

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/SB 2612

INTRODUCER: Governmental Operations Committee and Senator Ring

SUBJECT: Capital Formation Act/Public Records Exemption

DATE: April 18, 2007 REVISED: _____

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

I. Summary:

This bill creates an exemption from Florida’s public records laws for proprietary confidential business information held by the Florida Opportunity. It is a companion bill to SB 1762, which creates the Florida Capital Formation Act. The bill lists a series of documents and other types of information that would be considered confidential and exempt from the public. It defines “proprietary confidential business information” and specifically excludes certain information from this definition. The exemption is repealed October 2, 2012, unless re-enacted by the Legislature.

The bill authorizes the inspection or copying of a particular document as a public record if two conditions are met: if the document is requested and if the proprietor of the document has failed to verify in writing that the document is confidential and exempt. 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 bill.

SB 2612 also provides a statement of public necessity for the exemptions.

Because SB 2612 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. Its passage also is contingent on the passage of SB 1762, or a similar bill, during the same legislative session.

This bill creates section 288.96275, F.S.

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, 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

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

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.

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 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

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.

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.

- 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:

- (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.

¹⁵ Section 119.15(4)(b), F.S.

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

The Florida Capital Formation Act - SB 2612's companion bill, SB 1762, creates the Florida Capital Formation Act, which is intended to enhance venture capital investment in Florida businesses.

Three entities are created by SB 1762 to promote venture capital investing in Florida:

- The Florida Opportunity Fund (the Fund), which will invest on a “fund-of-funds” basis in venture capital firms that invest in Florida startup businesses. The Fund will not make direct investments in Florida businesses; and
- The Florida Capital Investment Trust, which will hold \$75 million in sales, corporate income, and insurance premium contingent tax credits to secure private investments in the Florida Opportunity Fund.

The Fund will have access to business plans, potential trade secrets¹⁷, and other sensitive proprietary information related to their investment partners.

III. Effect of Proposed Changes:

SB 2612 creates a public records exemption for certain information relating to venture capital investment in Florida businesses under the Florida Capital Formation Act, created by the linked SB 1762. It also sets up a process by which persons are authorized to inspect or copy a particular public record if requested, under certain conditions, and a process by which persons may petition the court for disclosure of records in question.

Section 1 creates s. 288.96275, F.S., which defines a number of terms related to the public records exemption. Among the key new definitions are:

- Alternative investment means “an investment by the Florida Opportunity Fund 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.”
- Alternative investment vehicle means “the limited partnership, limited liability company, or similar legal structure through which the Florida Opportunity Fund invests in a portfolio company.”
- Portfolio company means “a corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the Florida Opportunity Fund and any subsidiary of such corporation or other issuer.”
- Proprietor means “an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized offers, employees, agents, or successors in interest, that controls or owns information provided to the Florida Opportunity Fund.”

¹⁷ Section 812.081(1)(c), F.S., defines a trade secret to include, in pertinent part, “any scientific, technical, or commercial information” which provides a “business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.” According to that statute, a trade secret is: “secret, of value, for use in or use by the business; and of advantage to the business or providing an opportunity to obtain an advantage, over those who do not know or use it.”

Also defined is “proprietary confidential business information,” in a lengthy description of which types of information are protected from public view, and which are not. Covered is information provided to the Fund or the corporation by the proprietor, as specified in the bill, and includes:

- Trade secrets as defined in the Uniform Trade Secrets Act;
- Information provided to the fund or the corporation regarding a prospective investment in a private equity fund, venture 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;
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle;
- Information regarding the portfolio positions in which the alternative investment vehicles invest;
- Capital call and distribution notices to investors of an alternative investment vehicle;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the Fund, in an alternative investment vehicle;

Not included in the definition of “proprietary confidential business information,” and thus remaining a public record, are 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;
- Dollar amount of the commitment made by the Fund to each alternative investment vehicle since inception;
- Dollar amount and date of cash contributions made by the Fund to each alternative investment vehicle since inception;
- Dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the Fund from each alternative investment vehicle;
- 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’s investment in each alternative investment vehicle;
- Net internal rate of return of each alternative investment vehicle since inception;
- Investment multiple of each alternative investment vehicle since inception;
- 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; and the
- Dollar amount of cash profit received by the Fund from each alternative investment vehicle on a fiscal-year-end basis.

SB 2612 makes proprietary confidential business information held by the Fund or the corporation confidential and exempt from public records requirements for 10 years after the termination of the applicable alternative investment. [See “VI. TECHNICAL DEFICIENCIES” section below.] 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 Fund or

the corporation, fails to verify through a written declaration¹⁸ that a particular record contains the following information:

- The identity of the proprietary confidential business information and its specific location in the requested record;
- Where applicable, a verification that the information is a trade secret as defined in the Uniform Trade Secrets Act;¹⁹
- 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.

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.²⁰ The petition must be served, along with any other initial pleadings, on the Fund or the corporation and 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 Fund, the corporation, or any trust fund, the assets of which are invested by the Fund.

SB 2612 also provides for future review and repeal of the exemption on October 2, 2012, pursuant to the State Constitution and Florida law.

Section 2 of the bill provides a public necessity statement.

Section 3 provides an effective date contingent on the passage of SB 1762 or similar legislation during the same session.

¹⁸ 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.

¹⁹ Section 688.002, F. S.

²⁰ EFI staff indicated to Senate Commerce Committee staff that the reference to legal action being filed in Orange County is intended to lower legal costs of potential litigation, since EFI's legal counsel is based in Orange County. SB 1762, the substantive companion bill to SB 2612, gives EFI a significant role in helping implement the Florida Capital Formation Act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

CS/SB 2612 may have a fiscal impact on Orange County, because staff responsible for complying with public records requests will require training related 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.

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.
