**The Florida Senate**

# COMMITTEE MEETING EXPANDED AGENDA

**GOVERNMENTAL OVERSIGHT AND ACCOUNTABILITY**
**Senator Ring, Chair**
**Senator Siplin, Vice Chair**

**MEETING DATE:** Wednesday, March 23, 2011
**TIME:** 3:15 —5:15 p.m.
**PLACE:** *Toni Jennings Committee Room,* 110 Senate Office Building

**MEMBERS:** Senator Ring, Chair; Senator Siplin, Vice Chair; Senators Benacquisto, Bogdanoff, Dean, Fasano, Flores, Garcia, Latvala, Margolis, Montford, Norman, and Wise

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 1 | **SB 330**<br>Gaetz<br>(Identical H 553) | Violations of the Florida Election Code; Provides that a candidate who, in a primary or other election, falsely represents that he or she served or is currently serving in the military, commits a violation of the Florida Election Code. Requires that the commission adopt rules to provide for an expedited hearing for complaints filed with the commission. Requires that the Director of the Division of Administrative Hearings assign an administrative law judge to provide an expedited hearing in certain cases, etc.<br><br>EE 01/26/2011 Favorable<br>RC 02/24/2011 Favorable<br>MS 03/10/2011 Favorable<br>GO 03/23/2011<br>BC | |
| 2 | **CS/SB 90**<br>Education Pre-K - 12 / Gaetz | Financial Emergencies; Requires a plan of a county or municipality to improve the efficiency, accountability, and coordination of the delivery of local government services to include a plan for the consolidation of all administrative direction and support services if the county or municipality is subject to review and oversight by the Governor. Authorizes a financial emergency review board for a local government entity or district school board to consult with other governmental entities for the consolidation of all administrative direction and support services, etc.<br><br>CA 01/11/2011 Fav/2 Amendments<br>ED 02/21/2011 Fav/CS<br>GO 03/23/2011<br>BC | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 3 | **CS/SB 312**<br>Health Regulation / Richter<br>(Similar H 483, Compare H 485, H 795, S 656, Link CS/S 314) | Practice of Dentistry; Requires persons who apply for licensure renewal as a dentist or dental hygienist to furnish certain information to the Department of Health in a dental workforce survey. Requires the department to serve as the coordinating body for the purpose of collecting, disseminating, and updating dental workforce data. Requires the department to maintain a database regarding the state's dental workforce. Authorizes certain business entities to pay for prescription drugs obtained by practitioners licensed under ch. 466, F.S., etc.<br><br>HR 01/25/2011 Fav/CS<br>GO 03/23/2011<br>BC | |
| 4 | **CS/SB 314**<br>Health Regulation / Richter<br>(Identical H 485, Compare H 483, Link CS/S 312) | Public Records/Dental Workforce Surveys; Provides an exemption from public records requirements for information contained in dental workforce surveys submitted by dentists or dental hygienists to the Department of Health as a condition for license renewal. Provides exceptions to the exemption. Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity.<br><br>HR 01/25/2011 Fav/CS<br>GO 03/23/2011<br>BC<br>RC | |
| 5 | **SB 420**<br>Health Regulation<br>(Similar H 7079) | OGSR/Florida Center for Brain Tumor Research; Provides that personal identifying information pertaining to a donor to the central repository for brain tumor biopsies or the brain tumor registry of the Florida Center for Brain Tumor Research is confidential and exempt from public records requirements. Provides an exception under certain conditions for information disclosed to a person engaged in bona fide research. Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act, etc.<br><br>HR 02/08/2011 Favorable<br>GO 03/23/2011<br>RC | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 6 | **SB 568**<br>Judiciary<br>(Identical H 7085) | OGSR/Court Records/Court Monitors/Guardianship; Amends provisions relating to public record exemptions for court records relating to court monitors in guardianship proceedings. Consolidates provisions. Provides that orders appointing nonemergency court monitors are exempt rather than confidential and exempt. Provides that only court orders finding no probable cause are confidential and exempt. Saves the exemptions from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011<br>RC | |
| 7 | **SB 570**<br>Judiciary<br>(Identical H 7083) | OGSR/Interference With Custody; Amends a provision relating to a public records exemption for information submitted to a sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Saves the exemption from repeal under the Open Government Sunset Review Act. Deletes a provision providing for the repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011<br>RC | |

**A proposed committee substitute** for the following bill (SB 572) is expected to be considered:

| | | | |
|---|---|---|---|
| 8 | **SB 572**<br>Judiciary<br>(Similar H 7081) | OGSR/Statewide Public Guardianship Office; Repeals provisions relating to an exemption from public records requirements for information that identifies donors and prospective donors to the direct-support organization of the Statewide Public Guardianship Office. Saves the exemption from repeal under the Open Government Sunset Review Act. Abrogates the scheduled repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011<br>RC | |

