

**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 Governmental Oversight and Accountability Committee

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BILL: SB 832

INTRODUCER: Higher Education Committee

SUBJECT: OGSR/Direct Support Organization/St. Augustine Historic Preservation

DATE: February 2, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	deMarsh-Mathues	HE	<b>Favorable</b>
2.	Seay	Roberts	GO	<b>Pre-meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This bill is the result of the Higher Education Committee’s Open Government Sunset Review of the public records exemption for information identifying a donor or a prospective donor to the direct-support organization established by the University of Florida to aid historic preservation efforts in St. Augustine. The exemption will expire October 2, 2012, unless saved from repeal through reenactment by the Legislature. This bill reenacts and saves from repeal the public records exemption.

This bill substantially amends section 267.1736 of the Florida Statutes.

**II. Present Situation:**

**Public Records Law**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

Every 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 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Article I, s. 24, Fla. Constitution.

with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

- (a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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 Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

<sup>5</sup> Section 119.011(11), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>8</sup> Article I, s. 24(c), Fla. Constitution.

accomplish the stated purpose of the law.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

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

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.<sup>15</sup>

The Act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- Protects information of a sensitive, personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>16</sup>

The Act also requires consideration of the following:

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<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24(c), Fla. Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(5)(a), F.S.

<sup>16</sup> Section 119.15(4)(b), F.S.

- 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?

### **UF Historic St. Augustine, Inc. (UFHSA)**

The 2007 Legislature authorized a direct-support organization to assist the University of Florida in carrying out its responsibilities for historic preservation and historic preservation education for the City of St. Augustine and the state. In carrying out its purposes related to historic preservation of state owned historic properties in St. Augustine, the direct-support organization is authorized to raise money; apply for and receive grants from federal, state and local governments and private sources; receive, hold, invest, and administer property; and make expenditures to or on behalf of the university. Following the development of a strategic plan for the historic area, the direct-support organization was incorporated on June 28, 2010, as UF Historic St. Augustine, Inc. The UFHSA held its first board meeting on February 11, 2011.

According to the university, UFHSA has the following duties for historic preservation and historic preservation education:

- Responding to the state's needs for professionals in historic preservation, archaeology, cultural resources management, cultural tourism, and museum administration;
- Preserving, maintaining, and exhibiting ancient or historical landmarks within the City of St. Augustine, or surrounding areas;
- Assisting, establishing, or operating museums or other places for exhibits of documents and artifacts of historical interest;
- Promoting research, education, and publishing in science, history, literature, music and art relating to historic sites and persons in Florida history;
- To the extent permitted by law, soliciting, and receiving grants, gifts, and bequests of money or property from the federal government, state government, foundations, business entities, and individuals and holding or disposing of, and investing and reinvesting the same; and
- Acquiring, holding, managing, administering, selling, or in any manner, disposing of, dealing, or trading in property of any kind.

### **Public Records Exemption Under Review**

Under section 267.1736(9), F.S., the following information held by UFHSA is exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- The identity of a donor or prospective donor to UFHSA who wishes to remain anonymous; and
- All information identifying such a donor or prospective donor.

Based on the Open Government Sunset Review of this exemption, Senate professional staff of the Higher Education Committee recommended that the Legislature retain the public records exemption established in s. 267.1736(9), F.S. This recommendation was made in light of the information gathered for the Open Government Sunset Review, which indicated that a public necessity continues to exist in maintaining the exemption. While UFHSA has not used the public records exemption thus far, if a donor or potential donor to the organization requested anonymity, the exemption would be necessary to protect the information from public disclosure. Given the extensive duties of the organization for historic preservation efforts, it is likely that UFHSA will have the occasion to use the exemption in the future.

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

**Section 1** amends s. 267.1736, F.S., reenacting and saving from repeal the public records exemption for information identifying a donor or a prospective donor held by the University of Florida's direct-support organization that supports the university's historic preservation efforts for the City of St. Augustine.

**Section 2** provides an effective date of October 1, 2012.

### **IV. Constitutional Issues:**

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

None.

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

This bill retains an already-existing public records exemption and thus is not subject to the requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The bill complies with the requirement of Article I, section 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

#### **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. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.