

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 Oversight and Accountability Committee

BILL: CS/SB 1912

INTRODUCER: Education Pre-K-12 Committee and Senator Detert

SUBJECT: Public Records/Education Testing/Investigations

DATE: April 18, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	deMarsh-Mathues	Matthews	ED	Fav/CS
2.	Naf	Wilson	GO	Favorable
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:

The bill provides a new public records exemption for information obtained as part of an investigation of a testing impropriety by the Department of Education. The exempted information includes the following:

- The identity of the school or postsecondary institution;
- The personally identifiable information about personnel in the school district or postsecondary institution; and
- Any specific allegations of misconduct obtained or reported during the investigation.

This information is confidential and exempt until the conclusion of the investigation or until the investigation is no longer active. The bill specifies the circumstances that define an active investigation and the conclusion of an investigation. The exemption is subject to review under the Open Government Sunset Review Act¹ and will sunset on October 2, 2014, unless it is reenacted by the Legislature.

¹ See s. 119.15, F.S.

Because the bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for enactment.

This bill substantially amends s. 1008.24 of the Florida Statutes.

II. Present Situation:

Public Records

Article I, s. 24 of the State Constitution,² provides that:

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.

The Public Records Act³ 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ 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

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.”

⁵ Section 119.011(11), F.S.

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

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

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

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

The Open Government Sunset Review Act of 1995¹² establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

An exemption may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one the following purposes and 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:

- The exemption 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 exemption 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
- The exemption 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.¹³

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 so, 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?

Finally, 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

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 Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

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.¹⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁵

Test Security

Current law provides that it is a first degree misdemeanor for a person to knowingly and willfully violate test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification or administered by school districts pursuant to s. 1008.22, F.S. or, with respect to any such test, knowingly and willfully to:¹⁶

- Give examinees access to test questions prior to testing;
- Copy, reproduce, or use in any manner inconsistent with test security rules all or any portion of a secure test booklet;
- Coach examinees during testing or alter or interfere with examinees' responses in any way;
- Make answer keys available to examinees;
- Fail to follow test security rules for distribution and return of secure tests as directed, or fail to account for all secure test materials before, during, and after testing;
- Fail to follow test administration directions specified in the test administration manuals; or
- Participate in, direct, aid, counsel, assist in, or encourage any of the acts prohibited in s. 1008.24, F.S.

The State Board of Education rule¹⁷ provides for the security of tests implemented in accordance with the requirements for: adult education, national, state, and district assessments; the College Communication and Mathematics Level Academic Skills Test (CLAST); common placement tests for public postsecondary education; and educator certification examinations.¹⁸ The rules also provide for the Department of Education to investigate reports of students suspected of cheating or other violations, and for the DOE, institutional, and school district personnel to investigate missing test materials.

A district school superintendent, a president of a public postsecondary educational institution, or a president of a private postsecondary educational institution must cooperate with the Commissioner of Education in any investigation concerning the administration of a test administered pursuant to state statute or rule.¹⁹

While the investigation of a complaint about a teacher or an administrator and the investigative records are confidential and exempt,²⁰ there does not appear to be a specific provision in law that makes confidential and exempt the investigation and information obtained during the investigation of a testing impropriety.

¹⁴ Attorney General Opinion 85-62.

¹⁵ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹⁶ s. 1008.24, F.S.

¹⁷ Rule 6A-10.042, F.A.C.

¹⁸ ss. 1004.93, 1008.22, 1008.29, 1008.30, 1012.55, and 1012.56, F.S., respectively.

¹⁹ s. 1008.24

²⁰ s. 1012.796, F.S.

III. Effect of Proposed Changes:

The bill amends s. 1008.24, F.S., to create a new public records exemption for information obtained as a part of the Department of Education's investigation of a testing impropriety. The exemption includes the following:

- The identity of the school or postsecondary institution;
- The personally identifiable information about personnel in the school district or postsecondary institution; and
- Any specific allegations of misconduct obtained or reported during the investigation.

This information is confidential and exempt until the conclusion of the investigation or until it is no longer active. An investigation is concluded under the following circumstances: when there is a finding that no impropriety occurred; at the end of any resulting preliminary investigation of a complaint against a teacher or administrator pursuant to s. 1012.796, F.S.; completion of any resulting law enforcement investigation; or referral of the matter to an employer who has the authority to take disciplinary action against an individual who is suspected of a testing impropriety. An investigation is active as long as it is ongoing and there is a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future.

The exemptions will sunset on October 2, 2014, unless they are reenacted by the Legislature.

The stated public necessity is that an investigation of a testing impropriety may involve information of a personal nature that could cause unwarranted damage to the name or reputation of all involved individuals.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill complies with the requirements of s. 24, Art. I of the State Constitution that a law creating a new public records exemption must relate to only one subject, must state with specificity the public necessity justifying the exemption, and must create an exemption that is no broader than necessary to accomplish the stated purpose of the law.²¹

C. Trust Funds Restrictions:

None.

²¹ See, *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).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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 Education Pre-K-12 on March 18, 2009:

The committee substitute:

- Narrows the public records exemption to the following: the identity of the school or postsecondary institution; the personally identifiable information about personnel in the school district or postsecondary institution; and any specific allegations of misconduct obtained or reported during the investigation;
- Makes this information confidential and exempt until the conclusion of the investigation or until it is no longer active; and
- Specifies the circumstances that define an active investigation and the conclusion of the investigation.

B. Amendments:

None.