

**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 Committee on Governmental Oversight and Accountability

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BILL: SB 646

INTRODUCER: Senator Montford

SUBJECT: OGSR/Education and Applicant Records/Public Postsecondary Educational Institutions

DATE: March 18, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Letarte</u>	<u>Klebacha</u>	<u>ED</u>	<b>Favorable</b>
2.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 646 continues the current public records exemption for a student's education records and an applicant's records at a public postsecondary educational institution by removing the repeal date. The exemption is scheduled to repeal on October 2, 2014, unless saved from repeal through reenactment by the Legislature.<sup>1</sup>

The bill takes effect on October 1, 2014.

**II. Present Situation:**

**Florida Public Records Requirements**

The Constitution of the State of Florida provides that:

[e]very 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.<sup>2</sup>

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<sup>1</sup> Section 1006.52(3), F.S.

<sup>2</sup> Art. I, s. 24(a), Fla. Const. The Florida Statutes define the term "public records" as "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." Section 119.011(12), F.S.

Under Florida law, “[e]very 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.”<sup>3</sup>

However, the Legislature is authorized to exempt records from such laws that otherwise require accessibility.<sup>4</sup> Such exemptions must be passed by a two-thirds vote of each house, state with specificity the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the law.<sup>5</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (OGSRA) provides a review process for public records exemptions.<sup>6</sup> OGSRA requires that a new (or substantially amended) exemption be set to repeal on October 2<sup>nd</sup> of the fifth year after enactment, unless reenacted by the Legislature.<sup>7</sup>

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is substantially amended but not necessary if the exemption is reenacted without expansion.<sup>8</sup> A substantial amendment exists “if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>9</sup>

### **Federal and State Law Regarding Privacy of Education Records**

#### ***Federal Law: Family Educational Rights and Privacy Act***

The Family Educational Rights and Privacy Act (FERPA) applies to educational agencies or institutions that receive federal funds.<sup>10</sup> FERPA prohibits funding from being provided to an educational agency or institution that does not allow access to a student’s education records<sup>11</sup> by

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<sup>3</sup> Section 119.07(1)(a), F.S.

<sup>4</sup> Art. I, s. 24(c), Fla. Const.

<sup>5</sup> *Id.*

<sup>6</sup> Section 119.15, F.S. The statute provides specific questions to be considered during the review process. Section 119.15(6)(a), F.S. The questions are:

- 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?

Responses to these questions from the Florida Department of Education and the State University System of Florida Board of Governors are on file with the Senate Committee on Education.

<sup>7</sup> Section 119.15(3), F.S.

<sup>8</sup> *See* Section 119.15(4), F.S.

<sup>9</sup> Section 119.15(4)(b), F.S.

<sup>10</sup> 20 U.S.C. §1232g(a). An “educational agency or institution” is defined as “any public or private agency or institution which is the recipient of funds under any applicable program.” *Id.* §1232(a)(3).

<sup>11</sup> *Infra* note 16 and accompanying text (providing FERPA’s definition of “education records”).

a student or a parent pursuant to FERPA, or does not appropriately limit the transfer of a student's education records in accordance with FERPA.<sup>12</sup> Compliance with FERPA is a condition for receiving federal funds.<sup>13</sup>

***Florida Law: Section 1006.52, F.S., Education Records and Applicant Records***

Florida law codifies FERPA into state law to ensure compliance with FERPA and continued receipt of federal funds.<sup>14</sup> Section 1006.52, Florida Statutes, makes education records of students and applicants of a public postsecondary educational institution confidential and exempt from public records requirements.<sup>15</sup> "Education records" are defined as in FERPA and its regulations and include "records, files, documents, and other materials" containing "information directly related to a student" and are "maintained by an educational agency or institution or by a person acting for such agency or institution."<sup>16</sup> "Applicant records" consist of information "[d]irectly related to an applicant for admission to a public postsecondary educational institution who has not been in attendance at the institution" and are "[m]aintained by a public postsecondary educational institution or by a party acting on behalf of the public postsecondary educational institution."<sup>17</sup>

Current law prohibits a public postsecondary educational institution from releasing a student's education records and personally identifiable information contained therein<sup>18</sup> without a student's written consent except in accordance with the FERPA.<sup>19</sup> Additionally, Florida law requires that education records released to the Auditor General and the Office of Program Policy Analysis and Government Accountability for official business be used and maintained in accordance with FERPA.<sup>20</sup>

<sup>12</sup> 20 U.S.C. §1232g(a) and (b). FERPA provides that funding will not be provided to a program, agency, or institution "which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without written consent of their parents . . ." *Id.* §1232g(b)(1).

