

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill provides a public record exemption for trademark secrets and proprietary business information held by the Florida Opportunity Fund.

B. EFFECT OF PROPOSED CHANGES:

Florida Capital Formation Act

This bill serves as a companion to HB 83. HB 83 creates the Florida Capital Formation Act, which is intended to enhance venture capital investment in Florida businesses. The bill creates:

- The Florida Opportunity Fund, which will invest on a “fund-of-funds” basis in venture capital firms that invest in Florida start-up businesses. The fund will not make direct investments in Florida businesses. Enterprise Florida will assist in creating the fund and will oversee the fund.

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 by general law.

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 defines what qualifies as “proprietary confidential business information.”

- Trade secrets as defined in s. 688.002;
- Information provided to the Florida Opportunity Fund regarding a prospective investment in a private equity fund, venture capital fund, angel fund, or portfolio company that is proprietary to the provider of the information;
- Financial statements and auditor reports of an alternative investment vehicle or portfolio company, unless publicly released by the alternative investment vehicle or portfolio company;
- Meeting materials of an alternative investment vehicle or portfolio company relating to financial, operating, or marketing information of the alternative investment vehicle or portfolio company;
- Information regarding the portfolio positions in which the alternative investment vehicles or Florida Opportunity Fund invest;
- Capital call and distribution notices to investors or the Florida Opportunity Fund of an alternative investment vehicle;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the Florida Opportunity Fund, in an alternative investment vehicle or portfolio company.

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:

- 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 Florida Opportunity Fund to each alternative investment vehicle since inception;
- The dollar amount and date of cash contributions made by the Florida Opportunity Fund to each alternative investment vehicle since inception;
- 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;
- 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;
- 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 Florida Opportunity Fund to each alternative investment vehicle; and
- 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, 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:

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 S. 688.002, F. S.

- 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, the Florida Opportunity Fund Management Corporation, 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, 2012, provides a public necessity statement, and provides an effective date contingent on the passage of HB 83 or similar legislation.

C. SECTION DIRECTORY:

Section 1 - Creates s. 288.9626, F.S., creating a public records and public meetings 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 may have a fiscal impact on Orange County because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition,

Orange County 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), 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 and requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c), 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 and includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

This bill increases the amount of money available to finance new businesses in the state. Scripps and other biotech firms will generate startups and spin-offs. In order to keep them and their high-value jobs in state, we will need more venture capital than currently exists here. Venture capitalists generally choose to invest within 75 miles of their home base, and new businesses follow the financing. By establishing incentives for venture capitalists, we can keep the new high-tech, high-wage jobs in Florida.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.