

FINAL BILL ANALYSIS

BILL #: HB 7225

FINAL HOUSE FLOOR ACTION:

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SPONSOR: Rep. Patronis

GOVERNOR'S ACTION: Approved

COMPANION BILLS: SB 2174

SUMMARY ANALYSIS

HB 7225 passed the House on April 28, 2011, and subsequently passed the Senate on April 29, 2011. The bill was approved by the Governor on May 31, 2011, chapter 2011-101, Laws of Florida, and takes effect October 1, 2011.

The bill reenacts the public record exemption for certain proprietary confidential business information held by the State Board of Administration (SBA).

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides a public record exemption for proprietary confidential business information held by the SBA regarding alternative investments. The exemption expires 10 years after the termination of the alternative investment. It applies to proprietary confidential business information held by the SBA before, on, or after October 1, 2006.

Under current law, 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 through a written declaration that a particular record contains certain information. 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.

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

The bill does not appear to have a fiscal impact on state or local governments.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ 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.² 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 created³ 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 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.⁴

Current law sets forth the powers and duties of the SBA in relation to the investment of trust funds.⁵ Among the powers granted to the SBA is the authority to make purchases, sales, exchanges, and reinvestments for trust funds.⁶ The SBA is charged to ensure that the investments are handled in the best interests of the state, but also to have an appropriately

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

⁴ State Board of Administration Investment Overview, January 12, 2011, at 3.

⁵ Section 215.44, F.S.

⁶ Section 215.44(2)(a), F.S.

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.⁷ 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.⁸ 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 company⁹ through an investment manager.¹⁰ 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.¹¹

Public Record Exemption under Review

In 2006, the Legislature created a public record exemption for proprietary confidential business information held by the SBA.¹² Proprietary confidential business information regarding alternative investments is confidential and exempt¹³ from public records requirements for 10 years after the termination of the alternative investment.¹⁴ 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

⁷ 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.

⁸ Section 215.47(15), F.S.

⁹ 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 SBA and any subsidiary of such corporation or other issuer.

¹⁰ Section 215.44(8)(c)1.a., F.S.

¹¹ Section 215.44(8)(c)1.b., F.S.

¹² Chapter 2006-163, L.O.F.; codified as s. 215.44(8)(c), F.S.

¹³ 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).

¹⁴ Section 215.44(8)(c)2., F.S.

a reasonable period of time after the request is received by the SBA, to verify the following information through a written declaration:¹⁵

- 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;¹⁶
- 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.¹⁷

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
- 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.¹⁸

Definitions

“Proprietary confidential business information” means information that has been designated by the proprietor¹⁹ 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.

¹⁵ See s. 92.525, F.S., for requirements specific to a verified written declaration.

¹⁶ Chapter 688, F.S., is the Uniform Trade Secrets Act. Section 688.002(4), F.S., defines “trade secret” to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

¹⁷ Section 215.44(8)(c)3., F.S.

¹⁸ Section 215.44(8)(c)4., F.S.

¹⁹ 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.

- 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.²⁰

“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.
- 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.²¹

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2011, unless reenacted by the Legislature.²²

Effect of Proposed Changes

The bill removes the repeal date, thereby reenacting the public record 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

²⁰ Section 215.44(8)(c)1.f., F.S.

²¹ Section 215.44(8)(c)1.g., F.S.

²² Section 215.44(8)(c)5., F.S.

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 record exemptions for the SBA from s. 215.44(8), F.S., to a newly created s. 215.440, F.S.

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.