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: Commerce and Tourism

BILL: SPB 7020

INTRODUCER: Commerce and Tourism Committee

SUBJECT: OGSR/the Florida Opportunity Fund and the Institute for the Commercialization of Public Research

DATE: October 31, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pugh	Hrdlicka		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

In 2007, the Legislature created the Florida Opportunity Fund (FOF) and the Institute for the Commercialization of Public Research (institute) to provide certain types of businesses access to capital – both public and private investments – that would assist them in reaching their full potential as job-creators. Additionally, the Legislature created exemptions from the state's public records and public meetings laws, under specified circumstances, for both entities. The exemptions will expire October 2, 2012, unless saved from repeal through reenactment by the Legislature.

SPB 7020 is the result of Interim Report 2012-303,[1] the Commerce and Tourism Committee's Open Government Sunset Review of the public records and public meetings exemptions for the FOF and the institute. The report recommended re-enactment of the public records exemption and public meetings exemption in s. 288.9626, F.S., with a few changes. The key recommended change is to create a separate statute for the institute's exemptions. These changes will clarify, but not expand, the scope of the current statutory exemptions.

This proposed committee bill substantially amends s. 288.9626, F.S., and creates. 288.9627, F.S. It must pass each chamber of the Legislature by a two-thirds vote of the members present and voting.

[1] "Open Government Sunset Review of Section 288.9626, F.S., Public Records Exemption for Information Held by the Florida Opportunity Fund and the Institute for the Commercialization of Public Research." Report available at: http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-303cm.pdf. Site last visited October 19, 2011.

II. Present Situation:

Background on the FOF

Initial Responsibility

Created by the Legislature in 2007, the Florida Opportunity Fund (FOF)[2] was intended to attract venture capital investment into targeted Florida industries by providing a state match.[3] The FOF is organized as a private, not-for-profit corporation under ch. 617, F.S., with a five-member board of directors selected by an Enterprise Florida, Inc., (EFI) appointments committee.[4] The FOF's administrative staff is provided by EFI, and has a separate investment manager, Florida First Partners, comprised of Florida-based MILCOM Venture Partners and the Credit Suisse Customized Fund Investment Group. The Legislature appropriated $29.5 million for investment funds in FY 2007-2008.[5]

Originally, the FOF was established as a "fund-of-funds" program, meaning that it could only invest in investment funds, not directly in individual businesses. Additionally, the investment funds had to match each $1 in state investment with $2 of their own. The initial emphasis was on "seed" and "early-stage" investments, because proponents of creating the FOF concluded that these types of companies were least likely to have access to venture funding and traditional financing.[6] Targeted industries for the FOF investments included, but were not limited to, life sciences, information technology, advanced manufacturing processes, aviation and aerospace, and homeland security and defense. To be eligible for state participation, an investment fund must have an experienced and successful investment manager or team, and must focus on investment opportunities in Florida.

The FOF invested in its first fund in FY 2008-2009: $594,000 in Element Partners II, according to FOF's financial statements.[7] Currently, the FOF has invested $27 million of the original $29.5 million appropriation.[8]

Recent developments

In 2009, the Florida Legislature amended s. 288.9624, F.S., to allow the FOF to make loans and other direct investments to individual businesses and infrastructure projects; to form or operate other entities; and to accept funds from other public and private sources for use as investments.[9]

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[2] Section 288.9624, F.S. Also, the FOF's website is http://www.floridaopportunityfund.com/HomePage.asp. Site last visited October 19, 2011.

[3] The State Board of Administration (SBA) has, for many years, invested in so-called "alternative investments" that included Florida-based businesses, and in 2009, pursuant to ch. 2008-31, L.O.F., created the $250 million Florida Growth Fund for venture-capital private-equity and direct investments within Florida. More information is available at http://www.floridagrowthfund.com. Site last visited Oct. 19, 2011. These SBA programs are separate from the FOF.

[4] The current FOF board members are: chairman Kenneth Wright, partner with Baker Hostetler; vice chairman Andrew Hyltin, president of CNL Private Equity Corporation; Thomas Cornish, president and CEO of Seitlin Insurance and Advisory Services; Brian Nicholas, executive with the Acquired Asset Group of BB&T; and Pedro Pizarro, chairman and CEO of eLandia Group.

[5] This appropriation was included in Section 4 of the substantive legislation, ch. 2007-189, L.O.F., which created the FOF.

