

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 637 Pub. Rec./Postsecondary Education Executive Search Committees

SPONSOR(S): Higher Education and Workforce Subcommittee and Tobia

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Higher Education & Workforce Subcommittee	13 Y, 0 N, As CS	Brink	Sherry
2) Government Operations Subcommittee			
3) Education Committee			

SUMMARY ANALYSIS

There is currently no exemption from public records laws for information held by executive search committees on applicants for positions within state universities and Florida College System institutions.

The bill creates an exemption from inspection or copying under public records laws for information contained in an application provided to, or information obtained by, an executive search committee regarding an applicant for a position within a Florida College System institution or state university.

The bill provides for repeal of the exemptions on October 2, 2018, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill expands current public record exemptions; thus, it requires a two-thirds vote for final passage.

The bill has no anticipated fiscal impact. See FISCAL COMMENTS.

The bill provides an effective date of October 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes,² which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act³ 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; or
- Protects trade or business secrets.

Search Committees

Oftentimes, when looking to fill a vacant president or provost position, state universities and Florida College System (FCS) institutions⁴ will establish a search committee, which may be comprised of members from an institution's board of trustees, faculty and/or student representatives, members of the community, possibly a member from the Board of Governors (BOG) or State Board of Education (SBE), and other potentially interested persons. The purpose of these committees is to locate qualified applicants who are interested in filling the vacant position at the state university or FCS institution, vetting applicants, and ultimately selecting a candidate to fill the position.⁵

These search committees will often retain the services of a consulting firm for the purpose of conducting the search for a president or provost. It is typical that the consultant will make the initial contact with a potential applicant to determine whether he or she is interested in applying to fill the vacancy with the university or FCS institution.

Currently, there is no exemption from public records laws applicable to information held by executive search committees, or by consultants, which identifies applicants for executive-level positions at state universities and FCS institutions. Information obtained by search committees and consultants,

¹ Art. I, s. 24(c), Fla. Const.

² Section 119.07(1), F.S.

³ Section 119.15, F.S.

⁴ The Board of trustees for a FCS institution is charged with appointing an institution president and may appoint a search committee for this purpose. Section 1001.64(19), F.S.

⁵ The Board of Governors must confirm the selected candidate for president of a state university Section 1001.706(6)(a), F.S.

including applications and other information gathered by a committee or consultant regarding applicants, must be made available for copying and inspection to the public upon request.⁶

Effect of Proposed Changes

The bill creates an exemption from inspection or copying under public records laws for information contained in an application provided to, or information obtained by, an executive search committee regarding an applicant for a position within a Florida College System institution or state university.

This change will serve to prevent premature leaking of an applicant's identifying information through a public records request. It will also protect from disclosure the identities of applicants who are not selected to fill a position. The purpose of this protection, as explained in the bill's statement of public necessity, is to allow potential qualified applicants to freely express interest in and pursue a position at a Florida state university or FCS institution without fear of reprisal by their current employers.

However, without a similar public records exemption for information held by consulting firms, or a parallel public meetings exemption, the exemption established by this bill may be insufficient to effectuate the protection necessary to prevent public disclosure of applicants' identifying information. See CONSTITUTIONAL ISSUES, *infra*.

The bill provides a statement of public necessity as required by the State Constitution.⁷ The bill sets forth in the statement of public necessity the following findings:

- The task of filling a vacant position within a Florida State College institution or a state university is often conducted by an executive search committee.
- Many applicants for such a position could jeopardize their current positions if it were to become known that they are seeking employment elsewhere.
- The exemption is needed to ensure that such a search committee can avail itself of the most experienced and desirable pool of qualified applicants.
- It is a public necessity that information regarding an applicant be made confidential and exempt from s. 119.07(1), and s. 24(a), Art. I of the State Constitution.

The bill provides for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature.

B. SECTION DIRECTORY:

Section 1. Creates s. 1004.097, F.S.; providing an exemption from public records requirements for information contained in an application provided to an executive search committee, or information otherwise obtained by an executive search committee, regarding an applicant for a position within a Florida College System institution or a state university; providing for future legislative review and repeal of the exemption.

Section 2. Provides a statement of public necessity as required by the State Constitution.

Section 3. Provides an effective date of October 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁶ FCS institutions and state universities are considered state agencies, subject to Sunshine laws. See *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (holding that a University of Florida screening committee was subject to Florida's Sunshine Law); *Rhea v. District Bd. Of Trustees of Santa Fe College*, 2013 WL 950544 at 3, n. 1 (Fla. 1st DCA 2013)(noting that Santa Fe College, as part of the Florida College System, is a state agency having a duty to provide access to public records).

⁷ Art. I, s. 24(c), Fla. Const.

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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect any municipality or local government.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill expands current public record exemptions; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands current public record exemptions; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution, requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill's public necessity statement provides that applicants for positions with state universities or FCS institutions could put their current employment in jeopardy if it is made known to the public that they are seeking employment somewhere else. The statement explains that, in order to ensure a committee can avail itself of the most experienced and desirable pool of qualified applicants, the information they collect on applicants must be exempt from public records laws. According to the statement, the fear of possibly losing current employment may prevent applicants from seeking a position with a state university or FCS institution, resulting in a chilling effect on the number and quality of applicants to fill vacant positions.

The bill, as drafted, may not afford protection to identifying information held by consulting firms that are retained to assist with locating interested applicants.⁸ Further, the bill does not provide for a parallel public meeting exemption⁹ for meetings or communications held for the purpose of identifying and vetting interested, qualified applicants. It may be necessary to affirmatively grant certain meetings with the same protection the bill confers to the records that would be discussed at such meetings. Otherwise, it may be impossible for committees to maintain the confidentiality of exempt records and frustrate the purpose of the bill as set forth in its statement of public necessity.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not state that the expanded public record exemptions apply retroactively. The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively.¹⁰

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On Tuesday, March 19, 2013, a strike-all amendment was offered by the bill sponsor and adopted by the committee. The strike-all amendment makes the following changes to the bill:

- Exempts from public record laws all personal identifying information of applicants for the positions of president, provost, or dean with a state university or FCS institution.
- Provides that meetings for the purpose of identifying or vetting such applicants be exempt from public meeting laws.
- Provides that meetings for the purpose of establishing qualifications or compensation frameworks be subject to public meetings laws.
- Provides that meetings and interviews held after a final group of applicants has been established for the purpose of making a final selection are subject to public meeting laws.
- Requires state universities and FCS institutions to release the names of applicants to be considered in the final round of interviews no later than 10 days before the date of the meeting at which final action or vote is to be taken on the employment of the applicants.
- Provides that all documents containing personal identifying information of any applicants within the final group become subject to public records laws at the time the applicants' names are released.

⁸ In *Shevin v. Byron, Harless, Schaffer, Reid and Associates., Inc.*, 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court held that documents, including resumes and other identifying documents provided by applicants, held or made by an employment search consultant on behalf of a public agency are public records. *See also* Op. Att'y Gen. Fla. 92-80 (1992) (materials made or received by recruitment company in the course of its contract with a public agency to seek applicants and make recommendations to the board regarding the selection of an executive director constitute public records).

⁹ Section 286.011, Florida Statutes, provides that "all meetings of any board or commission of any state agency or authority . . . at which official acts are to be taken are declared to be public meetings open to the public at all times The board or commission must provide reasonable notice of all such meetings."

¹⁰ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).