proprietor as private.</i>	The disclosure of this information must harm the business operations of the proprietor. The information must not have 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;
3. <i>Relates to any of the designated areas.</i>	<p>These designated areas include:</p> <ul style="list-style-type: none"> - Trade secrets as defined in the Uniform Trade Secrets Act. - Information provided to the Florida Opportunity Fund regarding a prospective investment in a private equity fund, venture fund, angel 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

Proprietary Confidential Business Information Criteria	Elements of the Criteria
	<p>relating to financial, operating, or marketing information of the alternative investment vehicle.</p> <ul style="list-style-type: none"> - Information regarding the portfolio positions in which the alternative investment vehicles invest. - Capital call and distribution notices to investors of an alternative investment vehicle. - Alternative investment agreements and related records. - Information concerning investors, other than the Florida Opportunity Fund, in an alternative investment vehicle.

The bill also defines what information does not meet the definition of proprietary confidential business information and which would continue to be available as a public record:

1. 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.
2. The dollar amount of the commitment made by the Florida Opportunity Fund to each alternative investment vehicle since inception.
3. The dollar amount and date of cash contributions made by the Florida Opportunity Fund to each alternative investment vehicle since inception.
4. The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the Florida Opportunity Fund from each alternative investment vehicle.
5. The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the Florida Opportunity Fund plus the remaining value of alternative-vehicle assets that are attributable to the Florida Opportunity Fund's investment in each alternative investment vehicle.
6. The net internal rate of return of each alternative investment vehicle since inception.
7. The investment multiple of each alternative investment vehicle since inception.
8. The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the Florida Opportunity Fund to each alternative investment vehicle.
9. The dollar amount of cash profit received by the Florida Opportunity Fund from each alternative investment vehicle on a fiscal-year-end basis.

The bill also provides definitions for alternative investment vehicle, portfolio company, and portfolio positions.

Public Records Exemption for Alternative Investments: Operation

The bill makes proprietary confidential business information held by the Florida Opportunity Fund confidential and exempt¹ from public records requirements for 10 years after the termination of the alternative investment. The bill, however, permits access to inspect or copy a particular record if a proprietor, within a reasonable period after the public records request is received by the Florida Opportunity Fund, fails to verify through a written declaration² that a particular record contains the following information:

- 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 the Uniform Trade Secrets Act;³
- 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 such information to the public would harm the business operations of the proprietor.

Public Records Exemption for Alternative Investments: Petition for Public Release

Any person may petition a court of competent jurisdiction in Orange County, Florida for an order for the public release of those portions of any record made confidential and exempt by operation of this bill. The petition must be served, along with any other initial pleadings, on the Florida Opportunity Fund and on the proprietor of the information sought to be released, if the proprietor can be determined through diligent inquiry.

The court must make three findings in any order for the release of a public record:

- That the record or portion thereof is not a trade secret as defined in the Uniform Trade Secrets Act;
- That a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record; and
- That the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the Florida Opportunity Fund, or any trust fund, the assets of which are invested by the Florida Opportunity Fund.

Public Records Exemption for Alternative Investments: Other

The bill provides for future review and repeal of the exemption on October 2, 2011, provides a public necessity statement, and provides an effective date contingent on the passage of HB 1467 or similar legislation.

¹ There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are permitted to be disclosed under certain circumstances. See *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

² Pursuant to s. 92.525, F.S., verification may be accomplished under oath or affirmation taken or administered before an officer authorized to administer oaths, or by the signing of a written declaration. 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," followed by the signature of the person making the declaration, except when a 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 written declaration must be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

³ Section 688.002, Florida Statutes

C. SECTION DIRECTORY:

Section 1 creates s. 288.9623, F.S., creating a public records exemption for the Florida Opportunity Fund.

Section 2 provides a public necessity statement.

Section 3 provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a fiscal impact on state and local governments, because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition, state and local governments could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Economic Development, Trade and Banking Committee

The Economic Development, Trade and Banking Committee adopted a strike-all amendment to the bill on March 30, 2006. The amendment removed references to the exemption of social security numbers, which are already exempted from public records under ch. 119, F.S., revised the references to the definition of "trade secret" as it is defined in s. 688.002, F.S., and made related technical clarifying and conforming changes.

Governmental Operations Committee

On April 17, 2006, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with committee substitute. The strike-all amendment:

- Created definitions.
- Created a public records exemption for proprietary confidential business information held by the Florida Opportunity Fund regarding alternative investments.
- Provided for expiration of the exemption.
- Authorized access to inspect or copy a particular record if requested and if a proprietor failed to verify certain required information through a written declaration.
- Permitted any person to petition the courts in Orange County, Florida, for the public release of any record made confidential and exempt by the bill.

This analysis is drawn to the committee substitute.