[6] See bill analysis for CS/SB 2420, which was the Senate companion to CS/CS/HB 83, which created the FOF. Available at http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s2420.cm.pdf. Site last visited Oct. 19, 2011.

[7] The auditor described the $594,000 investment as a payment of a $4 million commitment to Element Partners II, which specializes in investments in "cleantech" companies. See http://www.elementpartners.com. Site last visited Oct. 19, 2011.

[8] Information on file with the Senate Commerce and Tourism Committee.

[9] Sections 25-26, ch. 2009-51, L.O.F.

These direct investments must be made in Florida infrastructure projects, or in businesses that are Florida-based or have significant business activities in Florida, and operate in technology sectors that are strategic to Florida, including the original list of industry types. The FOF may not use its original appropriation of $29.5 million to make direct investments or for any purposes not specified in the original legislation.

In May 2010, the FOF launched a direct investment program with the now-defunct Florida Energy and Climate Commission, which at the time was the lead entity for state energy and climate-change programs and policies.[10] This new FOF program is expected to increase the availability of investment capital in Florida for businesses engaged in developing or producing energy-efficient or renewable energy (EE/RE) products or services. The FOF has access initially to $32.4 million in federal funds through the 2009 American Recovery and Reinvestment Act[11] to make loans or investments in qualifying businesses. Under the terms of the federal agreement, these investments are restricted to facility and equipment improvement using EE/RE products; acquisition or demonstration of renewable energy products; and improvement of existing production, manufacturing, assembly, or distribution processes to reduce consumption or increase the efficient use of energy in such processes.

FOF has invested $12 million of the $32.4 million in federal funds into three Florida companies, matching $80 million in private investment.[12]

Lastly, in mid-2011, EFI entered into an agreement with the Florida Department of Economic Opportunity (DEO) for use of $43.5 million in federal funds from the U.S. State Small Business Credit Initiative.[13] These funds will be used by the FOF to make direct investments in eligible businesses.[14] EFI estimates that it can leverage the $43.5 million into $652.5 million in private investment. The U.S. Treasury has approved DEO's application to access Florida's full share of $97.6 million in federal funds, and in September, the Legislative Budget Commission approved the release of a portion of the federal funds.

Background on the institute

Created in the same legislation as the FOF, the Institute for the Commercialization of Public Research (institute) was envisioned as a matchmaker for venture capitalists and young companies trying to turn research ideas, technology, or patents, developed at public institutions, into marketable products and services.[15] The institute's stated purpose is:

> to assist in the commercialization of products developed by the research and development activities of publicly supported universities and colleges, research institutes, and other

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[10] The commission's statutes were repealed and its responsibilities transferred to the Florida Department of Agriculture and Consumer Services (DACS) by the Legislature in the 2011 session. See s. 500, ch. 2011-142, L.O.F.
[11] The website at http://www.recovery.gov/pages/default.aspx has links to the federal law and other program information.
[12] Information on file with the Senate Committee on Commerce and Tourism.
[13] This initiative is part of the federal Small Business Jobs Act of 2010. Information about the initiative is available at http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx. Site last visited Oct. 19, 2011.
[14] Florida's total share of the federal funding is $97.6 million. The monies not allocated to EFI for the investment program are earmarked for small business loans, export financing, and credit enhancement programs. More information on file with the Senate Commerce and Tourism Committee.
[15] Section 288.9625, F.S. The institute's website is http://www.florida-institute.com. Site last visited Oct. 19, 2011.

publicly supported organizations within the state.[16]

The institute must support existing commercialization efforts at Florida universities, and may not supplant, replace, or direct existing technology transfer operations or other commercialization programs, including incubators and accelerators.

Governance of the institute

The institute is a not-for-profit corporation that is eligible for sovereign immunity and is subject to Florida law, but is not an "agency," as defined in s. 20.03(11), F.S. It is governed by a five-member board of directors[17] comprised of:

- the chair of EFI or designee;
- the president of the state university where the institute is located or designee, or if jointly sponsored by a number of universities, the presidents of those universities must agree on the designated person to serve on the board; and
- three appointees by the Governor, to serve staggered 3-year terms to which they may be reappointed.

The institute also has a 15-member Industry Advisory Board, selected by the board of directors, to assist with mentoring companies selected by the institute, reviewing grant applications, and providing other guidance.

Staffing the institute is an interim executive director[18] and an executive assistant. The institute is based in Boca Raton, and is preparing to open a second administrative office in Gainesville.

