

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 Governmental Oversight and Accountability

BILL: CS/SB 182

INTRODUCER: Senator Hays

SUBJECT: Public Records and Meetings

DATE: March 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Scott</u>	<u>Klebacha</u>	<u>HE</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 182 creates exemptions from Florida's public records and open meetings laws for any personal identifying information of an applicant for state university or Florida College System (FCS) institution president, provost, or dean. Specifically, the bill protects an applicant's name from public disclosure in records or during portions of meetings held for the purpose of vetting applicants. The bill also requires that reasonable notice be provided for any such portion of a meeting.

Once a final list of applicants is established, the bill requires that the state university or FCS institution release the list no later than 10 days before the date of the meeting at which a final action or vote is to be taken to fill the position. Furthermore, the bill requires that any meeting or interview be open to the public, if held after a final group of applicants has been established for the purpose of deliberating and selecting an applicant from the final list to fill the position of president, provost, or dean.

As required by the Open Government Sunset Review Act, the bill provides for repeal of the exemptions on October 2, 2020, unless reviewed and saved from repeal by the Legislature. The bill also includes a statement of public necessity as required by the State Constitution.

The bill provides an effective date of October 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.¹ 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.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.³

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 Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ 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.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ 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" 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.

⁶ Section 286.011, F.S.

⁷ 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 provides 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.

⁸ 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).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

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.¹¹ 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.¹²

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 necessary.¹³ An exemption serves an identifiable purpose if it meets one of the following purposes 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;¹⁴
- 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;¹⁵ or
- It protects trade or business secrets.¹⁶

In addition, the Legislature must find that the purpose of the exemption overrides the Florida’s public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.¹⁷ 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.¹⁸ 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.¹⁹

¹¹ 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 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.

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ 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?

¹⁸ FLA. CONST., art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

State University and Florida College Systems

Board of Governors and State University Boards of Trustees

The Board of Governors (BOG) has the authority to regulate the State University System pursuant to s. 7(d), Article IX of the State Constitution and the Florida Statutes.²⁰ The BOG may develop procedures for adopting regulations to implement its constitutional duties.²¹

Each state university is administered by a board of trustees, which is subject to public record and open meetings laws.²² The BOG establishes the powers and duties of the boards of trustees and may delegate its constitutional or statutory powers and duties to the boards of trustees as its designee.²³ The BOG establishes the personnel system for all state university employees and confirms the selection and reappointment of presidents by state university boards of trustees.²⁴

State Board of Education and Florida College System Institution Boards of Trustees

The Legislature created the Florida College System consisting of institutions²⁵ governed by boards of trustees.²⁶ The State Board of Education establishes the standards and guidelines for Florida College System (FCS) institutions.²⁷

Each board of trustees is authorized to establish the personnel program for all employees of an FCS institution, including the president.²⁸ The established guidelines for the personnel program may include the recruitment, selection, or reappointment of personnel.²⁹ An FCS institution's board of trustees is authorized to appoint, suspend, or remove the president and may also appoint a search committee for the purpose of filling positions.³⁰

FSC institutions normally establish search committees for filling vacant president, provost and dean positions.³¹ The search committees may also utilize consultants to aid them in their search. Documentation held by a search committee or its consultants are public records, and all meetings of the search committee are open and noticed to the public.

²⁰ Sections 20.155 and 1001.70-1001.706, F.S. See s. 1001.705(a) and (d), F.S., defining the terms "Board of Governors" and "state universities" as used in the Florida K-20 Education Code.

²¹ Section 1001.706(2), F.S.

²² FLA. CONST. art. IX, s. 7(b) and (c); s. 1001.72(2), F.S.

²³ FLA. CONST. art. IX, s. 7(c); s. 1001.706(2)(b), F.S.

²⁴ Sections 1001.705(2)(k) and 1001.706(6)(a), F.S.

²⁵ See s. 1000.21(3), F.S., for a definition and list of each "Florida College System institution." Such institutions constitute political subdivisions of the state operated by boards of trustees. See s. 1004.67 and ss. 1001.61-1001.64, F.S.

²⁶ Sections 1001.60, 1001.61(1) and (2), and 1001.64(2), F.S.; See Ch. 2008-52, s. 2, Laws of Fla.; See also, s. 20.15(7), F.S.

²⁷ FLA. CONST. art. IX, s. 2; ss. 20.15(1), (2), and (5); and ss. 1001.02(1) and (6), F.S.

²⁸ Section 1001.64(18), F.S.; See s. 1001.02(6)(a), F.S.

