

**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.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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**BILL:** SB 878

**INTRODUCER:** Senator Benacquisto

**SUBJECT:** Personnel Records

**DATE:** February 14, 2012      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	deMarsh-Mathues	HE	<b>Favorable</b>
2.	Seay	Roberts	GO	<b>Pre-meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This bill amends the public records exemption for Florida College System (FCS) institution limited access personnel records to mirror the public records exemption for State University System institution limited-access personnel records. The bill maintains the current public records exemption for limited-access records; but provides that records relating to a performance evaluation of a president of a FCS institution are not confidential and exempt from public records requirements.

This bill substantially amends section 1012.81 of the Florida Statutes.

**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.<sup>1</sup> 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.<sup>2</sup> Article I, s. 24 of the State Constitution, provides 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,

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Article I, s. 24 of the State Constitution.

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,<sup>3</sup> which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> 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.

<sup>5</sup> Section 119.011(11), F.S.

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

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

<sup>8</sup> Article I, s. 24(c), Fla. Constitution.

<sup>9</sup> *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 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.<sup>12</sup> If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

### Personnel Records

Each Florida College System institution board of trustees is responsible for appointing, suspending, or removing the president of their respective institution.<sup>14</sup> Each board of trustees is required to conduct annual evaluations of the president in accordance with State Board of Education rule.<sup>15</sup> Upon completion, the evaluations are to be submitted to the State Board of Education for review.<sup>16</sup> The evaluations are required to address the achievement of the performance goals established by the accountability process implemented pursuant to s. 1008.45, F.S., and the performance of the president in achieving the annual and long-term goals and objectives established in the Florida College System institution's employment accountability program implemented pursuant to s. 1012.86, F.S.<sup>17</sup>

Under current law, the State Board of Education is required by rule to prescribe the content and custody of limited-access records which a Florida College System institution may maintain on its employees.<sup>18</sup> The rule adopted by the state board does not prescribe the content of limited-access records; but instead provides an expansive general definition of what is confidential and exempt.<sup>19</sup>

Prior to 1995, State University System (SUS) institutions had an identical exemption. The broad exemption authorized state universities to prescribe the content and custody of the limited-access records maintained on their employees, provided the records were limited to information reflecting evaluations of employee performance. Courts held this exemption applied to copies of minutes and other documentation indicating votes on tenure or promotion applications of university employees and also to investigate reports about university athletic staff.<sup>20</sup>

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<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24(c), Fla. Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

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

<sup>14</sup> Section 1001.64(19), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> According to state board rule, personnel records must contain information for efficient personnel administration, which must include, but not be limited to: dates of appointment, periods of employment, contract status, duties performed, records of leave, and evidence of factors used to calculate salary, retirement system records, and related documentation as determined by the college. Rule 6A-14.047, F.A.C.

<sup>19</sup> *Id.*

<sup>20</sup> See *Catanese v. Ceros-Livingston*, 599 So.2d 1021 (Fla. 4th DCA 1992), review denied, 613 So.2d 2 (Fla. 1992); *Tallahassee Democrat, Inc. v. Florida Board of Regents*, 314 So.2d 164 (Fla. 1st DCA 1975).

In 1995<sup>21</sup>, the Legislature restricted the contents of limited-access records maintained by a SUS institution as follows:

- Records containing information reflecting academic evaluations of employee performance that are open to inspection only by the employee and university officials responsible for supervision of the employee;
- Records relating to an investigation of employee misconduct which are confidential until the conclusion of the investigation or the investigation ceases to be active as defined by law;
- Records maintained for the purpose of any disciplinary proceeding against the employee or records maintained for any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract until a final decision is made;
- For sexual harassment investigations, portions of the records that identify or reasonably could lead to the identification of the complainant or a witness also constitute limited-access records; and
- Records which comprise the common core items contained in the State University System Student Assessment of Instruction instrument may not be prescribed as limited-access records.

### III. Effect of Proposed Changes:

**Section 1** amends s. 1012.81, F.S., providing that records relating to a performance evaluation of a president of a Florida College System institution are not confidential and exempt from public records requirements.

**Section 2** provides an effective date of July 1, 2012.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

As this bill limits a public records exemption allowing more records to be available to the public, this bill is not subject to the two-thirds vote requirement of both houses of the Legislature for creating or expanding a public records exemption.

#### C. Trust Funds Restrictions:

None.

### V. Fiscal Impact Statement:

#### A. Tax/Fee Issues:

None.

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<sup>21</sup> Ch. 95-246, L.O.F.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Florida College System institutions may incur minor expenses in providing the records to the public; however, current law authorizes agencies to charge modest fees for copies of public records.

**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.