

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1465 Florida College System Personnel Records

**SPONSOR(S):** K-20 Innovation Subcommittee; Caldwell

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 878

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) K-20 Innovation Subcommittee	10 Y, 0 N, As CS	Valenstein	Sherry
2) State Affairs Committee	15 Y, 0 N	Thompson	Hamby
3) Education Committee	17 Y, 0 N	Valenstein	Klebacha

### SUMMARY ANALYSIS

Currently, limited-access records maintained by a Florida College System (FCS) institution are afforded a broad exemption from public records requests. The law exempts these records to the extent the records contain information reflecting evaluations of employee performance. The limited-access records are only open to inspection by the employee and by officials of the college who are responsible for supervision of the employee.

The bill amends the public records exemption for FCS institution limited-access personnel records to mirror the public records exemption for State University System institution limited-access personnel records. The bill limits an existing public records exemption; therefore, more records will be available to the public. The bill does not create a public records exemption or expand an existing exemption; therefore, the constitutionally required 2/3 vote is not applicable. Likewise, the bill does not need a statement of public necessity.

The bill maintains the current public records exemption for limited-access records; therefore, limited-access records maintained by a FCS institution remain confidential and exempt. However, the bill restricts the contents of limited-access records to include only the following:

- Records containing information reflecting academic evaluations of employee performance; however, the employee and institution officials responsible for supervision of the employee have access to such records.
- Records relating to an investigation of employee misconduct; however, these records become public at the conclusion of the investigation or the investigation ceases to be active as defined by law.
- Records maintained for the purpose of any disciplinary proceeding against the employee or records maintained for any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract; however, these records shall be open to inspection by the employee and become public after a final decision is made.

The bill does not have a fiscal impact on state or local governments.

The bill takes effect July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### **Public Records Law**

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.<sup>2</sup>

##### **Personnel Records**

Limited-access records maintained by a Florida College System (FCS) institution on its employees are currently afforded a broad exemption from public records requests. The law provides these records are confidential and exempt<sup>3</sup> from the provisions of s. 119.07(1), F.S., to the extent the records contain information reflecting evaluations of employee performance. The limited-access records are only open to inspection by the employee and by officials of the college who are responsible for supervision of the employee.<sup>4</sup>

The law requires the State Board of Education (state board), through rule, to prescribe the content and custody of limited-access records. The rule adopted by the state board does not prescribe the content of limited-access records; instead it provides an expansive general definition of what is confidential and

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<sup>1</sup> Art. I, s. 24(c), Fla. Const.

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

<sup>3</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

<sup>4</sup> Section 1012.81, F.S.

exempt.<sup>5</sup> This allows FCS institutions wide latitude in determining if a document is exempt from public records.

Prior to 1995, State University System (SUS) institutions had an identical exemption. The broad exemption authorized state universities to prescribe the content and custody of the limited-access records maintained on their employees, provided the records were limited to information reflecting evaluations of employee performance. Courts held this exemption applied to copies of minutes and other documentation indicating votes on tenure or promotion applications of university employees and also to investigative reports about university athletic staff.<sup>6</sup>

In 1995, the Legislature restricted the contents of limited-access records maintained by a SUS institution as follows:

- Records containing information reflecting academic evaluations of employee performance that are open to inspection only by the employee and university officials responsible for supervision of the employee;
- Records relating to an investigation of employee misconduct which are confidential until the conclusion of the investigation or the investigation ceases to be active as defined by law;
- Records maintained for the purpose of any disciplinary proceeding against the employee or records maintained for any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract until a final decision is made.
- For sexual harassment investigations, portions of the records that identify or reasonably could lead to the identification of the complainant or a witness also constitute limited-access records.
- Records which comprise the common core items contained in the State University System Student Assessment of Instruction instrument may not be prescribed as limited-access records.<sup>7</sup>

### **Effect of Proposed Changes**

The bill amends the public records exemption for limited-access records maintained by a FCS institution on its employees to mirror the public records exemption for limited-access records maintained by a SUS institution on its employees. The bill limits an existing public records exemption; therefore, more records will be available to the public. The bill does not create a public records exemption or expand an existing exemption; therefore, the constitutionally required 2/3 vote is not applicable. Likewise, the bill does not need a statement of public necessity.

