

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 Commerce and Tourism Committee

BILL: SB 106

INTRODUCER: Senator Ring

SUBJECT: Public Records

DATE: March 8, 2011

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Gizzi | Yeatman | CA | Favorable |
| 2. | Pugh | Cooper | CM | Pre-meeting |
| 3. | _____ | _____ | GO | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

SB 106 creates exemptions from public-records requirements for information identifying a donor or prospective donor of a donation made to a “publicly owned performing arts center” and for the benefit of the Legislative Research Center and Museum at the Historic Capitol, should the donor wish to remain anonymous.

The bill defines the term “publicly owned performing arts center” as a facility owned and operated by a city or county, has at least 200 seats, and promotes development of any or all performing, visual, or fine arts. At least one performing arts center in Florida meets this definition. The bill also includes the required statement of public necessity.

Both exemptions are subject to legislative review and repeal under the Open Government Sunset Review Act in October 2016.

Since SB 106 creates a new public-records exemption, it requires a two-thirds vote of the membership of each house of the Legislature for passage.

SB 106 substantially amends s. 272.136, F.S., and creates two undesignated sections of law.

II. Present Situation:

Public Access

The State of Florida has a long history of providing public access to governmental records, with the first public records law being enacted by the Florida Legislature in 1892.¹ In 1992, Florida voters adopted an amendment to the State Constitution, which raised the statutory right of access to public records to a constitutional level.²

Section 24, Art. I, of the State Constitution, states 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. 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 Act

The Public Records Act, located in ch. 119, F.S., specifies conditions under which the public must be provided access to agency records.³ Section 119.07(1)(a), F.S., requires every person who has custody of a public record to allow 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 records”.⁴ Unless specifically exempted by law, all agency records are available for public inspection.

The term “public record”, is broadly defined in s. 119.011(12), F.S., 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.⁵

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

² FLA. CONST. art. I, s. 24.

³ 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.

⁴ Section 119.07(1)(a), F.S.

⁵ Section 119.011(12), F.S.

The Florida Supreme Court has interpreted this definition to encompass any materials prepared by an agency in connection with official business to “perpetuate, communicate or formalize knowledge of some type”.⁶

The Legislature is the only entity that is authorized to create exemptions from open government requirements.⁷ The Legislature may provide an exemption by a general law that is approved by a two-thirds vote of each house of the Legislature.⁸ The exemption must specifically state the public necessity justifying the exemption and 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 exempts from public inspection and those that the Legislature makes *confidential* and exempt for public inspection. If the Legislature makes a record confidential and exempt, then such information may not be released by an agency to anyone other than 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

Open Government Sunset Review Act

The Open Government Sunset Review Act (act), in s. 119.15, F.S., provides a process for the review, and repeal or reenactment of, public records exemptions.¹⁴ Under Florida law, a new exemption or substantial amendment to an existing exemption shall be repealed on October 2nd of the 5th year after enactment, unless the Legislature acts to reenact the exemption.¹⁵ By June 1 of each year, 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.¹⁶

As part of the legislative review process for exemptions from public meeting and public records requirements, the Legislature is required to consider the following criteria:

- Specific records or meetings that are affected by the exemption;
- Whom the exemption uniquely affects, as opposed to the general public;
- The identifiable public purpose or goal of the exemption;
- Whether the information contained in the records or discussed in the meeting can be readily obtained by alternative means, and if so, how;

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

⁷ FLA. CONST. art. I, s. 24(c).

⁸ *Id.*

⁹ *Id.* See also *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 treated as a new exemption if it is “substantially amended,” so that the exemption is expanded to cover additional records or information, or to include meetings as well as records.

See s. 119.15(4)(b), F.S.

¹¹ FLA. CONST. art. I, s. 24(c).

¹² Op. Att’y Gen. Fla. 85-62 (1985).

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ This act applies to exemptions from s. 24, Art. I, of the State Constitution and s. 119.07(1), F.S., or s. 286.011, F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(5)(a), F.S.

- Whether the record or meeting is protected by another exemption; and
- If there are multiple exemptions for the same type of record or meeting that would be appropriate to merge.¹⁷

The act states that an exemption may only be created, revised, or expanded if it serves an identifiable public purpose and the exemption is no broader than necessary to meet the public purpose it serves.¹⁸ An identifiable public purpose is considered to be served if the exemption meets one of three specified criteria, 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.”¹⁹ The prescribed statutory criteria include whether 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;
- 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
- 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.²⁰

