

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Operations Committee

BILL: CS/SB 1464

INTRODUCER: Governmental Operations Committee and Senator Dean

SUBJECT: Public Records/Direct-Support Organization/FDVA

DATE: March 19, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	McElroy	MS	Favorable
2.	Rhea	Wilson	GO	Fav/CS
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

As an entity meeting the definition of “agency” under ch. 119, F.S., records of the Department of Veterans’ Affairs direct-support organization are presumptively public records. Meetings of the board of directors are public meetings, as well. This bill creates a public records exemption for identifying-information of a donor or prospective donor to a direct-support organization assisting the Department of Veterans’ Affairs. It also creates a meetings exemption for those portions of meetings of the direct-support organization at which such exempt information is discussed.

The provisions of this bill are subject to the Open Government Sunset Review Act.

This bill creates section 292.075 (10) of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ 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. . . .

Unless specifically exempted, all agency⁵ 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.⁶

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.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ 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

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

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

³ Article I, s. 24 of the State Constitution.

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ 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.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

The Public Records Act¹⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ If requested, the records custodian must state the basis for the exemption, in writing.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ 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.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation

¹⁰ *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).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So.2d 203 (Fla. 1998).

²¹ 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.²²

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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 identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

²² *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

²³ Section 119.15, F.S.

- [p]rotects 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
- [p]rotects 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.²⁴

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- 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.²⁵ 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.

Department of Veterans' Affairs Direct-Support Organization – Separate legislation (SB 1462) provides for the establishment of a direct-support organization to assist the Department of Veterans' Affairs in performing its mission.

Florida law provides for the establishment of direct-support organizations as a means to assist state agencies in accomplishing their missions. Direct-support organizations are established as a Florida corporation not for profit incorporated under ch. 617, F.S., and approved by the Department of State. Section 617.01401(5), F.S., defines the term corporation not for profit as "a

²⁴ Section 119.15(4) (b), F.S.

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

corporation no part of the income or profit of which is distributable to its members, directors, or officers.”²⁶

Direct-support organizations perform a variety of services to state agencies including:

- Raising money;
- Submitting requests for and receiving grants from the federal government, the state or its political subdivisions;
- Receiving, holding, investing, and administering property; and
- Making expenditures for the benefit of the supported agency.²⁷

Direct-support organizations have been established to support a wide array of services and agencies including child abuse prevention and adoption; tourism; public guardianship; victims of crime; universities, community colleges, and school districts; the Florida National Guard; the Departments of Corrections, Juvenile Justice, and Agriculture and Consumer Services; and the Florida Prepaid College Board.²⁸

Florida Statutes generally require direct-support organizations to:

- Operate under written contract with the supported agency;
- Be governed by a board of directors; and
- Operate for the benefit of and in a manner consistent with the goals of the agency and in the best interest of the state.

III. Effect of Proposed Changes:

This bill provides for a public records exemption granting requested anonymity to donors or prospective donors to a direct-support organization assisting the Department of Veterans’ Affairs. The bill also creates an exemption for that portion of a meeting at which such confidential and exempt information is discussed.

The provisions of this bill are subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2013, unless reviewed and reenacted by the Legislature.

The bill provides a legislative finding that protecting the identity of donors and prospective donors to the direct-support organization authorized to assist the Department of Veterans’ Affairs is a public necessity. The finding asserts that the exemption honors the request for anonymity by donors and prospective donors thereby assisting the direct-support organization in performing its fund raising mission. The bill also provides a public necessity for the meetings exemption.

The bill provides for an effective date of July 1, 2008, contingent upon SB 1462 or similar legislation passing during the same Legislative session and becoming a law.

²⁶ Section 617.01401, F.S.

²⁷ Sections 39.0011, 250.115, 267.1732, 267.1736, 288.1226, 570.903, 744.7082, 944.802, 960.002, 985.672, 1001.453, 1004.28, 1004.70, and 1009.983, F.S.

²⁸ *Id.*

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

The bill provides for a public records exemption granting requested anonymity to donors or prospective donors to a direct-support organization assisting the Department of Veterans Affairs.

The direct-support organization, while a not-for-profit corporation, is authorized by law, the board members are appointed by the secretary of the department, and the sole purpose of the direct-support organization is to provide support for statutorily-delegated functions of the department. As such, the direct-support organization is “acting on behalf of” the department, meets the definition of an “agency” pursuant to s. 119.011(2), F.S., and is subject to open records and meetings requirements under Florida law.²⁹ Unless an exemption for records of the direct-support organization exists, any one may inspect and copy those records. Further, as the direct-support organization is an arm of the department (“agency acting on behalf of”), the department has access to records of the direct-support organization that are exempt or confidential and exempt.

Further, s. 11.45(3)(d), F.S., provides that the Auditor General may, pursuant to his or her own authority, or at the direction of the Legislative Auditing Committee, conduct audits or other engagements as determined appropriate by the Auditor General of the accounts and records of any direct-support organization or citizen support organization created or established by law. The Auditor General is authorized to require and receive *any* records from the direct-support organization or citizen support organization, or from its independent auditor.

Further, where an entity is authorized to receive confidential and exempt information from the custodian of that information, the receiving entity is under the same obligation as the custodian to maintain the confidentiality of that information.³⁰

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

²⁹ See, e.g., AGO 94-34 and AGO 95-17; see, also, *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So.2d 418 (Fla. 5th DCA 1997).

³⁰ See, *Ragsdale v. State*, 720 So.2d 203, 206(Fla. 1998); *Alice P. v. Miami Daily News, Inc.*, 440 So. 2d 1300 (Fla. 3d DCA 1983), review denied, 467 So. 2d 697 (Fla. 1985); see, also, AGO 04-44.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill is tied to SB 1462 and is contingent upon that bill or similar legislation becoming a law.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Operations on March 19, 2008:

The committee substitute:

- Creates an exemption for those portions of meetings at which the confidential and exempt information is discussed and adds language to the statement of public necessity regarding the meetings exemption.
- Corrects numeric references and adds the bill number of the related bill to the contingent effective date.
- Removes unnecessary language related to access to the records.

B. Amendments:

None.