

1 A bill to be entitled

2 An act relating to a public records exemption for
3 alternative investments; amending s. 215.44, F.S.;
4 providing definitions; defining "proprietary confidential
5 business information" and specifying information which
6 does not constitute proprietary confidential business
7 information; creating an exemption from public records
8 requirements for proprietary confidential business
9 information held by the State Board of Administration
10 regarding alternative investments; providing for limited
11 duration of the exemption; providing for retroactive
12 application of the exemption; authorizing the inspection
13 and copying of confidential and exempt records if the
14 proprietor of the information fails to verify that a
15 record contains certain information within a specified
16 period of time; authorizing a court to order the release
17 of confidential and exempt records upon making certain
18 findings; providing for future review and repeal;
19 providing a statement of public necessity; providing an
20 effective date.

21
22 Be It Enacted by the Legislature of the State of Florida:

23
24 Section 1. Paragraph (c) is added to subsection (8) of
25 section 215.44, Florida Statutes, to read:

26 215.44 Board of Administration; powers and duties in
27 relation to investment of trust funds.--

28 (8)

29 (c)1. As used in this paragraph, the term:

30 a. "Alternative investment" means an investment by the

31 State Board of Administration in a private equity fund, venture

32 fund, hedge fund, or distress fund or a direct investment in a

33 portfolio company through an investment manager.

34 b. "Alternative investment vehicle" means the limited

35 partnership, limited liability company, or similar legal

36 structure or investment manager through which the State Board of

37 Administration invests in a portfolio company.

38 c. "Portfolio company" means a corporation or other

39 issuer, any of whose securities are owned by an alternative

40 investment vehicle or the State Board of Administration and any

41 subsidiary of such corporation or other issuer.

42 d. "Portfolio positions" means individual investments in

43 portfolio companies which are made by the alternative investment

44 vehicles, including information or specific investment terms

45 associated with any portfolio company investment.

46 e. "Proprietor" means an alternative investment vehicle, a

47 portfolio company in which the alternative investment vehicle is

48 invested, or an outside consultant, including the respective

49 authorized officers, employees, agents, or successors in

50 interest, which controls or owns information provided to the

51 State Board of Administration.

52 f. "Proprietary confidential business information" means

53 information that has been designated by the proprietor when

54 provided to the State Board of Administration as information

55 | that is owned or controlled by a proprietor; that is intended to
56 | be and is treated by the proprietor as private, the disclosure
57 | of which would harm the business operations of the proprietor
58 | and has not been intentionally disclosed by the proprietor
59 | unless pursuant to a private agreement that provides that the
60 | information will not be released to the public except as
61 | required by law or legal process, or pursuant to law or an order
62 | of a court or administrative body; and that concerns:

63 | (I) Trade secrets as defined in s. 688.002.

64 | (II) Information provided to the State Board of
65 | Administration regarding a prospective investment in a private
66 | equity fund, venture fund, hedge fund, distress fund, or
67 | portfolio company which is proprietary to the provider of the
68 | information.

69 | (III) Financial statements and auditor reports of an
70 | alternative investment vehicle.

71 | (IV) Meeting materials of an alternative investment
72 | vehicle relating to financial, operating, or marketing
73 | information of the alternative investment vehicle.

74 | (V) Information regarding the portfolio positions in which
75 | the alternative investment vehicles invest.

76 | (VI) Capital call and distribution notices to investors of
77 | an alternative investment vehicle.

78 | (VII) Alternative investment agreements and related
79 | records.

80 (VIII) Information concerning investors, other than the
81 State Board of Administration, in an alternative investment
82 vehicle.

83 g. "Proprietary confidential business information" does
84 not include:

85 (I) The name, address, and vintage year of an alternative
86 investment vehicle and the identity of the principals involved
87 in the management of the alternative investment vehicle.

88 (II) The dollar amount of the commitment made by the State
89 Board of Administration to each alternative investment vehicle
90 since inception.

91 (III) The dollar amount and date of cash contributions
92 made by the State Board of Administration to each alternative
93 investment vehicle since inception.

94 (IV) The dollar amount, on a fiscal-year-end basis, of
95 cash distributions received by the State Board of Administration
96 from each alternative investment vehicle.

97 (V) The dollar amount, on a fiscal-year-end basis, of cash
98 distributions received by the State Board of Administration plus
99 the remaining value of alternative-vehicle assets that are
100 attributable to the State Board of Administration's investment
101 in each alternative investment vehicle.

102 (VI) The net internal rate of return of each alternative
103 investment vehicle since inception.

104 (VII) The investment multiple of each alternative
105 investment vehicle since inception.

106 (VIII) The dollar amount of the total management fees and
107 costs paid on an annual fiscal-year-end basis by the State Board
108 of Administration to each alternative investment vehicle.

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

112 2. Proprietary confidential business information held by
113 the State Board of Administration regarding alternative
114 investments is confidential and exempt from s. 119.07(1) and s.
115 24(a), Art. I of the State Constitution for 10 years after the
116 termination of the alternative investment. This exemption
117 applies to proprietary confidential business information held by
118 the State Board of Administration before, on, or after October
119 1, 2006.