The bill maintains the current public records exemption for limited-access records; therefore, limited-access records maintained by a FCS institution remain confidential and exempt. However, the bill restricts the contents of limited-access records to include only the following:

- Records containing information reflecting academic evaluations of employee performance; however, the employee and institution officials responsible for supervision of the employee have access to such records.
- Records relating to an investigation of employee misconduct; however, these records become public at the conclusion of the investigation or the investigation ceases to be active as defined by law.
- Records maintained for the purpose of any disciplinary proceeding against the employee or records maintained for any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract; however, these records shall be open to inspection by the employee and become public after a final decision is made.<sup>8</sup>

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<sup>5</sup> According to Rule 6A-14.047, F.A.C., personnel records must contain information for efficient personnel administration, which must include, but not be limited to, dates of appointment, periods of employment, contract status, duties performed, records of leave, and evidence of factors used to calculate salary, retirement system records, and related documentation as determined by the college.

<sup>6</sup> See *Cantanese v. Ceros-Livingston*, 599 So.2d 1021 (Fla. 4th DCA 1992), *review denied*, 613 So.2d 2 (Fla. 1992); *Tallahassee Democrat, Inc. v. Florida Board of Regents*, 314 So.2d 164 (Fla. 1st DCA 1975).

<sup>7</sup> Section 1, ch. 95-246, L.O.F.; codified as s. 1012.91, F.S.

<sup>8</sup> While the law related to SUS personnel files includes records maintained for the purposes of any sexual harassment investigations that identify the complainant or witness, this exemption is unnecessary as it is already provided in law. Section 119.071(2)(g), F.S.,

By limiting the existing public records exemption, the bill allows the public to access records of investigations, disciplinary proceedings, and grievance proceedings, once completed. Additionally, the bill allows the public to access personnel performance evaluations, except for those records reflecting academic evaluations.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 1012.81, F.S., relating to personnel records; to specify records which constitute limited-access records.

**Section 2.** Provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

According to the Department of Education, Florida College System institutions may incur minor expenses relating to the provision of public records; however, current law<sup>9</sup> authorizes agencies to charge modest fees for copies of public records.<sup>10</sup>

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not affect county or municipal governments.

2. Other:

None.

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provides an exemption for all complaints and other records in the custody of any agency which relate to a complaint of discrimination. *See also* s. 110.1221, F.S. (establishes “sexual harassment” as a form of discrimination).

<sup>9</sup> *See* s. 119.07(4), F.S.

<sup>10</sup> Department of Education, HB 1465 Analysis (Jan. 15, 2012) at 3; on file with the House Government Operations Subcommittee.

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**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 31, 2012, the K-20 Innovation Subcommittee of the Education Committee reported the proposed committee substitute (PCS) for HB 1465 favorably as a committee substitute. The K-20 Innovation Subcommittee adopted two technical amendments to the proposed committee substitute. The first amendment narrowed the scope of the title to better reflect the scope of the bill and the second amendment removed an unnecessary cross-reference to the State Constitution. The cross-reference was not needed because the PCS does not create or expand a public records exemption, but merely narrows an exemption that was established before 1993.

The amended PCS differs from HB 1465 in that it narrows the public records exemption for Florida College System (FCS) personnel records to mirror the exemption for State University System personnel records. Rather than just providing, upon request, public access to the performance evaluations of FCS institution presidents, as in HB 1465, the PCS provides greater public access to personnel records, including performance evaluations of FCS presidents, and also investigations, disciplinary proceedings, and grievance proceedings, once completed.