

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 749 Public Records and Meetings/DOEA/Direct-Support Organization

Donors

SPONSOR(S): Anderson and others

TIED BILLS: HB 747

IDEN./SIM. BILLS: SB 648

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Elder & Family Services Policy Committee	9 Y, 1 N	Cicccone	Cicccone
2)	Governmental Affairs Policy Committee			
3)	Health & Family Services Policy Council			
4)	Full Appropriations Council on General Government & Health Care			
5)				

SUMMARY ANALYSIS

House Bill 749 is the public records exemption companion to House Bill 747, which authorizes the Department of Elderly Affairs (DOEA or the "department") to establish a direct-support organization to provide assistance, funding, and support to the department.

The bill creates s. 430.82, F.S., and provides a public records exemption for identifying information of a donor or prospective donor to a direct-support organization. The bill makes confidential and exempt, from section 119.07(1) and Article I, s. 24(A) of the Florida Constitution, the identity of a donor or prospective donor to the direct-support organization who desires to remain anonymous, and all identifying information of such donor or prospective donor. The bill further provides an exemption for portions of meetings of the direct-support organization during which the identity of donors or prospective donors is discussed.

The bill specifies this exemption is subject to the Open Government and Sunset Review Act in accordance with s. 119.15, F.S., and provides that such exemption will stand repealed on October 2, 2014, unless reviewed and reenacted by the Legislature.

The bill provides a statement of public necessity for the exemption.

The bill creates a new public records exemption and, as a result, is subject to Article I, s. 24(a) of the Florida Constitution, which requires that two-thirds of the members present and voting in each house shall pass the bill.

The bill provides an effective date of July 1, 2009, contingent upon House Bill 747 taking effect and becoming law.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

House Bill 747, the companion bill to this legislation, authorizes DOEA to establish a direct-support organization.

A direct-support organization (DSO) is a Florida not-for-profit corporation, incorporated under ch. 617, F.S., and authorized by law to benefit or provide assistance to a governmental entity. A DSO is created to give a governmental entity the flexibility to seek an additional funding source, and to enhance the mission of the department.

DSOs are specifically authorized or created in statute. Generally, the authorizing statute establishes requirements for the organization's articles of incorporation, oversight requirements, and membership and appointment procedures for the DSO's board of directors. Several DSOs currently exist in Florida Statute including the Florida Veterans Foundation, the Florida National Guard Foundation and the Florida Juvenile Justice Foundation. Several state agencies and political subdivisions are statutorily-empowered to authorize DSOs including the Statewide Public Guardianship office;<sup>1</sup> the Statewide Guardian Ad Litem Office;<sup>2</sup> the Office of Tourism, Trade and Economic Development;<sup>3</sup> the Department of Military Affairs;<sup>4</sup> the Department of Corrections;<sup>5</sup> and the Department of Education.<sup>6</sup>

DSOs with annual expenditures in excess of \$100,000 that are administered by a state agency are statutorily required to provide for an annual financial audit of accounts and records to be conducted by an independent certified public accountant. Such audit report is submitted by the DSO within 9 months after the end of the fiscal year to the Auditor General and to the state agency responsible for its creation, administration, or approval.<sup>7</sup>

Currently, DOEA does not have legislative authority to establish a DSO.

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<sup>1</sup> S. 744.7082, F.S.

<sup>2</sup> S. 39.8298, F.S.

<sup>3</sup> S. 288.1229, F.S.

<sup>4</sup> S. 250.115, F.S.

<sup>5</sup> S. 944.802, F.S.

<sup>6</sup> S. 1001.24, F.S.

<sup>7</sup> S. 215.981, F.S.; note that the Auditor General, the state agency administering the DSO, the Office of Program Policy Analysis and Government Accountability are further provided with the authority to require and receive from the DSO or from the independent auditor any records relative to the operation of the organization.

## Public Records Law

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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> specifies conditions under which public access must be provided to records of an agency.<sup>11</sup> 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.<sup>12</sup>

The Supreme Court of Florida 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.<sup>13</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>14</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>15</sup> 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.<sup>16</sup> A bill enacting an exemption<sup>17</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>18</sup>

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

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<sup>8</sup> S. 1390, 1391, F.S., (Rev. 1892).

<sup>9</sup> Article I, s. 24 of the Florida Constitution.

<sup>10</sup> Ch. 119, F.S.

<sup>11</sup> 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.

<sup>12</sup> S. 119.011(11), F.S.

<sup>13</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633,640 (Fla. 1980).

<sup>14</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>15</sup> Article I, s. 24(c) of the Florida Constitution.

<sup>16</sup> *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).

<sup>17</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>18</sup> Article I, s. 24(c) of the Florida Constitution.

information may not be released by an agency to anyone other than to persons or entities designated in the statute.<sup>19</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>20</sup>

The Open Government Sunset Review Act<sup>21</sup> provides for the systematic review, through a 5-year cycle ending October 2<sup>nd</sup> of the 5<sup>th</sup> 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.<sup>22</sup>

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?

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

...notwithstanding s. 768.28, F.S., 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. Additionally, any person who willfully and

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<sup>19</sup> Attorney General Opinion 85-62

<sup>20</sup> *Williams v. City of Minneola*, 575 So.2d 683,687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>21</sup> S. 119.15, F.S.

<sup>22</sup> *Id.*

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.

### **Effect of Proposed Changes**

House Bill 749 is the public records exemption companion to House Bill 747, which authorizes the Department of Elderly Affairs (DOEA or department) to establish a direct-support organization to provide assistance, funding, and support to the department.

The bill creates s. 430.82, F.S., and provides a public records exemption for certain donor or prospective donor information. Specifically, the bill makes confidential and exempt, from s. 119.07(1) and Article I, s. 24(A) of the Florida Constitution, the identity of a donor or prospective donor to the direct-support organization who desires to remain anonymous, and all identifying information of such donor or prospective donor. The bill also provides an exemption for portions of meetings of the direct-support organization during which the identity of donors or prospective donors is discussed.

The bill specifies this exemption is subject to the Open Government and Sunset Review Act in accordance with s. 119.15, F.S., and provides that such exemption will stand repealed on October 2, 2014, unless reenacted by the Legislature.

The bill provides a statement of public necessity for the public records exemption.

The bill provides for an effective date of July 1, 2009 contingent upon House Bill 747 or similar legislation passing during the same legislative session and becoming a law.

#### **B. SECTION DIRECTORY:**

Section 1. Creates s. 430.82, F.S., relating to confidentiality of donors or prospective donors to the direct-support organization.

Section 2. Creates an undesignated section of law and provides a statement of public necessity for the exemption.

Section 3. Provides an effective date of July 1, 2009, contingent upon HB 747 taking effect and becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**