

II. Present Situation:

Government in the Sunshine¹

Public Records

Article I, s. 24(a) of the State Constitution affords every person access to public records made or received in association with the official business of any governmental entity.² Florida's public records requirements are codified in chapter 119 of the Florida Statutes. Any agency³ must produce public records for inspection and copying by any person who requests to do so, unless an exemption applies.⁴ The custodian⁵ of public records is responsible for maintaining, as well as ensuring that certain confidential, personal information is redacted.⁶

Open Meetings

Article I, s. 24(b) of the State Constitution requires that meetings during which a governmental entity discusses official business be noticed and open to the public.⁷ The Florida Statutes expound further on the state's open meetings requirements.⁸ Specifically, the minutes of a public meeting must be promptly recorded and made available for public inspection.⁹

Statutory Exemptions

Article I, s. 24(c) of the State Constitution authorizes the Legislature to pass general laws by two-thirds vote exempting public records and meetings from the requirements in the State Constitution and Florida Statutes, if the law specifically identifies a public necessity for the exemptions and is narrowly tailored to achieve the purpose of the exemptions.¹⁰ The Legislature has created several general exemptions from the public records and meetings requirements.¹¹

¹ See Office of the Attorney General of Florida, Government-in-the-Sunshine Manual *available at* [http://myfloridalegal.com/webfiles.nsf/WF/RMAS-9GNQTW/\\$file/2014SunshineLawManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/RMAS-9GNQTW/$file/2014SunshineLawManual.pdf).

² Art. I, s. 24(a), Fla. Const.; s. 119.07(1), F.S. State law broadly defines a public record to include "[...] documents, papers, letters, maps, books, tapes, photographs, films, sounds recordings, data processing software, or other material [...]." Section 119.011(12), F.S.

³ The term "agency" is defined 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 [...]." Section 119.011(2), F.S.

⁴ Section 119.07(1)(a), F.S. See, s. 119.071, F.S., relating to general exemptions.

⁵ Section 119.011(5), F.S.

⁶ Section 119.07(1), F.S.

⁷ Although "official business" or "official acts" is not defined in the statutes, the courts have interpreted it to mean "any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 698 (Fla. 1969) The Florida Statutes is also silent on what constitutes "reasonable notice." The courts have interpreted "reasonable notice" or "due public notice" on a case-by-case basis. *Rhea v. City of Gainesville*, 574 So.2d 221 (Fla. 1st DCA 1991). An opinion by the Florida Attorney General suggested some general, but essential, guidelines for satisfying the "reasonable notice" requirement. Fla. Att'y Gen. Op. 73-170 (1973). See also, Fla. Att'y Gen. Ops. 00-08 (2000), 94-62 (1994), and 90-56 (1990) (the guidelines are merely suggestions).

⁸ Section 286.011(1), F.S.

⁹ Section 286.011(2), F.S.

¹⁰ Art. I, s. 24(c), Fla. Const.

¹¹ Section 119.071(5), F.S., identifying general exemptions; specific exemptions can be found throughout the Florida Statutes.

Public records that are made confidential and exempt from the law are not available for inspection.¹² For instance, the Legislature has recognized the unique and sensitive nature of certain *personally identifying information* that, if released, could be used to perpetrate a fraud on individuals.¹³ Unless otherwise provided in law, records containing certain personal information are exempt from disclosure and, if made available for inspection, must be redacted by the custodian of the records.¹⁴

An exemption from public records law does not imply that the protected information may not be disclosed during a public meeting.¹⁵ Thus, if the legislative intent is to protect the information *in toto*, the law must expressly exempt portions of meetings during which the information is discussed from the requirements in the State Constitution and in s. 286.011(1), F.S.¹⁶

Periodic Review of Exemptions

The Open Government Sunset Review Act (the Act) provides for legislative review of public records and meetings exemptions.¹⁷ The Act requires that any exemption that is created be repealed 5 years after enactment, unless the Legislature reenacts the exemption.¹⁸ The Legislature must consider certain factors as part of its review of any exemption.¹⁹ Furthermore, the Act requires that “[a]n exemption may be created [...] only if it serves an identifiable public purpose [...]” and is narrowly tailored to that public purpose.²⁰

State University System

Board of Governors and 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.²¹ The BOG may develop procedures for adopting regulations to implement its constitutional duties.²²

¹² There is a difference between records the Legislature designates as exempt from public records requirements and the records that 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 to anyone other than the persons or entities specifically designated in the statutory exemption. *See also*, Fla. Att’y Gen. Op. 85-62 (1985).

