

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 1676

INTRODUCER: Governmental Oversight and Accountability Committee and Higher Education Committee

SUBJECT: OGSR/Commission for Independent Education

DATE: April 6, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harkey</u>	<u>Matthews</u>	<u>HE</u>	Favorable
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____
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:

This bill is the result of an Open Government Sunset Review conducted by the Higher Education Committee.

Current law provides a public-records exemption for investigatory records held by the Commission for Independent Education (CIE) during investigations of suspected violations of law or rule by postsecondary education institutions operating under ch. 1005, F.S. Current law also provides a public-records exemption for the portion of probable cause panel meetings in which exempt records are discussed by the panel to determine if there is probable cause that a violation has occurred. The exemptions expire 10 days after the panel makes a determination regarding probable cause.

The exemptions are subject to review under the Open Government Sunset Review Act and will sunset on October 2, 2010, unless reenacted by the Legislature. This bill reenacts the exemptions.

The bill also requires a recording to be made of any closed portion of a probable cause panel meeting and expands the current exemptions to include such recordings. Therefore, the bill

extends the repeal date from October 2, 2010 to October 2, 2015 and provides a public necessity statement.

This bill amends section 1005.38, Florida Statutes.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" to include 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. 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

¹ Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

² Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

“intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹² 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.¹³ An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without 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 the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *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).

⁷ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Section 24(c), art. I of the State Constitution

⁹ Attorney General Opinion 85-62, August 1, 1985.

¹⁰ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(b), F.S.

¹³ *Id.*

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.¹⁴

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁵

Commission for Independent Education

The Commission for Independent Education (commission) is established in the Department of Education.¹⁶ It is a seven-member commission that functions in matters concerning independent postsecondary education institutions in consumer protection, program improvement, and licensure for institutions under its purview.¹⁷

The commission currently licenses more than 820 private postsecondary institutions serving more than 275,000 students. Approximately 38 percent of the licensed institutions are degree-granting institutions.¹⁸ The commission must adopt rules for the establishment and operation of the postsecondary educational institutions it licenses and must submit the rules to the State Board of Education for approval.¹⁹

The commission may conduct disciplinary proceedings through an investigation of any suspected violation of chapter 1005, F.S., related to nonpublic postsecondary education.²⁰ It may deny, place on probation, or revoke the license of an institution or may fine an institution up to \$5000, for a violation of the commission's rules.²¹

Exemptions Under Review

Current law provides a public-records and public-meetings exemption for the Commission for Independent Education.²²

All investigatory records held by the commission, in conjunction with an investigation conducted pursuant to a suspected violation of chapter 1005, F.S., or commission rule, are exempt²³ from

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S.

¹⁶ Section 1005.21(1), F.S.

¹⁷ Section 1005.21(2), F.S.

¹⁸ Senate Bill Analysis and Fiscal Impact Statement for SB 1676 (February 24, 2010) at 3.

¹⁹ Section 1005.22(1)(e)1., F.S.

²⁰ Section 1005.38(6), F.S.

²¹ Section 1005.38(1), F.S.

²² Section 1005.38(6)(b), F.S.

²³ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See Attorney General Opinion 85-62*, August 1, 1985).

public records requirements. The exemption expires 10 days after a probable cause panel makes a determination regarding probable cause.²⁴

Those portions of meetings of a probable cause panel at which exempt records are discussed are exempt from public meetings requirements.²⁵ In addition, minutes and findings of an exempt probable cause panel meeting are exempt from public records requirements for a period not to exceed 10 days after the panel makes a determination regarding probable cause.²⁶

Open Government Sunset Review of s. 1005.38(6)(b), F.S.

Senate professional staff recommends reenacting the public-records exemption for investigatory records held by the Commission for Independent Education and the public-meetings exemption for those portions of probable cause panel meetings where exempt records are discussed. The exemptions allow the commission to effectively administer a governmental program—the licensure of private postsecondary institutions—and it protects the good name of persons or institutions while the investigation is being conducted. Because the information made exempt under this act is available to the public after a probable cause determination is made, public oversight is maintained.

III. Effect of Proposed Changes:

This bill reenacts and saves from repeal the public-records and public-meetings exemptions for investigations by the Commission for Independent Education.

The bill also requires the commission to record any closed portion of a meeting and to maintain those recordings. The bill creates a temporary public-records exemption for such recordings. The exemption for the recordings also expires 10 days after a probable cause panel makes a determination regarding probable cause.

Because the bill creates a temporary public-records exemption for the recordings of closed panel meetings, the bill extends the repeal date for the exemptions from October 2, 2010 to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.²⁷

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁴ Section 1005.38(6)(b)1., F.S.

²⁵ Section 1005.38(6)(b)2., F.S.

²⁶ Section 1005.38(6)(b)1., F.S.

²⁷ Section 24(c), art. I of the State Constitution.

B. Public Records/Open Meetings Issues:

This bill reenacts and expands an existing public-records and public-meetings exemption.

Vote Requirement

Section 24(c), art. I of the State Constitution requires a two-thirds vote of members of both houses of the Legislature for passage of a newly-created or expanded public-records exemption. This bill expands an existing exemption; therefore, it requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a bill creating or expanding a public-records or public-meetings exemption to contain a public necessity statement. This bill expands an existing exemption; therefore, it contains a public necessity statement.

C. Trust Funds Restrictions:

None.

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 Governmental Oversight and Accountability on April 6, 2010:

The committee substitute:

- Requires the commission to record all closed portions of probable cause panel meetings and to maintain those recordings;
- Expands the public-records exemption to include those recordings;
- Extends the repeal date from October 2, 2010 to October 2, 2015; and
 - Provides a statement of public necessity.

- B. **Amendments:**

None.