

**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 7004  
INTRODUCER: Higher Education Committee  
SUBJECT: OGSR/Commission for Independent Education  
DATE: February 16, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Scott</u>	<u>Klebacha</u>		<b>HE SPB 7004 as introduced</b>
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
2.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 7004 saves the public records exemption for investigatory records and public meetings exemption relating to disciplinary proceedings conducted by the Commission for Independent Education from their scheduled repeal on October 2, 2015.

The bill takes effect July 1, 2015.

**II. Present Situation:**

**Public Records and Open Meetings Requirements**

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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 of persons acting on their behalf.<sup>1</sup> The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.<sup>2</sup> The Legislature’s meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>4</sup> guarantees every person’s right to inspect and copy any state or local government public record.<sup>5</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(b).

<sup>3</sup> FLA. CONST., art. I, s. 24(b).

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> Section 119.011(12), F.S., defines “public record” 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

The Sunshine Law<sup>6</sup> requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.<sup>7</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>8</sup> An exemption must specifically state the public necessity justifying the exemption<sup>9</sup> and must be tailored to accomplish the stated purpose of the law.<sup>10</sup>

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

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>11</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>12</sup>

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>13</sup> An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>14</sup>

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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(2), F.S., defines “agency” to mean as “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 Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature’s records are public pursuant to section 11.0431, F.S.

<sup>6</sup> Section 286.011, F.S.

<sup>7</sup> Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

<sup>8</sup> FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released, to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

<sup>12</sup> Section 119.15(3), F.S.

<sup>13</sup> Section 119.15(6)(b), F.S.

<sup>14</sup> Section 119.15(6)(b)1., F.S.

- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>15</sup> or
- It protects trade or business secrets.<sup>16</sup>

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.<sup>17</sup>

The OGSR also requires specific questions to be considered during the review process.<sup>18</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>19</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>20</sup>

## **Commission for Independent Education**

### ***Disciplinary Proceedings***

The Commission for Independent Education<sup>21</sup> (Commission) created within the Florida Department of Education approves applications submitted by independent postsecondary educational institutions for licensure to operate in the state and to award diplomas and degrees.<sup>22</sup> The Commission is authorized to deny, revoke, or place on probation any license that it has granted and to investigate and initiate disciplinary proceedings against licensed institutions suspected of violating chapter 1005, Florida Statutes, or a Commission rule.<sup>23</sup> The results of an investigation are reported to a panel to determine whether there is probable cause to find that a

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<sup>15</sup> Section 119.15(6)(b)2., F.S.

<sup>16</sup> Section 119.15(6)(b)3., F.S.

<sup>17</sup> Section 119.15(6)(b), F.S.

<sup>18</sup> Section 119.15(6)(a), F.S. The specified 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?

<sup>19</sup> FLA. CONST., art. I, s. 24(c).

<sup>20</sup> Section 119.15(7), F.S.

<sup>21</sup> Seven members are appointed by the Governor to serve on the Commission, subject to Senate confirmation pursuant to section 1005.21(2), F.S.

<sup>22</sup> Sections 1005.05 and 1005.21(1) and (2), F.S. *See also*, ss. 1005.06 and 1005.31(1)(a), F.S. An independent postsecondary educational institution that is not within the Commission's jurisdiction is not required to obtain licensure.

<sup>23</sup> Section 1005.38(1) and (6), F.S.

violation of a law or rule has occurred.<sup>24</sup> These meetings are closed to the public; however, the meeting must be recorded, and no portion of the meeting may be off the record.

### ***Publication of Investigatory Records and Panel Meeting Records***

During the investigatory process and disciplinary proceedings, any records or meetings held by the Commission, including the recordings and minutes of meetings, are confidential and exempt from disclosure for no longer than 10 days after a probable cause panel makes its determination.<sup>25</sup>

Any records or portions of meetings that contain information that is protected under state or federal law maintain their protected status after investigatory records are made public.<sup>26</sup> Such information would be redacted by the Commission before being released.<sup>27</sup>

### ***Scheduled for Repeal Unless Reenacted***

As required by the Open Government Sunset Review Act, the exemptions are scheduled for repeal on October 2, 2015, unless reenacted by the Legislature.<sup>28</sup> If the exemptions are not saved from repeal by the Legislature before October 2, 2015, the investigatory records and probable cause hearings held by the Commission will be subject to public disclosure.<sup>29</sup>

### ***Legislative Review of Exemptions***

Pursuant to the OSGR, the Commission recommended that the exemption be continued.<sup>30</sup> The exemption protects independent colleges and universities from unwarranted damage to their reputations until a thorough investigation is completed.<sup>31</sup>

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

SPB 7004 amends s. 1005.38(6), F.S., by removing the scheduled repeal date to maintain the existing public records and meeting exemptions for investigatory records and probable cause panel meetings associated with disciplinary proceedings initiated by the Commission.

The bill takes effect July 1, 2015.

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<sup>24</sup> Section 1005.38(6)(a), F.S.

<sup>25</sup> Section 1005.38(6)(b), F.S.

<sup>26</sup> Title 20 U.S.C. s. 1232g, Family Educational Rights and Privacy Act (FERPA), provides federal protection for student records. Section 1002.221, F.S., provides that student records under FERPA are confidential and exempt under Florida Law.

<sup>27</sup> Section 119.07(1)(d), F.S.

<sup>28</sup> Section 1005.38(6)3., F.S.

<sup>29</sup> The Commission for Independent Education recommends in its response to an Open Government Sunset Review Questionnaire that the Legislature reenact the public records and meetings exemptions, stating that “it is foreseeable that an investigation could be compromised” if the records and meetings were open to the public (received December 18, 2014; on file with the Senate Committee on Higher Education). Also, in a letter addressed to the chairs of the Senate Committee on Governmental Oversight and Accountability and the House State Affairs Committee, the First Amendment Foundation does not object to reenactment of the exemptions as written, stating that the exemptions are “sufficiently narrow.” (dated August 22, 2014; on file with the Senate Committee on Higher Education).

<sup>30</sup> Open Government Sunset Review Questionnaire survey results, on file with the Senate Committee on Higher Education.

<sup>31</sup> *Id.*

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

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

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members of each house of the Legislature for final passage of a bill that creates an exemption for public records or meetings. The bill does not create an exemption, nor does it expand the scope of an existing exemption; therefore, a two-thirds vote of the members of each house of the Legislature is not required for final passage of the bill.

**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. Statutes Affected:**

The bill amends section 1005.38 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.

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

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