

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.)

Prepared By: The Professional Staff of the Committee on Education

BILL: SPB 7020

INTRODUCER: For consideration by the Education Committee

SUBJECT: OGSR/University Direct-support Organization/Research Funding or Research Plans

DATE: February 4, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Bouck	Sikes		ED Submitted as Comm.Bill/Fav

I. Summary:

SPB 7020 saves from repeal the public meetings exemption for any portion of a meeting of the board of directors of a university direct-support organization (DSO), or of the executive committee or other committees of such board, at which any proposal seeking research funding from the DSO or a plan for initiating or supporting research is discussed. The bill removes the October 2, 2019, repeal date.

The bill takes effect October 1, 2019.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that:

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹² and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹³

When creating or expanding a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁴ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the

⁵ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ 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 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Id.*

¹² The bill may, however, contain multiple exemptions that relate to one subject.

¹³ FLA. CONST., art. I, s. 24(c).

¹⁴ 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).

Legislature or pursuant to a court order. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ The Act 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 or repeal the sunset date.¹⁸ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The Act 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.¹⁹ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁰
- 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;²¹ or
- It protects trade or business secrets.²²

The Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁴ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.

¹⁷ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

²³ 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?

²⁴ FLA. CONST. art. I, s. 24(c).

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.²⁵

University Direct-Support Organizations

A university direct-support organization (DSO) is a Florida not-for-profit corporation which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university.²⁶ In addition, a university DSO may also be operated for the benefit of a research and development park or research and development authority affiliated with a state university.²⁷ The DSO must be certified by a state university board of trustees to operate in a manner consistent with the goals of the university and in the best interest of the state.²⁸ DSOs help the state universities “achieve excellence by providing supplemental resources from private gifts and bequest, and valuable education support services.”²⁹

State universities are considered agencies of the state.³⁰ As a result, state universities are subject to public records and public meetings laws.³¹ DSO boards are also subject to public records and public meetings laws.³²

A university DSO must provide for an annual financial audit of the organization’s accounts and records which must be conducted by an independent certified public accountant pursuant to rules adopted by the Auditor General in accordance with current law³³ and by the university board of trustees.³⁴ Current law provides that the identity of a donor who desires to remain anonymous must be protected, including in the auditor’s report.³⁵

All records of the DSO are confidential and exempt from public records requirements *except* any.³⁶

²⁵ Section 119.15(7), F.S.

²⁶ Section 1004.28(1)(a)1.-2., F.S.

²⁷ Section 1004.28(1)(a)2., F.S.

²⁸ Section 1004.28(1)(a)3., F.S.

²⁹ Board of Governors, *State University System of Florida Consolidated Financial Statements* (Fiscal Year June, 30, 2017; updated Aug. 27, 2018), at 12, available at https://www.flbog.edu/board/office/budget/doc/fin_statement/2016-2017SUSConsolidatedFinancialStatementsDraftPost-Audit.pdf.

³⁰ Section 1001.705(1)(d), F.S.

³¹ Chapters 119 and 286, F.S. 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).

³² Section 1004.28, F.S.; see also *Palm Beach Community College Foundation, INC., v. WFTV, INC.*, 611 So.2nd 588 (4th DCA 1993); Op. Att’y Gen. Fla. 05-27 (2005); Op. Att’y Gen. Fla. 92-53 (1992) (providing that the John and Mable Ringling Museum of Art Foundation, Inc., established pursuant to statute as a not-for-profit corporation to assist the museum in carrying out its functions by raising funds for the museum, is subject to Sunshine Law by virtue of its substantial ties with the museum).

³³ Section 11.45(8), F.S.

³⁴ Section 1004.28(5)(a), F.S.

³⁵ *Id.*

³⁶ Section 1004.28(5)(b), F.S. Confidential and exempt records include any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability (OPPAGA). *Id.*

- Audit report prepared by the independent auditor during the annual audit process under current law;³⁷
- Management letter;
- Records related to the expenditure of state funds; or
- Financial records related to the expenditure of private funds for travel.

In addition, current law provides that any portion of a meeting of the board of directors of the DSO, or of the executive committee or other committees of such board, at which any proposal seeking research funding from the organization or a plan or program for either initiating or supporting research is discussed is exempt from the law requiring public meetings.³⁸ Such exemption is subject to the Open Government Sunset Review Act in accordance with law,³⁹ and must be repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.⁴⁰

Chapter 2014-207, L.O.F., included a public necessity statement that provided the rationale for the exemption. This rationale recognized the role of DSOs in raising resources for research that contains proprietary information and may lead to commercial applications. This activity requires DSOs to conduct meetings to discuss research strategies, plans, and proposals that allow for candid exchanges among reviewers. Failure to close meetings in which these activities are discussed would significantly undermine the confidentiality of the strategies, plans, and proposals themselves.

Open Government Sunset Review Findings

In August 2018, the Senate Education Committee and the House Oversight, Transparency & Administration Subcommittee, in consultation with the Florida Board of Governors office, sent an Open Government Sunset Review Questionnaire to each state university regarding the need to maintain the public meetings exemption for any portion of a meeting of the board of directors of the DSO, or of the executive committee or other committees of such board, at which any proposal seeking research funding from the organization or a plan or program for either initiating or supporting research is discussed.

Seventeen DSOs representing 10 state universities returned the questionnaire. Of those, three indicated that the DSO has a board of directors or committee that discusses proposals seeking research funding or plans or programs for initiating or supporting research. Two DSOs recommended that the exemption be retained in its current form. One DSO indicated a future strategic initiative regarding research proposals that would be negatively impacted by a removal of the exemption. No DSO recommended removal or modification of the exemption.

III. Effect of Proposed Changes:

The bill removes the scheduled repeal date of October 2, 2019.

³⁷ Section 1004.28(5)(b), F.S.

³⁸ Section 1004.28(5)(c), F.S. *See also* FLA. CONST. art. I, s. 24(b), and s. 286.011, F.S.

³⁹ Section 119.15, F.S.

⁴⁰ Section 1004.28(5)(c), F.S.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

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 bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect proposals seeking research funding from the organization or a plan or program for either initiating or supporting research. This bill exempts from the public meetings requirement only any portion of a meeting of the board of directors of the DSO, or of the executive committee or other committees of such board, at which any proposal seeking research funding from the organization or a plan or program for either initiating or supporting research is discussed. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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:

This bill substantially amends section 1004.28 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.