

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: SB 2174

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/State Board of Administration/Alternative Investments

DATE: April 12, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Roberts	GO	Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review of the public-records exemption for proprietary confidential business information held by the State Board of Administration (SBA) regarding alternative investments. The exemption expires 10 years after the termination of the alternative investment.

This bill reenacts the exemption, which will repeal on October 2, 2011, if this bill does not become law.

The bill revises the definition of what does not constitute proprietary confidential business information. The bill also requires the SBA to maintain a list and a description of the records covered by any verified, written declaration made by a proprietor.

This bill does not expand the scope of the public-records exemption; therefore, it does not require a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 215.44, F.S.

II. Present Situation:

Florida's Public-Records Law

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, provide 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 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 records” 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 “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

¹ Section 119.011(12), F.S.

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.”

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).

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 sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.¹² If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created¹³ then a public necessity statement and a two-thirds vote for passage are not required.

State Board of Administration

The State Board of Administration (SBA or board) is established by Article IV, s. 4(e) of the State Constitution, and is composed of the Governor as Chair, the Chief Financial Officer as Treasurer, and the Attorney General as Secretary. The board members are commonly referred to

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 Op. Att'y Gen. Fla. 85-62 (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 24(c), Art. I of the State Constitution.

¹³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

as “Trustees.” While the Florida Retirement System Pension Trust Fund represents about 80 percent of the assets under SBA management, the board also manages 37 different funds, including the Florida Hurricane Catastrophe Fund, the Lawton Chiles Endowment Fund and the Local Government Surplus Funds Trust Fund.¹⁴

Current law sets forth the powers and duties of the SBA in relation to the investment of trust funds.¹⁵ Among the powers granted to the SBA is the authority to make purchases, sales, exchanges, and reinvestments for trust funds.¹⁶ The SBA is charged to ensure that the investments are handled in the best interests of the state, but also to have an appropriately diversified portfolio that maximizes financial returns consistent with the risks incumbent in each investment.

Alternative Investments and Alternative Investment Vehicles

The SBA’s ability to invest moneys available for investments is subject to limitations imposed by a “legal list” of the types of investments and the amount that may be invested in each investment type.¹⁷ Under current law, the board is authorized to invest no more than 10 percent, in the aggregate, of any fund in alternative investments through participation in alternative investment vehicles.¹⁸ An alternative investment is an investment by the SBA in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company¹⁹ through an investment manager.²⁰ An alternative investment vehicle is the limited partnership, limited liability company, or similar legal structure or investment manager through which the board invests in a portfolio company.²¹

¹⁴ State Board of Administration Investment Overview, January 12, 2011, at 3.

¹⁵ Section 215.44, F.S.

¹⁶ Section 215.44(2)(a), F.S.

¹⁷ Section 215.47, F.S., provides the “legal list” of types of investments summarized as follows:

- No more than 80 percent of assets can be invested in domestic common stocks.
- No more than 75 percent of assets can be invested in internally managed common stocks.
- No more than 3 percent of equity assets can be invested in the equity securities of any one corporation, except when the securities of that corporation are included in any broad equity index or with approval of the Board; and in such case, no more than 10 percent of equity assets can be invested in the equity securities of any one corporation.
- No more than 80 percent of assets should be placed in corporate fixed income securities.
- No more than 25 percent of assets should be invested in notes secured by FHA- insured or VA-guaranteed first mortgages on Florida real property, or foreign government general obligations with a 25-year default free history.
- No more than 20 percent of assets should be invested in foreign corporate or commercial securities or obligations.
- No more than 5 percent of any fund should be invested in private equity through participation in limited partnerships and limited liability companies.
- No more than 25 percent of assets can be invested in foreign securities.

¹⁸ Section 215.47(15), F.S.

¹⁹ Section 215.44(8)(c)1.c., F.S., defines “portfolio company” to mean corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the State Board of Administration and any subsidiary of such corporation or other issuer.

²⁰ Section 215.44(8)(c)1.a., F.S.

²¹ Section 215.44(8)(c)1.b., F.S.

