

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 131 Public Records
SPONSOR(S): Policy & Budget Council; Grant
TIED BILLS: HB 83 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Economic Development</u>	<u>9 Y, 0 N</u>	<u>Brown</u>	<u>Croom</u>
2) <u>Economic Expansion & Infrastructure Council</u>	<u>14 Y, 0 N, As CS</u>	<u>West</u>	<u>Tinker</u>
3) <u>Policy & Budget Council</u>	<u>19 Y, 0 N, As CS</u>	<u>Voyles</u>	<u>Hansen</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill creates a public records and public meetings exemption for certain information relating to venture capital investment in Florida businesses created by CS/CS/HB 83. Specifically, the bill makes confidential and exempt for 10 years proprietary confidential business information held by the Florida Opportunity Fund and the Institute for the Commercialization of Public Research. The bill provides a public records and meetings exemption for the Florida Technology, Research, and Scholarship Board. 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. In addition, any person may petition the appropriate court in Orange County, Florida, for the disclosure of any record made confidential and exempt by the Florida Opportunity Fund or the Institute for the Commercialization of Public Research.

The bill provides for future review and repeal of the exemptions and provides statements of public necessity.

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

The bill provides a contingent effective date.

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, the Institute for the Commercialization of Public Research, and the Florida Technology, Research, and Scholarship Board.

B. EFFECT OF PROPOSED CHANGES:

Florida Capital Formation Act

This bill serves as a companion to CS/CS/HB 83, which is intended to enhance venture capital investment in Florida businesses. CS/CS/HB 83 creates:

- The Florida Opportunity Fund, which will invest on a “fund-of-funds” basis in venture capital funds that invest in Florida start-up businesses;
- The Institute for the Commercialization of Public Research, which will act as a clearinghouse for research projects generated by universities and colleges, research institutes, and publicly supported organizations; and
- The State University Research Commercialization Assistance Grant Program to promote the commercialization of state university research products.

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 in cases where 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 and the Institute for the Commercialization of Public Research.

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 or the Institute for the Commercialization of Public Research 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;
- Information concerning investors, other than the Florida Opportunity Fund, in an alternative investment vehicle or portfolio company;
- Materials that relate to the methods of manufacture or production, potential trade secrets, or patentable material received, generated, or discovered during the course of research projects conducted by universities and other publicly supported organizations;
- Information that would identify an investor or potential investor who desires to remain anonymous;
- Information received from a person from another state or nation which is confidential or exempt to the laws of that state or nation; and
- Confidential business information regarding alternate investments for ten years after the termination of the alternate investment.

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."

The bill provides a public record and meetings exemption for the Florida Technology, Research, and Scholarship Board for the following information:

- Materials that relate to the methods of manufacture or production, potential trade secrets, or patentable material received, generated, or discovered during the course of research projects conducted by state universities;
- Information that would identify an investor or potential investor who desires to remain anonymous;
- Information received from a person from another state or nation which is confidential or exempt to the laws of that state or nation; and
- That portion of a meeting of the Florida Technology, Research, and Scholarship Board at which information is discussed that is confidential and exempt.

Public Records Exemption for Alternative Investments: Operation

The bill makes proprietary confidential business information held by the Florida Opportunity Fund or the Institute for the Commercialization of Public Research confidential and exempt¹ from public records

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

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:

- Proprietary confidential business information and its specific location in the requested record;
- A trade secret, as defined in the Uniform Trade Secrets Act;³
- Confidential business information that 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
- Information that would harm the business operations of the proprietor if disclosed to the public.

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 the Florida Opportunity Fund or the Institute for the Commercialization of Public Research. The petition must be served, along with any other initial pleadings, 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 or the Institute for the Commercialization of Public Research.

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 CS/CS/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 and the Institute for the Commercialization of Public Research.

Section 2 - Provides a public necessity statement.

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.

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Section 3 – Renumbers subsection (8) of section 1004.226, F.S., as created by CS/CS/HB 83, 2007 Regular Session, as subsection (9) and a new subsection (8) is added to that section.

Section 4 – Provides a public necessity statement.

Section 5 - 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

On Monday April 23, 2007, the Policy and Budget Council reported the bill favorably with a strike-all amendment. The amendment:

- Included public records and meeting exemptions for the Institute for the Commercialization of Public Research to align this bill with CS/CS/HB 83.
- Included public records and meeting exemptions for the Florida Technology, Research, and Scholarship Board to align this bill with CS/CS/HB 83.