

The Florida Senate
PROFESSIONAL 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: Governmental Operations Committee

BILL: CS/CS/SB 2422

INTRODUCER: Governmental Operations Committee, Commerce Committee and Senator Ring

SUBJECT: Public Records and Meetings/SURE Ventures Capital Fund

DATE: April 19, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Pugh</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates a public records exemption for proprietary confidential business information held by the SURE Venture Capital Fund or the Institute for Commercialization of Public Research, and a public meetings exemption for that portion of meetings at which such information is discussed. The bill defines “proprietary confidential business information,” as well as other terms. Exceptions to the exemption are authorized.

As the bill creates a new public record and public meeting exemption, it is subject to Art. I, s. 24(a), of the State Constitution, which requires that two-thirds of the members present and voting in each chamber must pass the bill.

II. Present Situation:

Public Records – The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One 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,

¹ Section 1390, 1391 F.S. (Rev. 1892).

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

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

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

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).

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

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 Act¹⁴ 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. 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 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:

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 Art. 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.

¹⁵ Section 119.15(4)(b), F.S.

- (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.

The companion to this bill, SB 2420, creates the SURE Venture Capital Act, a program intended to promote investment in seed capital and early stage venture capital equity for emerging Florida companies. The bill creates a two-tiered structure to manage and implement the program:

- The Sure Venture Capital Fund (fund) and its board of directors are responsible for hiring the investment fund allocation manager, making the actual investments, and attracting other co-investors.
- The Institute for Commercialization of Public Research (institute), operated by a public Florida university and located within a major metropolitan area in the southern part of the

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

state with extensive commercial air service, selects companies that will be eligible to receive the SURE investments, and helps mentor those companies.

III. Effect of Proposed Changes:

Section 1 creates s. 288.9630, F.S., which specifies the public records exemptions pertaining to the aforementioned fund and institute. They are:

- 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 research projects conducted by universities and other publicly supported organizations in Florida, and which are held by the fund or the institute.
- Information that would identify investors or potential investors in projects reviewed by the fund.
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt that governmental entity's laws. Proprietary confidential business information regarding alternative investments for 10 years after the termination of the alternative investments.

The term "proprietary confidential business information" is defined to mean information that has been designated by the proprietor when provided to the fund or the institute that is owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private, the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body, and that concerns:

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

The bill also expressly excludes certain items from the definition. It excludes:

- The name, address, and vintage year of an alternative investment vehicle or the fund and the identity of principals involved in the management of the alternative investment vehicle or the fund.
- The dollar amount of the commitment made by the fund to each alternative investment vehicle since inception.
- The dollar amount and date of cash contributions made by the 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 fund from each alternative investment vehicle.
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the fund plus the remaining value of alternative-vehicle assets that are attributable to the fund 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 fund to each alternative investment vehicle on a fiscal-year-end basis.

Protected records may be released to a governmental entity in the performance of its duties upon written request. The confidentiality must be maintained by those receiving entities. Violating this provision is a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.

Once a confidential and exempt record becomes legally available or subject to public disclosure for any reason, that record is no longer confidential and exempt, and shall be made available for inspection and copying.

This section is subject to the Open Government Sunshine Review Act in accordance with s. 119.15, F.S., and shall be repealed on October 2, 2012, unless reviewed and reenacted by the Legislature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

As this bill creates a public records and meeting exemption, pursuant to Art. I, s. 24(a), of the State Constitution, two-thirds of the members present and voting in each chamber must vote to pass the bill.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be minimal costs of complying with the confidentiality and exemption requirements; however, these costs are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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