

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 374

INTRODUCER: Senator Detert

SUBJECT: Public Records/Historic Capitol Direct-Support Organization

DATE: November 29, 2011

REVISED: _____

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

I. Summary:

This bill creates a public records exemption for information that identifies a donor or a prospective donor to the direct-support organization of the Florida Historic Capitol and the Legislative Research Center and Museum if the donor desires to remain anonymous. The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act. The bill contains a statement of public necessity as required by the State Constitution.

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 272.136, F.S., and creates one undesignated section of law.

II. Present Situation:

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 1892.¹ 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.² Article I, s. 24 of the State Constitution, provides that:

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

² Article I, s. 24 of the State Constitution.

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,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

- (a) 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.⁵

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 used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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

³ Chapter 119, F.S.

⁴ 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.

⁵ Section 119.011(11), F.S.

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

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c), Fla. Constitution.

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 has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements then 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)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th 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.¹⁵

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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose 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.¹⁶

The Act also requires consideration of the following:

⁹ *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 considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c), Fla. Constitution.

¹² Attorney General Opinion 85-62.

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

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(5)(a), F.S.

¹⁶ Section 119.15(4)(b), F.S.

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Examples of Existing 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. |
| 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. |

| <i>Entity</i> | <i>Exemption</i> | <i>Florida Statute</i> | <i>Status</i> |
|----------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|-------------------------------------------------------------------------------------|
| 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 Organizations

In General

Florida law provides for the establishment of direct-support organizations (DSO or DSOs) as a means to assist state agencies in accomplishing their missions. DSOs 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.”

DSOs 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.¹⁷

DSOs 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, Agriculture and Consumer Services, and Veterans’ Affairs; and the Florida Prepaid College Board.¹⁸

¹⁷ 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.

¹⁸ *Id.*

Florida law generally requires DSOs 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.

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 Curator¹⁹ to establish a 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.²⁰ 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.²¹

The DSO²² 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.²³ 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.²⁴

III. Effect of Proposed Changes:

Section 1 amends s. 272.136, F.S., to provide a public records exemption to make the identity of a donor or prospective donor to the direct-support organization of the Florida Historic Capitol

¹⁹ 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 s. 272.135(3), F.S. See s. 272.135, F.S.

²⁰ Ch. 2009-179, s.3, L.O.F.

²¹ Section 272.136(2), F.S.

²² The DSO's official name is the Florida Historic Capital Foundation, Inc., and its website is <http://www.flhistoriccapitol.gov/foundation.cfm>.

²³ Section 272.136(1), F.S.

²⁴ Section 272.136(6), F.S.

and the Legislative Research Center and Museum confidential and exempt from s. 119.07(1), F.S., and s. 24(a), art. I, State Constitution, if the donor desires to remain anonymous. The section provides that the donor or prospective donor's anonymity be maintained in the direct-support organization's annual financial audit submitted to the Auditor General. The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.

Section 2 provides a statement that this public records exemption is a public necessity:

- To encourage private investment;
- To promote the giving of gifts; and
- To promote the raising of private funds for the acquisition, renovation, rehabilitation, and the programming and preservation of the Florida Historic Capitol and the Legislative Research Center and Museum.

Section 3 provides an effective date of July 1, 2012.

Other potential implications:

If the DSO for the Legislative Research Center and Museum at the Historic Capitol is considered a part of the legislative branch, it is not subject to the provisions of chapter 119, F.S.

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 house of the Legislature for passage of a newly-created or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

Donors or prospective donors of donations made for the benefit of the Florida Historic Capitol and the Legislative Research Center and Museum would have the option of requesting anonymity, which may encourage private entities to donate.

C. Government Sector Impact:

The exemption may encourage donations and therefore result in a financial gain to the state's DSO for the 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.