State Funding for the institute

In 2007, the Legislature appropriated $900,000 in general revenue to the institute for its operations.[19] An additional $600,000 was appropriated in 2009, as a transfer from the Florida Small Business Technology Growth Trust Fund administered by EFI.[20] In 2010, the institute was authorized to use up to 5 percent of the $3 million appropriated for the Research Commercialization Matching Grant Program to administer the grants.[21] In FY 2011-2012, the institute received a $10 million general revenue appropriation, which did not specify the uses or amount set aside for the institute's administration.[22] The institute and DEO have entered into a contract that specifies how the funds may be spent, including a low-interest loan program for eligible companies.

[16] Section 288.9625(2), F.S.

[17] The institute's current board members are: chairman Beau Ferrari, Special Assistant to the CEO of Univision Communications, Inc.; vice-chairman David Day, the university designee and director of the Office of Technology Licensing at the University of Florida; treasurer Rhys Williams, president of iTherapeutics, a biotechnology company developing therapies for retinal degenerative disease; John Fraser, executive director of the Office of IP Development and Commercialization at Florida State University; and EFI designee Carl Roston, an attorney with Akerman Senterfitt who specializes in mergers & acquisitions and private equity.

[18] The institute's interim executive director is Jane Teague, who also is the executive director of the Enterprise Development Corporation of South Florida, a public-private partnership that helps recruit investors and acts as a business incubator.

[19] Section 4, ch. 2007-189, L.O.F.

[20] Section 72, ch. 2009-81, L.O.F.

[21] Section 56, ch. 2010-147, L.O.F.

[22] Section 39(3), ch. 2011-76, L.O.F.

Responsibilities of the institute[23]

To be eligible for the institute's assistance, the company or organization attempting to commercialize its product or service must be accepted by the institute into its program. The institute reviews the business plans and technology information of each company recommended by an institute peer-review board, before making its decision whether to accept a recommended company.

For each company that is accepted, the institute provides mentoring, develops marketing information, and uses its resources to attract capital investment into the company. The institute's other duties are to:

- Maintain a centralized location to showcase companies and their technologies and products;
- Develop an efficient process to inventory and publicize companies and products that have been accepted by the institute for commercialization;
- Routinely communicate with private investors and venture capital organizations regarding the investment opportunities in its showcased companies;
- Facilitate meetings between prospective investors and eligible companies in the institute;
- Develop cooperative relationships with publicly supported organizations all of which work together to provide resources or special knowledge that is likely to be helpful to institute companies; and
- Administer the Florida Research Commercialization Matching Grant Program, created in s. 288.9552, F.S.

The institute is prohibited from developing or accruing any ownership, royalty, or other such rights over, or interest in, companies or products in the institute and must maintain the confidentiality of proprietary information. It also may not charge for services rendered to state universities and affiliated organizations, community colleges, or state agencies.

In 2010, the Legislature created the Research Commercialization Matching Grant Program, to leverage existing federal grant programs for small businesses, and directed the institute to manage it.[24] The grant program is intended to assist small or startup companies that take advantage of federal and private financial support to accelerate their growth and market penetration. Program applicants must meet several criteria, such as having attracted funding from non-government sources and achieved certain milestones required by the federal government. As mentioned above, the Legislature appropriated $3 million for the grant program. Last fall, the institute awarded Phase II grants to 11 Florida companies and Phase I grants to two companies.[25] A second round of grants is not planned for FY 2011-2012.

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[23] Section 288.9625(8), F.S.

[24] Background on the federal programs – the Small Business Innovation Research Program (SBIR) and the Small Business Technology Transfer (STTR) Program – is on the website of the U.S. Small Business Administration, available at http://www.sba.gov/aboutsba/sbaprograms/sbir/index.html. Site last visited Oct. 20, 2011.

[25] The Office of Program Policy and Government Accountability is preparing an evaluation of the Commercialization Matching Grant Program. The evaluation may be published by December 2011.

Public Records and Public Meetings Exemptions for the FOF and the institute

The Legislature created a joint public records and public meetings exemption, in s. 288.9626, F.S., for the FOF and the institute in 2007.[26] Covered under the public records exemption in s. 288.9626(2), F.S., are:

- Materials that relate to methods of manufacture or production; potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida;
- Information that would identify investors or potential investors in projects reviewed by the FOF or the institute;
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt from that governmental entity's laws; and
- Proprietary confidential business information regarding alternative investments for 10 years after the termination of the alternative investments.

