

**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: CS/SB 656

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Montford

SUBJECT: OGSR/Active Investigations of Allegations/Testing Impropriety

DATE: March 20, 2014      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Letarte	Klebacha	ED	<b>Favorable</b>
2.	McVaney	McVaney	GO	<b>Fav/CS</b>
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 656 continues the current public records exemption for the identity of a school or postsecondary educational institution, personally identifying information of personnel, and specific allegations of misconduct until an investigation conducted by the Department of Education is concluded or inactive 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

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<sup>1</sup> Section 1008.52(4)(b), F.S.

with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.<sup>2</sup>

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.<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 exemption or substantial amendment of an existing exemption be set to repeal on October 2nd 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>

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<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.

<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.

## **Florida Public Records Exemption for Information in Active Investigations Conducted by the Florida Department of Education: Section 1008.24, F.S., Test Administration and Security**

Florida law requires school district and public postsecondary educational administrators to cooperate with the Commissioner of the Florida Department of Education (DOE) during any investigation regarding the administration of tests required by state statute or rule.<sup>10</sup> Certain information is classified as confidential and exempt from public records requirements until an investigation by DOE regarding allegations of testing impropriety is concluded or inactive.<sup>11</sup>

In 2009, the Legislature made the identity of a school or public postsecondary educational institution, personally identifiable information of personnel, and specific allegations related to alleged testing impropriety confidential and exempt from public records requirements until an investigation was concluded or inactive.<sup>12</sup> The public necessity identified for making such information confidential and exempt was that “[t]he release of information before an investigation is concluded may reveal sensitive or personal information that could cause unwarranted damage to the names or reputations of the individuals involved” in the alleged misconduct.<sup>13</sup>

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<sup>10</sup> Section 1008.24(4)(a), F.S.

<sup>11</sup> Section 1008.24(4)(b), F.S. An investigation is considered concluded if there is “a finding that no impropriety has occurred, upon the conclusion of any resulting preliminary investigation pursuant to s. 1012.796[F.S.], upon the completion of any resulting investigation by a law enforcement agency, or upon the referral of the matter to an employer who has the authority to take disciplinary action against an individual who is suspected of a testing impropriety.” *Id.* Additionally, an investigation is active “so long as it is ongoing and there is a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future.” *Id.*

<sup>12</sup> Section 1, ch. 2009-143, L.O.F. Personnel records maintained for the purpose of investigating employee misconduct are exempted from public records requirements in sections 1012.31, 1012.81, and 1012.91, of the Florida Statutes. However, the exemption for personnel records of a public school employee are only protected through the completion of a preliminary investigation as opposed to being exempted until the completion or inactivity of the investigation under section 1008.24, Florida Statutes. Additionally, the exemption under section 1008.24, Florida Statutes, exempts the identity of a school or institution and any specific allegations of misconduct until the completion or inactivity of an investigation while the exemptions for personnel records do not. *See* ss. 1012.31(3)(a)1., 1012.81(1)(b), 1012.91(1)(b), and 1008.24(4)(b), F.S.; Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 13, 2014) (on file with Senate Committee on Education).

<sup>13</sup> *Id.* s. 2. The release of information prior to the conclusion of an investigation may also compromise the integrity of the investigation. Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 13, 2014) (on file with Senate Committee on Education). To the extent that information obtained or reported in an investigation involves student education records or personally identifiable information, those records would be confidential and exempt pursuant to other statutes. *See* ss. 1002.221, 1006.52, F.S.; Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1008.24(4)(b), F.S. Test Administration and Security* (Jan. 13, 2014) (on file with Senate Committee on Education) (providing that education records, as defined in the Federal Educational Rights and Privacy Act (FERPA) and its regulations, and personally identifiable information therein, is confidential and exempt from public records requirements).

The exemption in s. 1008.24, F.S., which makes the identity of a school or public postsecondary educational institution, personally identifiable information of personnel, and specific allegations related to alleged testing impropriety from public records requirements until the conclusion or inactivity of an investigation 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>14</sup>

### **III. Effect of Proposed Changes:**

CS/SB 656 continues the current public records exemption for the identity of a school or public postsecondary educational institution, personally identifiable information of personnel, and specific allegations related to alleged testing impropriety from public records requirements until the conclusion or inactivity of an investigation.<sup>15</sup> This 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.

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.

#### **B. Private Sector Impact:**

None.

#### **C. Government Sector Impact:**

None.

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<sup>14</sup> Section 1008.24(4)(b), F.S.

<sup>15</sup> See s. 1008.24(4), F.S.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends section 1008.24 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.)

**CS by Governmental Oversight and Accountability on March 20, 2014:**

The CS integrates technical changes.

**B. Amendments:**

None.