Examples of current exemptions for donors or prospective donors

| <i>Entity</i> | <i>Exemption</i> | <i>Florida Statute</i> | <i>Status</i> |
|---|--|------------------------|--|
| Enterprise Florida, Inc. | Identity of donor or prospective donor who desires to remain anonymous and all identifying information | s. 11.45(3)(i) | Confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution. |
| Florida Development Finance Corporation, Inc. | Identity of donor or prospective donor who desires to remain anonymous and all identifying information | s. 11.45(3)(j) | Confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution. |
| Cultural Endowment Program (Department of State) | Information which, if released, would identify donors and amounts contributed. Information which, if released, would identify prospective donors. | s. 265.605(2) | Confidential and exempt from s. 119.07(1), F.S. |
| Direct Support Organization (University of West Florida) | Identity of donor or prospective donor of property to a DSO who desires to remain anonymous, and all identifying information. | s. 267.1732(8) | Confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution. |

¹⁷ Section 119.15(6)(a)1. - 6., F.S.

¹⁸ Section 119.15(6)(b), F.S.

¹⁹ *Id.*

²⁰ *See* s. 119.15(6)(b)1. - 3., F.S.

| <i>Entity</i> | <i>Exemption</i> | <i>Florida Statute</i> | <i>Status</i> |
|---|---|------------------------|--|
| Citizen Support Organization (Fish and Wildlife Commission) | Identity of donor or prospective donor to a CSO who desires to remain anonymous and all identifying information. | s. 379.223(3) | Confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution. |
| Florida Agricultural Museum (Department of Agriculture and Consumer Services) | Identity of donor or prospective donor who desires to remain anonymous and all identifying information. | s. 570.903(6) | Confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, State Constitution. |
| John and Mable Ringling Museum of Art Direct Support Organization (Florida State University) | Information that, if released, would identify donors who wish to remain anonymous or prospective donors who wish to remain anonymous when the DSO has identified the prospective donor and has not obtained the name in another manner. | s. 1004.45(2)(h) | Confidential and exempt from s. 119.07(1), F.S. |
| Florida Prepaid College Board Direct Support Organization | Identity of donors who wish to remain anonymous. Any sensitive, personal information regarding contract beneficiaries, including identity. | s. 1009.983(4) | Confidential and exempt from s. 119.07(1) and s. 24(a), Art. I, State Constitution. |

Direct-Support Organization

A.) In General

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 Florida corporations not for profit which are 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 corporation no part of the income or profit of which is distributable to its members, directors, or officers.”

Direct-support organizations perform a variety of services for 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;
- Assisting an agency in performing its mission; and
- Making expenditures for the benefit of the supported agency.²¹

Direct-support organizations have been established in Florida to support a wide array of services and agencies, including: child abuse prevention and adoption; tourism; amateur athletics and professional sports; public guardianship; victims of crime; universities, community colleges, and school districts; the Florida National Guard; the Departments of Corrections, Juvenile Justice,

²¹ Sections 39.0011, 250.115, 267.1732, 267.1736, 288.1226, 288.1229, 292.055, 570.903, 744.7082, 944.802, 960.002, 985.672, 1001.453, 1004.28, 1004.70, and 1009.983, F.S.

Agriculture and Consumer Services, and Veterans' Affairs; and the Florida Prepaid College Board.²²

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.

B.) Direct-Support Organization for the Florida Historic Capitol and the Legislative Research Center and Museum

In 2009, the Legislature enacted s. 272.136, F.S., authorizing the Legislative Research Center and Museum at the Historic Capitol and the Capitol Curator²³ to establish a direct-support organization (DSO) in order to provide assistance and promotional support through fundraising for the Florida Historic Capitol and the Legislative Research Center and Museum, including but not limited to, their education programs and initiatives.²⁴ The DSO established under s. 272.136, F.S., must be:

- A Florida corporation;
- Not for profit;
- Incorporated under ch. 617, F.S.; and
- Approved by the Department of State.²⁵

The DSO²⁶ is governed by a board of directors with a demonstrated capacity for supporting the mission of the Historic Capitol. Initial appointments to the board shall be made by the President of the Senate and the Speaker of the House of Representatives, and thereafter by the board.²⁷ The DSO received its not-for-profit designation in October 2010, and has been receiving contributions.

If the DSO is no longer authorized or fails to comply with the requirements of s. 272.136, F.S., fails to maintain its tax-exempt status, or ceases to exist, then all funds obtained through grants, gifts, and donations in the DSO's account revert to the state and are deposited into an account designated by the Legislature.²⁸

²² *Id.*

²³ The Florida Historic Capitol Curator (curator) is appointed by and serves at the pleasure of the President of the Senate and the Speaker of the House of Representatives. The curator is responsible for: (a) promoting and encouraging state knowledge and appreciation of the Florida Historic Capitol; (b) collecting, researching, exhibiting, interpreting, preserving and protecting the history, artifacts, objects, furnishings and other materials related to the Florida Historic Capitol, other than archaeological materials; and (c) developing, directing, supervising, and maintaining the interior design and furnishings within the Florida Historic Capitol. In conjunction with the Legislative Research Center and Museum at the Historic Capitol, the curator may also assist the Florida Historic Capitol in the performance of certain monetary duties outlined in subsection (3) of s. 272.135, F.S. See s. 272.135, F.S.

