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: Education Committee

BILL: SB 2082

INTRODUCER: Senator Peaden

SUBJECT: High School Drug Testing/Public Records

DATE: April 12, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.			HE	
3.			JU	
4.			GO	
5.			RC	
6.				

I. Summary:

This bill provides a public record exemption for the following:

- Drug test findings of high school student athletes; and
- Public meetings at which a challenge or appeal is made.

A repealer date of October 2, 2011 is included in this bill.

This bill contains a public necessity statement for the public records exemption.

This bill is linked to SB 1928, which requires the Florida High School Athletic Association to establish a three year drug testing program for anabolic steroids of high school student athletes.

This bill substantially amends section 1006.20 of the Florida Statutes.

II. Present Situation:

Public Records Law, Generally

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[1] also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term "public records" 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 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.

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."[4]

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;

[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).
[4] s. 119.15(3)(b), F.S.

- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

Section 119.15(6)(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?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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."
- 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."[5]

Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority of any agency, or any county, municipality, or political subdivision, at which official acts are taken, are considered public meetings. As meetings open to the public, these meetings must be properly noticed and recorded, and open to public inspection.[6]

[5] s. 119.15(4)(b), F.S.
[6] s. 286.011(1) and (2), F.S.

III. Effect of Proposed Changes:

This bill creates a public records exemption relating to the Florida High School Athletic Association's (FHSAA) drug testing program, which will provide for the random drug testing of high school athletes for anabolic steroids.

This bill makes drug test findings held by the school or the FHSAA confidential and exempt from public disclosure. Challenge and appeal procedures of positive drug test findings or a student's ineligibility to participate, however, are only made exempt under this bill. Public records law 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.[7] 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.[8]

A public necessity statement is included in this bill addressing drug testing findings and meetings of appeals or challenges. This statement provides that regarding drug test findings, this information:

- Is of a sensitive, personal nature;
- Could be used to discriminate against a student; and
- Could cause harm to a student's reputation.

Regarding meetings at which a challenge to a positive finding is made or an appeal is made to the FHSAA's commissioner or board of directors regarding student ineligibility, this bill finds that it is a public necessity to make these proceedings confidential and exempt, to accomplish the following:

- Minimize the potential of unnecessary scrutiny by the public or media concerning sensitive, personal information about a student; and
- Release of the information would otherwise defeat the purpose of the exemption.[9]

This bill provides for a repeal date of October 2, 2011, unless this public records exemption is reviewed and saved from repeal through reenactment by the Legislature.

This bill is linked to SB 1928, which provides for the implementation of the FHSAA anabolic steroid drug testing program for high school student athletes for a period of three years.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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[7] *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), *rev. denied*, 589 So.2d 289 (Fla. 1991).
[8] *See* Inf. Op. to Chiaro, January 24, 1997.
[9] Section 119.15, F.S., does not specifically reference minimizing public scrutiny as a basis for exempting a public record; rather, it references protecting from public disclosure information of a personal and sensitive nature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Open Government Sunset Review Act of 1995 requires a bill to be drafted no broader than necessary, and requires an identifiable public purpose to be stated. Protection of information of a sensitive personal nature pertaining to individuals is listed as an identifiable public purpose in s. 119.15(6)(b)2., F.S., and is the actual justification provided in the public necessity statement of this bill. However, s. 119.15(6)(b)2., F.S., also specifies that where the identifiable public purpose is the protection of information of a sensitive, personal nature pertaining to individuals, "only information which would actually identify the individuals may be exempted…."

Additionally, an argument may be made that a public benefit results from permitting the public access to data on the rate of steroid-positive student athletes at a particular school. Therefore, it may be advisable to consider modifying the public records exemption to personal identifying information contained in drug test findings and meetings relating to appeals and challenges. Alternatively, language can be included which clarifies that information compiled in the aggregate is not included in the public records exemption.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This public record exemption minimizes the likelihood that member schools and the FHSAA will otherwise have to legally defend the decision to keep this information confidential, therefore potentially reducing litigation costs.

VI. Technical Deficiencies:

This bill does not specify that it is linked to SB 1928. Additionally, the bill references the random drug testing program as created by the House Bill but is contingent upon the Senate Bill's passage.

VII. Related Issues:

This bill provides an exemption for all challenge and appeal procedures. The public necessity statement, however, only makes reference to the meetings at which challenges and appeals are made, which appears to narrow the exemption. It is unclear whether this bill intends to capture all information related to the appeal and challenge process, or only the meetings themselves. If the meeting itself is exempt from public records requirements, but notice of the meeting is not, for example, then it appears that the goal of the exemption can be otherwise defeated.

VIII. Summary of Amendments:

None.