

hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(a) 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.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to mean:

. . . 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.¹⁴ Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- (3) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

- (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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1) (a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

III. Effect of Proposed Changes:

The bill makes the following information held by Sure Ventures Commercialization, Inc., confidential and exempt from s. 24, Art. I of the State Constitution and s. 119.07(1), F.S.:

¹⁵ Section 119.15(4)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

- Materials that relate to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through the state universities' research projects submitted for funding under the Sure Ventures Commercialization Grant Program;
- Agreements and proposals to receive funding, including grant applications; however, those portions of such agreements and proposals, including grant applications, which do not contain information made exempt by this bill, are not confidential and exempt upon issuance of the report that is made after the conclusion of the project for which funding was provided;
- Materials that relate to the identity of other investors or potential investors in projects reviewed by the corporation; and
- Any information received from a person or another state or nation or the federal government which is otherwise confidential or exempt under that state's or nation's laws or under federal law.

The bill also makes that portion of a meeting of the board of directors of Sure Ventures Commercialization, Inc., at which information is presented or discussed which is confidential and exempt under the bill is closed to the public and exempt from s. 24(b), Art. I of the State Constitution and s. 286.011, F.S. Any records generated during those portions of the board meetings which are closed to the public under the bill, such as minutes, tape recordings, videotapes, transcriptions, or notes, are confidential and exempt from s. 24, Art. I of the State Constitution and s. 119.07(1), F.S.

Public employees may inspect and copy records or information that is made exempt and confidential under this exemption exclusively for the performance of their public duties. Public employees receiving this exempt and confidential information must maintain the confidentiality of the information. Any public employee receiving confidential information who violates this subsection commits a misdemeanor of the first degree, punishable as provided by up to 1 year in prison or a fine of up to \$1,000.

At the time that any record or information made confidential and exempt by this bill, or portion thereof, is legally available or subject to public disclosure for any other reason, that record or information, or portion thereof, is no longer confidential and exempt and shall be made available for inspection and copying.

This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity for the exemption—that disclosing proprietary confidential business information derived from university research projects, including trade secrets would negatively affect the ability of public universities that rely heavily on the information gained from publicly funded research products to generate investment returns. This stated purpose meets the statutory criterion that an exemption is appropriate if it 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 bill also meets the statutory criterion that an exemption is appropriate if it protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to further a business advantage over those who do not know or use it, the disclosure of which would injure the affected party in the marketplace. The release of university-based proprietary confidential business information could result in inadequate returns and ultimately frustrate attainment of the investment objective of the Sure Ventures Commercialization Grant Program. The bill states that the public and private harm in disclosing proprietary confidential business information relating to university research projects significantly outweighs any public benefit derived from disclosure.

The public's ability to be informed regarding the university's research projects funded by the grant program is preserved by the disclosure of information excepted from the created exemption.

The bill provides an effective date of July 1, 2007, if an undesignated Senate Bill or similar legislation is adopted in the same legislative session or an extension thereof and becomes law. The Senate Bill that creates Sure Ventures Commercialization, Inc., is SB 2414.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. The bill appears to relate to one subject and contain only provisions creating exemptions and providing for enforcement.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By protecting sensitive research and financing information, the public records and meetings exemptions created by the bill may help prevent university proposals submitted

to Sure Ventures Commercialization, Inc., from being injured in the marketplace. Thus the exemptions may help facilitate economic development activities that benefit the state.

C. Government Sector Impact:

The exemption will help universities maintain the confidential nature of proprietary business information as they develop ways to commercialize research conducted by their faculty.

VI. Technical Deficiencies:

On page 4, line 15, the number of Senate Bill 2414 should be inserted in the blank space after the words "Senate Bill"

VII. Related Issues:

None.

VIII. Summary of Amendments:

Barcode 833852 by Higher Education:

Inserts the number of Senate Bill 2414 into the contingency section of the effective date of the bill, thus making the effective date of SB 2416 contingent upon the passage of SB 2414 or similar legislation.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