120 3. Notwithstanding the provisions of subparagraph 2., a
121 request to inspect or copy a record under s. 119.07(1) which
122 contains proprietary confidential business information shall be
123 granted if the proprietor of the information fails, within a
124 reasonable period of time after the request is received by the
125 State Board of Administration, to verify the following to the
126 State Board of Administration through a written declaration in
127 the manner provided by s. 92.525:

128 a. That the requested record contains proprietary
129 confidential business information and the specific location of
130 such information within the record;

131 b. If the proprietary confidential business information is
132 a trade secret, a verification that it is a trade secret as
133 defined in s. 688.002;

134 c. That the proprietary confidential business information
135 is intended to be and is treated by the proprietor as private,
136 is the subject of efforts of the proprietor to maintain its
137 privacy, and is not readily ascertainable or publicly available
138 from any other source; and

139 d. That the disclosure of the proprietary confidential
140 business information to the public would harm the business
141 operations of the proprietor.

142 4. Any person may petition a court of competent
143 jurisdiction for an order for the public release of those
144 portions of any record made confidential and exempt by
145 subparagraph 2. Any action under this subparagraph must be
146 brought in Leon County, Florida, and the petition or other
147 initial pleading shall be served on the State Board of
148 Administration and, if determinable upon diligent inquiry, on
149 the proprietor of the information sought to be released. In any
150 order for the public release of a record under this
151 subparagraph, the court shall make a finding that the record or
152 portion thereof is not a trade secret as defined in s. 688.002,
153 that a compelling public interest is served by the release of
154 the record or portions thereof which exceed the public necessity
155 for maintaining the confidentiality of such record, and that the
156 release of the record will not cause damage to or adversely
157 affect the interests of the proprietor of the released

158 information, other private persons or business entities, the
159 State Board of Administration, or any trust fund, the assets of
160 which are invested by the State Board of Administration.

161 5. This paragraph is subject to the Open Government Sunset
162 Review Act in accordance with s. 119.15 and shall stand repealed
163 on October 2, 2011, unless reviewed and saved from repeal
164 through reenactment by the Legislature.

165 Section 2. The Legislature finds that it is a public
166 necessity that proprietary confidential business information
167 held by the State Board of Administration regarding alternative
168 investments be held confidential and exempt from s. 119.07(1),
169 Florida Statutes, and s. 24(a), Art. I of the State Constitution
170 for 10 years after the termination of the alternative
171 investment. Disclosing proprietary confidential business
172 information, including trade secrets as defined in s. 688.002,
173 Florida Statutes, used in determining how private equity
174 investments are made or managed by private partnerships
175 investing assets on behalf of the State Board of Administration
176 would negatively affect the business interests of private
177 partnerships that rely heavily on their information advantage to
178 generate investment returns, and competitor partnerships could
179 gain an unfair competitive advantage if provided access to such
180 information. Maintaining the information advantage of highly
181 skilled private equity investment managers is necessary in order
182 for the State Board of Administration to generate an adequate
183 return from its assets committed to this high-risk segment of
184 the market, since only those managers having a strong

185 information advantage have generated adequate risk-adjusted
186 returns. Research shows that 60 percent of all private equity
187 partnerships have delivered a return less than that of the
188 lower-risk public markets. Only 30 percent of all private equity
189 partnerships have been able to produce the State Board of
190 Administration's required premium over public-market returns to
191 justify incurring the risks associated with these investments.
192 The ninth and tenth deciles of private equity managers are those
193 having a substantial information advantage and they have
194 generated sizable premiums over the public markets, with net
195 returns of 19.4 percent and 29.7 percent, respectively. The
196 Legislature finds that the exemption of proprietary confidential
197 business information used in or implying how private equity
198 investments are made or managed is necessary for the effective
199 and efficient administration of the State Board of
200 Administration's asset-management program. Assets of the Florida
201 Retirement System must grow rapidly in order to keep pace with
202 growth in the system's liabilities and to manage the costs of
203 employer contributions. In order to meet its investment
204 objectives, the State Board of Administration must invest in
205 diversified asset types, including high-return, high-risk
206 private equity partnerships. Those partnerships that have and
207 are able to maintain a substantial information advantage over
208 their competitors are likely to provide an adequate return. The
209 release of proprietary confidential business information,
210 including trade secrets, revealing how private equity
211 investments are made or managed could result in inadequate

212 returns and ultimately frustrate attainment of the investment
213 objective of the State Board of Administration, subsequently
214 increasing contribution costs for employers in the Florida
215 Retirement System and lowering the system's funded ratio. It is
216 the Legislature's intent to allow the public access to
217 sufficient information in order to be informed regarding the
218 alternative investments of the State Board of Administration and
219 to balance the public's right to information against the right
220 of private business entities to be protected from harmful
221 disclosure of confidential and exempt proprietary confidential
222 business information, the disclosure of which would injure them
223 in the marketplace, impair the ability of the State Board of
224 Administration to invest in the best performing alternative
225 investment vehicles, and diminish investment earnings in the
226 Florida Retirement System Trust Fund. It is also the
227 Legislature's intent to establish consistency with regard to the
228 classification of information relating to alternative
229 investments by the State Board of Administration as either
230 confidential or suitable for public disclosure. In finding that
231 the public records exemption created by this act is a public
232 necessity, the Legislature finds that the public and private
233 harm in disclosing proprietary confidential business information
234 relating to alternative investments by the State Board of
235 Administration significantly outweighs any public benefit
236 derived from disclosure; that the exemption created by this act
237 will enhance the ability of the State Board of Administration to
238 fulfill its duties as an investment fiduciary by making it more

239 | effective and competitive in the marketplace as an investor that
240 | is able to gain access to the best alternative investment
241 | vehicles; and that the public's ability to be informed regarding
242 | the alternative investments made by the State Board of
243 | Administration is preserved by the disclosure of information
244 | excepted from the created exemption.

245 | Section 3. This act shall take effect October 1, 2006.