<sup>13</sup> 20 U.S.C. §1232g(a)(1) and (2); *see* 34 C.F.R. §99.67(a) (identifying actions that may be taken against an educational agency or institution that does not comply with FERPA, which include withholding further payments, compelling compliance through a cease and desist order, and terminating eligibility to receive funding under any applicable program).

<sup>14</sup> *See* s. 1006.52, F.S.; s. 3, ch. 2009-240, L.O.F. (providing that noncompliance with FERPA could result in the loss of federal funding and that "[t]he Legislature finds that in order to comply with the applicable federal requirements regarding the collection, use, and release of education records, such records must be made confidential and exempt from public disclosure).

<sup>15</sup> *See* ss. 2-3, ch. 2009-240, L.O.F. (providing that education records, as defined by the Family Educational Rights and Privacy Act, are confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I, Florida Constitution).

<sup>16</sup> 20 U.S.C. §1232g(a)(4)(A); s. 1006.52, F.S.; *see also* Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1006.52, F.S. Education Records and Applicant Records* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1006.52, F.S. Education Records and Applicant Records* (Jan. 13, 2014) (on file with Senate Committee on Education).

<sup>17</sup> Section 1006.52(1), F.S. Applicant records were made confidential and exempt because the Legislature found that records of an applicant who is not admitted or does not enroll at an institution contain private information identical to that of an enrolled student and should be protected in the same manner. Section 3, ch. 2009-240, L.O.F.

<sup>18</sup> *See* 20 U.S.C. §1232g(b)(1) (providing that funding will not be provided to an educational agency or institution that has a policy or practice of releasing such information without consent).

<sup>19</sup> Section 1006.52(2), F.S.

<sup>20</sup> *Id.*

The exemption in s. 1006.52, Florida Statutes, which makes a student's education records and an applicant's records at a public postsecondary educational institution confidential and exempt from public records disclosure requirements, is set to repeal on October 2, 2014 unless reviewed and saved through reenactment by the Legislature.<sup>21</sup>

### III. Effect of Proposed Changes:

SB 646 continues the current public records exemption for a student's education records and an applicant's records at a public postsecondary educational institution by removing the repeal date. The bill does not require a public necessity statement or a two-thirds vote for passage because the bill does not create a new exemption or substantially amend an existing exemption.

If the exemption is not reenacted, a conflict would exist between a public postsecondary educational institution's obligations under public records laws and the privacy rights afforded to students under FERPA.<sup>22</sup> Noncompliance with FERPA may result in the loss of federal funding to educational agencies and institutions.<sup>23</sup>

The bill takes effect on October 1, 2014.

### IV. Constitutional Issues:

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

None.

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

None.

#### C. Trust Funds Restrictions:

None.

### V. Fiscal Impact Statement:

#### A. Tax/Fee Issues:

None.

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<sup>21</sup> Section 1006.52(3), F.S.

<sup>22</sup> Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1006.52, F.S. Education Records and Applicant Records* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1006.52, F.S. Education Records and Applicant Records* (Jan. 13, 2014) (on file with Senate Committee on Education); see 20 U.S.C. §1232g; Art. I, s. 24(a), Fla. Const.; s. 119.011(12), F.S.

<sup>23</sup> 20 U.S.C. §1232g(a)-(b); 34 C.F.R. §99.67(a); Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1006.52, F.S. Education Records and Applicant Records* (Jan. 17, 2014) (on file with Senate Committee on Education).

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends section 1006.52 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.