

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: SB 7020

INTRODUCER: Education Committee

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

DATE: February 18, 2019 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Bouck</u>	<u>Sikes</u>		ED Submitted as Committee Bill
1.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

I. Summary:

SB 7020 saves from repeal to continue 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 scheduled repeal date of the exemption.

The bill takes effect October 1, 2019.

II. Present Situation:

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.² This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.³

¹ FLA. CONST. art. I, s. 24(b).

² *Id.*

³ FLA. CONST. art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: "The rules of procedure of each house shall further provide that all 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 formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public."

Public policy regarding access to government meetings is also addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”⁴ or the “Sunshine Law,”⁵ 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 open to the public.⁶ The board or commission must provide the public reasonable notice of such meetings.⁷ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in a manner that unreasonably restricts the public’s access to the facility.⁸ Minutes of a public meeting must be promptly recorded and open to public inspection.⁹

Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.¹⁰ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.¹¹

The Legislature may create an exemption to open meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.¹² The exemption must explicitly lay out the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹³ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹⁴

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,¹⁵ with specified exceptions.¹⁶ 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.¹⁷ 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.¹⁸

⁴ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

⁵ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

⁶ Section 286.011(1)-(2), F.S.

⁷ *Id.*

⁸ Section 286.011(6), F.S.

⁹ Section 286.011(2), F.S.

¹⁰ Section 286.011(1), F.S.

¹¹ Section 286.011(3), F.S.

¹² FLA. CONST. art. I, s. 24(c).

¹³ *Id.*

¹⁴ *See supra*, note 11.

¹⁵ 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.

¹⁶ 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.

¹⁷ Section 119.15(3), F.S.

¹⁸ Section 119.15(6)(b), F.S.

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;¹⁹
- 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;²⁰ or
- It protects trade or business secrets.²¹

The Act also requires specified questions to be considered during the review process.²² 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.²³ If the exemption is reenacted or saved from repeal 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.²⁴

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.²⁵ 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.²⁶ 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.²⁷ DSOs help the state universities “achieve excellence by providing supplemental resources from private gifts and bequest, and valuable education support services.”²⁸

¹⁹ Section 119.15(6)(b)1., F.S.

²⁰ Section 119.15(6)(b)2., F.S.

²¹ Section 119.15(6)(b)3., F.S.

²² 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?

²³ FLA. CONST. art. I, s. 24(c).

²⁴ Section 119.15(7), F.S.

²⁵ Section 1004.28(1)(a)1.-2., F.S.

²⁶ Section 1004.28(1)(a)2., F.S.

²⁷ Section 1004.28(1)(a)3., F.S.

²⁸ 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.

State universities are considered agencies of the state.²⁹ As a result, state universities are subject to public records and public meetings laws.³⁰ DSO boards are also subject to public records and public meetings laws.³¹

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 law³² and by the university board of trustees.³³

DSOs are subject to public record and public meeting laws.³⁴ Current law provides a public records exemption for the identity of a donor who desires to remain anonymous³⁵ and for all records of a university DSO *except* any:³⁶

- 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 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

²⁹ Section 1001.705(1)(d), F.S.

³⁰ 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).

³¹ 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).

³² Section 11.45(8), F.S.

³³ Section 1004.28(5)(a), F.S.

³⁴ *See Palm Beach Community College Foundation, Inc. v. WTFT, Inc.*, 611 So.2d 588 (Fla. 4th DCA 1993). The Florida Attorney General opined that community college direct-support organizations are subject to Sunshine Law. Op. Att'y Gen. Fla. 05-27 (2005). *See also* Op. Att'y Gen. Fla. 92-53 (1992) (providing that 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).

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.*

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.

Chapter 2014-207, L.O.F., included a public necessity statement that provided the rationale for the public meetings 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 saves from repeal the public meeting exemption of s. 1004.28(5)(c), F.S., thereby continuing the public meeting exemption for any portion of a meeting of the board of directors of a university DSO, or of the executive or other committees of such board, at which the board or the committee discusses a proposal seeking research funding from the DSO or a plan or program for either initiating or supporting research.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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 meetings requirements. This bill continues a current public meetings 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 meetings requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public meetings exemption without expansion.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public meetings 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 identified.

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.