Public-Records Exemption under Review

In 2006, the Legislature created a public record exemption for proprietary confidential business information held by the State Board of Administration.²² Proprietary confidential business information regarding alternative investments is confidential and exempt²³ from public records requirements for 10 years after the termination of the alternative investment.²⁴ The exemption applies to proprietary confidential business information held by the SBA before, on, or after October 1, 2006.

Operation of the Exemption

Current law provides that a request to inspect or copy a record that contains proprietary confidential business information must be granted if the proprietor of the information fails, within a reasonable period of time after the request is received by the SBA, to verify the following information through a written declaration:²⁵

- That the requested record contains proprietary confidential business information and the specific location of such information within the record;
- If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in the Uniform Trade Secrets Act;
- That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and,
- That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.²⁶

Petition for Public Release

Any person may petition a court of competent jurisdiction in Leon County, Florida, for an order for the public release of those portions of any record made confidential and exempt under this public record exemption. The petition must be served, along with any other initial pleadings, on the SBA and on the proprietor of the information sought to be released, if the proprietor can be determined through diligent inquiry. The court must make three findings in any order for the release of the record:

- That the record or portion thereof is not a trade secret as defined in the Uniform Trade Secrets Act;
- That a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record; and,

²² Chapter 2006-163, L.O.F.; codified as s. 215.44(8)(c), 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).

²⁴ Section 215.44(8)(c)2., F.S.

²⁵ See s. 92.525, F.S., for requirements specific to a verified written declaration.

²⁶ Section 215.44(8)(c)3., F.S.

- That the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the SBA, or any trust fund, the assets of which are invested by the board.²⁷

Definitions

“Proprietary confidential business information” means information that has been designated by the proprietor²⁸ when provided to the SBA as information that is owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private, the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:

- Trade secrets as defined in the Uniform Trade Secrets Act.²⁹
- Information provided to the board regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information.
- Financial statements and auditor reports of an alternative investment vehicle.
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle.
- Information regarding the portfolio positions in which the alternative investment vehicles invest.
- Capital call and distribution notices to investors of an alternative investment vehicle.
- Alternative investment agreements and related records.
- Information concerning investors, other than the SBA, in an alternative investment vehicle.³⁰

“Proprietary confidential business information” does not include the:

- Name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.
- Dollar amount of the commitment made by the SBA to each alternative investment vehicle since inception.
- Dollar amount and date of cash contributions made by the SBA to each alternative investment vehicle since inception.
- Dollar amount, on a fiscal-year-end basis, of cash distributions received by the SBA from each alternative investment vehicle.
- Dollar amount, on a fiscal-year-end basis, of cash distributions received by the SBA plus the remaining value of alternative-vehicle assets that are attributable to the board’s investment in each alternative investment vehicle.
- Net internal rate of return of each alternative investment vehicle since inception.
- Investment multiple of each alternative investment vehicle since inception.

²⁷ Section 215.44(8)(c)4., F.S.

²⁸ Section 215.44(8)(c)1.e., F.S., defines “proprietor” to mean an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the SBA.

²⁹ Chapter 688, F.S.

³⁰ Section 215.44(8)(c)1.f., F.S.

- Dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the SBA to each alternative investment vehicle.
- The dollar amount of cash profit received by the SBA from each alternative investment vehicle on a fiscal-year-end basis.³¹

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2011, unless reenacted by the Legislature.³²

III. Effect of Proposed Changes:

The bill removes the repeal date, thereby reenacting the public-records exemption for proprietary confidential business information held by the SBA regarding alternative investments. The bill revises the definition of what does *not* constitute proprietary confidential business information to include:

A description of any compensation, fees, or expenses, including the amount or value, paid or agreed to be paid by a proprietor to any person to solicit the board to make an alternative investment through an alternative investment vehicle. This does not apply to an executive officer, general partner, managing member, or other employee of the proprietor, who is paid by the proprietor to solicit the SBA to make such investments.

In addition, the bill requires the SBA to maintain a list and a description of the records covered by any verified, written declaration made by a proprietor.

Finally, the bill transfers the public-records exemptions for the SBA from s. 215.44(8), F.S., to a newly created s. 215.440, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill does not expand the scope of the public-records exemption under review; therefore, it does not require a public necessity statement or a two-thirds vote of each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

³¹ Section 215.44(8)(c)1.g., F.S.

³² Section 215.44(8)(c)5., F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

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.