²⁴ Chapter 2009-179, s.3, L.O.F.

²⁵ Subsection (2), of s. 272.136, F.S.

²⁶ The DSO's official name is the Florida Historic Capital Foundation, Inc., and its website is <http://www.flhistoriccapitol.gov/foundation.cfm>.

²⁷ Subsection (1), of s. 272.136, F.S.

²⁸ Subsection (6), of s. 272.136, F.S.

Performing Arts Centers in Florida

According to the Florida Department of State Division of Cultural Affairs, spending on arts and cultural events in Florida generated nearly \$250 million in state and local tax revenues in 2008 and the overall return on investment by governments on art and cultural spending is 5 to 1.²⁹ There is no breakout specifically reflecting the economic impact of Florida's performing arts centers.

Florida has dozens of performing arts centers³⁰ in every region of the state, and their ownership, management and financing varies widely, according to information on their websites.

III. Effect of Proposed Changes:

Section 1 of SB 106 creates an undesignated section of law stating that if a donor or a prospective donor of a donation made for the benefit of a publicly owned performing arts center wishes to remain anonymous, then that donor or prospective donor's name, address, and telephone number are confidential and exempt from s. 119.07(1), F.S., and section 24(a), Art. I, of the State Constitution.

SB 106 defines "publicly owned performing arts center" as:

a facility consisting of at least 200 seats, owned and operated by a county or municipality, which is used and occupied to promote development of any or all of the performing, visual or fine arts or any or all matters relating thereto, and to encourage and cultivate public and professional knowledge and appreciation of the arts.

Based on a list of performing arts centers in provided by the Division of Cultural Affairs, at least one appears to meet the bill's definition: The Broward Center for the Performing Arts in Fort Lauderdale, because it is owned by the county and managed by a county board.

The exemption created under this section subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act in s. 119.15, F.S., and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 of the bill creates subsection (7) of s. 272.136, F.S., stating that the identity and all information identifying a donor or prospective donor to the direct-support organization for the Florida Historic Capitol and the Legislative Research Center and Museum who desires to remain anonymous is confidential and exempt from s. 119.07(1), F.S., and section 24(a), Art. I, of the State Constitution. The section also provides that such anonymity shall be maintained in any auditor's report created pursuant to the annual financial audits required under subsection (5) of this section, in accordance with s. 215.981, F.S.

²⁹ Information provided by the Department of State's Division of Cultural Affairs in an email dated February 1, 2011. On file with the Commerce and Tourism Committee.

³⁰ An unofficial list is available at <http://funandsun.com/1toct/artf/perfs.html>.

This exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act in s. 119.15, F.S., and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 3 of the bill expresses legislative findings that these two exemptions are a public necessity, in order to:

- Encourage private support for publicly owned performing arts centers and the direct-support organization;
- Promote the giving of gifts to, and the raising of private funds for, the acquisition, renovation, rehabilitation, and operation of publicly owned performing arts centers; and
- Promote the programming and preservation of the Florida Historic Capitol and the Legislative Research Center and Museum.

According to this section, without these two exemptions there could be a “chilling effect” on private donations in Florida because potential donors would be concerned that disclosure of their personal identifying information could lead to theft and threats to their personal safety and security.

Section 4 of the bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I, of the State Constitution requires a two-thirds vote of each chamber of the Legislature for passage of a newly created or expanded public-records or public-meetings exemption. Since SB 106 creates a new public-records exemption, it will require a two-thirds vote of each chamber of the Legislature for passage.

Statement of Public Necessity

Section 24(c), Art. I, of the State Constitution requires a statement of public necessity for a newly-created or expanded public-records or public-meetings exemption. Section 3 of this bill provides a statement of public necessity for the new public record exemptions proposed therein.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

Donors or prospective donors to a publicly owned performing arts center and the direct-support organization for the Florida Historic Capitol and The Legislative Research Center and Museum, would have the option of requesting anonymity, which may encourage more private entities to donate to these facilities.

C. Government Sector Impact:

This exemption may encourage donations, and therefore result in a financial gain to counties and municipalities that own and operate publicly owned performing arts centers.

Similarly, this exemption also may encourage donations that result in financial gain to the state's direct-support organization for the Florida Historic Capitol and the Legislative Research Center and Museum.

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.)

None.

B. Amendments:

None.