²⁹ Section 1001.64(18), F.S.

³⁰ Section 1001.64(19), F.S.

³¹ 2015 Legislative Bill Analysis from the State University System of Florida, Board of Governors for Bill Number SB 182, on file with the Committee on Education Pre-K-12.

III. Effect of Proposed Changes:

CS/SB 182 creates exemptions from Florida's public records and open meetings laws for the name and personal identifying information of any individual who applies for president, provost, or dean at a state university or Florida College System (FCS) institution.

The bill makes personal identifying information of applicants for president, provost, or dean at a state university or FSC confidential and exempt from public disclosure. Confidential and exempt information may not be released unless there are exceptions delineated in statute or by court order. The bill makes the records confidential and exempt but provides no methods of releasing the records to anyone without a court order. This may become cumbersome if a state university or FSC decides it is necessary to release identifying information to another entity for any reason, even for administrative purposes. Under this bill, the identities of any applicant who is not a finalist will remain confidential and exempt indefinitely.

The bill provides that any meeting discussing the identification and vetting of candidates must be noticed, however, those portions of a meeting are closed to the public. There will be no records of what was discussed at the closed portion of any meeting where a candidate is identified or vetted as this bill does not provide that the closed portion of a meeting must be recorded and that no portion of the closed meeting may be off the record.

The bill provides that if the purpose of a meeting is to discuss the general qualifications or compensation framework for the position, the public must be given notice and the meeting will be open. If at any point, a meeting discloses the personal identifying information of an applicant or potential applicant, the meeting will be closed. There will be no records of what was discussed at the closed portion of any meeting where a candidate is identified or vetted as this bill does not provide that the closed portion of a meeting must be recorded and that no portion of the closed meeting may be off the record.

Any meetings or interviews held for purpose of making a selection from the final list of applicants must be open to the public. The bill does not define what constitutes a "final" group of applicants or "final selection."

In addition, once the final list of applicants is established, the bill requires that the state university or FCS institution make the names of the finalists, and all of their personal identifying information, available to the public no later than 10 days before the date of the meeting at which a final action or vote is to be taken to fill the position. The bill's broad use of personal identifying information may be problematic, since personal identifying information may include sensitive personal information and may inadvertently lead to the release of information that might otherwise be exempt from public records.

It is not clear from the language of the bill if the intent is for public meetings and interviews to take place in 10 day window between the release of all personal identifying information of the finalists and the date of the final selection. Otherwise, if a meeting or interview takes place before the 10 day window before a final selection is made, the finalists' identities would be openly discussed in public but none of the relevant documents, such as a finalist's résumé, could be publically released.

As required by the State Constitution, the bill provides a statement of public necessity stating that protecting the names and other personal information of applicants for state university and FCS institution president, provost, or dean will encourage qualified candidates to apply without the fear of reprisal from their current employers. The public necessity statement provides that the Legislature finds that the failure to have these exemptions in place could have a chilling effect on the number and quality of the pool of candidates for president, provost or dean. The public necessity statement provides that the portion of a meeting held for the purposes of establishing qualifications is also closed to the public, contrary to the language in the bill.

Also, as required by the Open Government Sunset Review Act, the bill provides for the repeal of the exemptions on October 2, 2020, unless reviewed and saved from repeal by the Legislature.

The bill provides an effective date of October 1, 2015.

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 open meetings. The bill creates exemptions; thus, a two-thirds vote of the members of each house of the Legislature is required for final passage of the bill.

Article I, s. 24(c) of the State Constitution requires that a bill creating an exemption for public records or open meetings contain a public necessity statement justifying the exemption. The bill contains a public necessity statement.

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:

The bill provides that any personal identifying information of the final group of applicants will be made public. Personal identifying information may include sensitive information that is otherwise protected by statute.

The public necessity statement provides that any portion of a meeting held for the purposes of establishing the qualification or compensation to a candidate would be closed to the public. This appears to contradict the language in the bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 1004.097 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Higher Education on February 16, 2015:

The committee substitute maintains the original substance of SB 182 with the following modifications:

- Clarifies that personal identifying information includes the name of any applicant for president, provost, or dean of a state university or Florida College System institution.
- Clarifies that any portion of a meeting held for the purpose of identifying and vetting applicants is exempt from Article I, s. 24(b) of the State Constitution and s. 286.011(1), F.S.
- Adds a provision requiring that reasonable notice be provided for any portion of a meeting that is otherwise exempt from Article I, s. 24(b) of the State Constitution and s. 286.011(1), F.S.

- B. **Amendments:**

None.