The term "proprietary confidential business information" is defined to mean information that has been designated by the proprietor when provided to the FOF or the institute as owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private and 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 s. 688.002, F.S.;
- Information provided to the FOF or institute regarding a prospective investment in a private equity fund, venture capital fund, angel fund, or portfolio company which is proprietary to the provider of the information;
- Financial statements and auditor reports of an alternative investment vehicle or portfolio company, unless such records have been released by the alternative investment vehicle or portfolio company and are publicly available;
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle or portfolio company;
- Information regarding the portfolio positions in which an alternative investment vehicle or the FOF invests;
- Capital call and distribution notices to investors of an alternative investment vehicle or the FOF;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the FOF itself, in an alternative investment vehicle or portfolio company.[27]

[26] Chapter 2007-190, L.O.F.
[27] Section 288.9626(1)(g)1., F.S.

The statute also expressly excludes certain items from the definition of proprietary confidential business information:

- The name, address, and vintage year of an alternative investment vehicle or the FOF, and the identity of principals involved in the management of the alternative investment vehicle or the FOF;
- The dollar amount of the commitment made by the FOF to each alternative investment vehicle since inception;
- The dollar amount and date of cash contributions made by the FOF to each alternative investment vehicle since inception;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF from each alternative investment vehicle;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF, plus the remaining value of alternative-vehicle assets that are attributable to the FOF investment in each alternative investment vehicle;
- The net internal rate of return of each alternative investment vehicle since inception;
- The investment multiple of each alternative investment vehicle since inception; and
- The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the FOF to each alternative investment vehicle on a fiscal-year-end basis.[28]

Section 288.9626(3), F.S., creates a public meetings exemption for the FOF and the institute. The boards of directors of those entities may close that portion of their otherwise public meetings when they are discussing information that is confidential and exempt, per subsection (2) of that statute. The closed portions of the meetings still must be recorded and transcribed, but this information also is confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), of the State Constitution.

Pursuant to s. 288.9626(4), F.S., the FOF and the institute may release the protected records to a governmental entity in the performance of its duties upon written request. The confidentiality must be maintained by those receiving entities. Violating s. 288.9626, F.S., is a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.[29]

Once a confidential and exempt record becomes legally available or subject to public disclosure for any reason, that record is no longer confidential and exempt, and shall be made available for inspection and copying.

The legislation's "statement of necessity" listed a number of reasons why certain documents and information in the possession of the FOF and the institute should be confidential and exempt:[30]

- Disclosure of proprietary confidential business information to the public would harm the business operations of the proprietor.
- Information received by the FOF or the institute from a person from another state or nation or the Federal Government, which is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law, should remain exempt or

[28] Section 299.9626(1)(g)2., F.S.
[29] Section 288.9626(5), F.S.
[30] Section 2, ch. 2007-190, L.O.F.

confidential because the highly confidential nature of research necessitates that it be protected.

- Without these exemptions, the disclosure of confidential and exempt information would jeopardize the effective and efficient administration of the FOF and the institute.
- Disclosure of investor identities may adversely impact the ability of the FOF or the institute to attract investors who desire anonymity.
- Disclosing proprietary confidential business information used in determining how private equity investments are made or managed by private partnerships investing assets on behalf of the FOF would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information.
- The release of proprietary confidential business information revealing how alternative investments are made could result in inadequate returns and ultimately frustrate attainment of the investment objective of the FOF.
- Portions of meetings of the FOF and institute boards of directors at which records made confidential and exempt by this act are discussed be made exempt from public meetings requirements in order to maintain the confidential and exempt status of this information.

General Background on Florida's Public Records and Public Meetings Laws

Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.[31] 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.[32]

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

> (a) 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,[33] which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

[31] Sections 1390 and 1391, F.S. (Rev. 1892)
[32] Article I, s. 24, of the State Constitution.
[33] Chapter 119, F.S.

Unless specifically exempted, all agency[34] 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."[35]

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.[36] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[37]

Article I, s. 24, of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Art. III, s. 4(e), of the State Constitution, except with respect to meetings exempted pursuant to this section or specifically closed by the Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.[38] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[39] A bill enacting an exemption[40] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[41]

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

[34] 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."

[35] Section 119.011(12), F.S.

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

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

[38] Article I, s. 24(c), of the State Constitution.

[39] *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).

[40] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

[41] Article I, s. 24(c), of the State Constitution.

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.[42] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[43]

The Open Government Sunset Review Act (the act)[44] provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Sunshine 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.