¹³ Section 119.071(5), F.S., exempts certain personal information, including, social security numbers; bank account numbers, and debit and credit card numbers; medical history records; and biometric identification information. The section refers to “personal identifying information” without specifically defining the term. However, *see* s. 817.568(1)(f), F.S., defining “personal identification information” as used within ch. 817, F.S., relating to crimes of fraud. *See also*, 18 U.S.C. s. 1028(d)(7), which lists the types of information that, if used alone, or in combination, could be used to identify a specific individual.

¹⁴ Section 119.07(1)(d), F.S. *See also*, s. 119.011(13), F.S., defining the term “redact.”

¹⁵ Section 119.07(7), F.S.

¹⁶ *Id.*

¹⁷ Section 119.15, F.S. (s. 2, ch. 95-217, L.O.F.).

¹⁸ *Id.* at (3).

¹⁹ *Id.* (6).

²⁰ *Id.*

²¹ Sections 20.155 and 1001.70-706, 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.

²² Section 1001.706(2), F.S.

Each state university is administered by a board of trustees, which is subject to chapters 119 and 286 of the Florida Statutes.²³ 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.²⁴ 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.²⁵

Florida College System

State Board of Education and Boards of Trustees

The Legislature created the Florida College System consisting of institutions²⁶ governed by boards of trustees.²⁷ The State Board of Education establishes the standards and guidelines for Florida College System (FCS) institutions.²⁸

Each board of trustees is authorized to establish the personnel program for all employees of an FCS institution, including the president.²⁹ The established guidelines for the personnel program may include the recruitment, selection, or reappointment of personnel.³⁰ 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.³¹

III. Effect of Proposed Changes:

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

Current law does not provide exemptions protecting the identity of applicants contained in records or discussed during meetings associated with a state university's or an FCS institution's search-and-selection process for executive or senior administrative positions, *i.e.* president, provost, or dean.

In effect, under the newly created public records exemption a state university or FCS institution would be prohibited from disclosing any applicant's name and other personal information that could be used to identify the applicant. Therefore, if a public records request were made to inspect or copy records containing applicants' names, the state university or FCS institution must refuse the request on the basis that the records are confidential and exempt.

²³ Art. IX, s. 7(b); (c), Fla. Const., and s. 1001.72(2), F.S.

²⁴ Art. IX, s. 7(c); s. 1001.706(2)(b), F.S.

²⁵ Sections 1001.705(2)(k) and 1001.706(6)(a), F.S.

²⁶ 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 ss. 1004.67 and 1001.61-.64, F.S.

²⁷ Sections 1001.60, 1001.61(1) and (2), and 1001.64(2), F.S. See s. 2, ch. 2008-52, L.O.F. See also, s. 20.15(7), F.S.

²⁸ Art. IX, s. 2, Fla. Const.; s. 20.15(1), (2), and (5), F.S.; s. 1001.02((1), (6), and (8), F.S.

²⁹ Section 1001.64(18), F.S. See s. 1001.02(6)(a), F.S.

³⁰ Section 1001.64(18), F.S.

³¹ *Id.* at (19).

Furthermore, under the newly created open meetings exemption a state university or FCS institution must close meetings held for the purpose of vetting applicants, which would entail a discussion of the applicants' confidential and protected information. However, the bill provides an exception that would permit the state university or FCS institution to conduct open, public meetings if the purpose of the meeting is to discuss the general qualifications or compensation framework for the executive or senior administrative position. Thus, the public would be able to attend such meetings and participate in the search committee's deliberations. Otherwise, any meeting that would identify an applicant by name would not be accessible to the public.

In addition, once the final list of applicants is established, the bill requires that the state university or FCS institution make the list 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. Also, any meetings or interviews held for purpose of making a selection from the final list of applicants must be open to the public. Therefore, once the final list of applicants is established, the list of applicants who made the final cut would be available for public inspection and the public would be able to attend and participate in meetings or interviews held for the purpose of making a final decision on filling the position.

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.

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:

None.

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 Changes:

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

None.

B. Amendments:

None.