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 is 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. The three statutory criteria are that 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.[45]

The act also requires the Legislature to consider the following:

- 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?[46]

[42] Attorney General Opinion 85-62.
[43] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[44] Section 119.15, F.S.
[45] Section 119.15(6)(b), F.S.
[46] Section 119.15(6)(a), F.S.

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[47] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

> "… notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment."

Background on Florida's Trade Secrets Law

Over the years, the Legislature has created a number of specific exemptions from public records for trade secrets.[48] Chapter 688, F.S., the Uniform Trade Secrets Act, defines a trade secret to mean:

> . . . information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) 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
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[49]

Chapter 688, F.S., also provides for injunctive relief, damages, and attorneys' fees for misappropriating a trade secret. It permits the courts to enter an injunction for the actual or threatened misappropriation of a trade secret.[50] Further, the court may, in appropriate circumstances, require affirmative acts to protect trade secrets. A complainant under the act is also entitled to damages, which can include the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In the alternative, royalties can be required.[51]

In an action under the Uniform Trade Secrets Act, the court is required to preserve the secrecy of the alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the

[47] *Straughn v. Camp,* 293 So.2d 689, 694 (Fla. 1974).
[48] See, e.g., s. 1004.78(2), F.S. (trade secrets produced in technology research within community colleges); s. 365.174, F.S. (proprietary confidential business information and trade secrets submitted by wireless 911 provider to specified agencies); s. 570.544(8), F.S. (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services); and s. 627.6699(8)(c), F.S. (trade secrets involving small employer health insurance carriers).
[49] Section 688.002(4), F.S.
[50] Section 688.003, F.S.
[51] Section 688.004, F.S.

action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.[52]

Additionally, s. 812.081(2), F.S., provides that:

> Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

Section 812.081(1)(c), F.S., defines "trade secret" to mean ". . . the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it." The term "trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

Additionally, irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, when the owner of a trade secret takes measures to prevent it from becoming available to persons other than those selected by the owner to have access to it, the trade secret is considered to be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

The Florida Attorney General has concluded that the fact certain information constitutes a trade secret under s. 812.081, F.S., does not, in and of itself, remove it from the requirements of the Public Records Act.[53] When there is no exemption making information confidential or exempt, an agency is therefore under a duty to release public records even though such records may constitute trade secrets.

III. Effect of Proposed Changes:

SPB 7020 incorporates the findings and recommendations of Senate Interim Report 2012-303. The report recommended reenacting s. 288.9626, F.S., with some technical changes – primarily, to give the FOF and the institute separate statutes for public records exemptions and public meetings exemptions more closely tied to their individual responsibilities and missions. None of the recommended changes expands the scope of the existing exemptions in s. 288.9626, F.S.

[52] Section 688.006, F.S.
[53] Attorney General Opinion 92-43.

Section 1: Amends s. 288.9626, F.S., to:

- Remove references to the institute from s. 288.9626, F.S., so that it applies only to the FOF;
- Reduce from 10 years to 7 years the period of time that investment, loan, or other confidential and exempt information may be shielded from public review;
- Modify certain definitions to better reflect the full extent of the FOF's investment responsibilities, without expanding their scope; and
- Clarify and make consistent terminology in s. 288.9626, F.S.

Section 2: Creates s. 288.9627, F.S., and transfers to it the relevant provisions of s. 288.9626, F.S., pertaining to public records and public meetings exemptions that apply strictly to the institute. The institute's current exemptions are maintained but not expanded.

Section 3: Specifies that SPB 7020 takes effect upon becoming law.

SPB 7020 requires passage by a two-thirds vote of the Senate and the House of Representatives in order to become law. It takes effect upon becoming a law.

Other Potential Implications:
If the Legislature chooses not to retain the public-records exemption for the information obtained by the FOF and the institute, or the public meetings exemption, then they will expire on October 2, 2012. Without the exemption, certain types of proprietary business information, trade secrets, and donor identities will become public, at least, what is not otherwise protected under federal law. The FOF and the institute contend this would hamper their ability to attract private investments and other participation in their programs, thus reducing their programs' ability to encourage economic and job growth.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

SPB 7020 retains the substance of an existing public records exemption and existing public meetings exemption. It also complies with the requirement of Art. I, s. 24, of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes. Finally, the proposed committee bill complies with s. 119.15(4)(c), F.S., which specifies that only existing exemptions that are substantially amended must undergo another scheduled repeal in 5 years.

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.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.