**A proposed committee substitute** for the following bill (SB 600) is expected to be considered:

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 9 | **SB 600**<br>Criminal Justice<br>(Similar H 7075) | OGSR/Records/DJJ Employees & Family Members; Amends a provision which provides an exemption from public records requirements for certain records relating to current and former employees of the Department of Juvenile Justice and their family members, including juvenile probation officers and supervisors, detention and assistant detention superintendents, juvenile justice detention officers and supervisors, juvenile justice residential officers and supervisors, juvenile justice counselors and supervisors, human service counselor administrators, etc.<br><br>CJ 03/09/2011 Favorable<br>GO 03/23/2011<br>RC | |
| 10 | **SB 602**<br>Criminal Justice<br>(Identical H 7077) | OGSR/Biometric Identification Information; Amends a provision which provides an exemption from public records requirements for biometric identification information held by an agency. Saves the exemption from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption.<br><br>CJ 03/09/2011 Favorable<br>GO 03/23/2011<br>RC | |
| 11 | **CS/SB 380**<br>Children, Families, and Elder Affairs / Wise<br>(Compare H 279) | Training/Certification/Child Welfare Personnel; Provides required criteria for the approval of credentialing entities that develop and administer certification programs for persons who provide child welfare serves. Revises the use of the Child Welfare Training Trust Fund within the Department of Children and Family Services. Requires persons who provide child welfare services to be certified by a third-party credentialing entity. Allows entities to contract for training. Requires persons to master core competencies. Authorizes approval of third-party credentialing entities, etc.<br><br>CF 02/08/2011 Fav/CS<br>GO 03/23/2011<br>BC | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 12 | **CS/SB 480**<br>Community Affairs / Wise<br>(Compare H 811) | Florida Endowment for Vocational Rehabilitation; Removes a provision that requires the State Board of Administration to invest and reinvest moneys in the endowment fund for the Florida Endowment for Vocational Rehabilitation. Requires that a specified percent of the remainder of all civil penalties received by a county court and after distribution pursuant to ch. 318, F.S., be remitted to the Department of Revenue on a monthly basis, etc.<br><br>CA 02/21/2011 Fav/CS<br>HE 03/09/2011 Favorable<br>GO 03/23/2011<br>BC | |
| 13 | **SB 386**<br>Bogdanoff<br>(Similar S 1258, Compare H 1079) | Procurement/Preference to Florida Businesses; Cites this act as the "Buy Florida Act." Requires an agency, county, municipality, school district, or other political subdivision of the state to grant a specified preference to a vendor located within the state when awarding a contract for printing under certain circumstances. Specifies the percentages of preference to be granted, etc.<br><br>GO 03/23/2011<br>CA<br>BC | |
| 14 | **SB 1182**<br>Ring | State Board of Administration; Authorizes the board to invest the assets of a governmental entity in the Local Government Surplus Funds Trust Fund without a trust agreement with that governmental entity. Provides that certain investments made by the board under a trust agreement are subject only to the restrictions and limitations contained in the trust agreement. Corrects cross-references. Clarifies provisions prohibiting certain conflicts of interest by investment advisers and managers retained by the board.<br><br>GO 03/23/2011<br>BC | |

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 330 |
| INTRODUCER: | Senator Gaetz |
| SUBJECT: | Political Speech; Military Service Mispresentations |
| DATE: | March 15, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Fox | Roberts | EE | **Favorable** |
| 2. | Fox | Phelps | RC | **Favorable** |
| 3. | Fleming | Carter | MS | **Favorable** |
| 4. | Roberts | Roberts | GO | **Pre-meeting** |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

Senate Bill 330 makes it an administrative violation of the Florida Election Code for candidates to misrepresent the fact that they served, or are currently serving, in the U.S. military; a civil penalty of up to $5,000 may be assessed for each violation by the Florida Elections Commission or the administrative law judge (ALJ) hearing the case, as appropriate.

This bill creates Section 104.2715 of the Florida Statutes.

## II. Present Situation:

Section 104.271, Florida Statutes, makes it a violation of the Florida Election Code for a candidate to knowingly make a false statement about an opposing candidate in an election, an offense punishable by an administrative fine of up to $5,000:

> Any candidate who, in a primary or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code.[1]

This appears to be the only provision in the Code that directly addresses false political speech.

Interestingly, what SB 330 proposes is strikingly similar to the federal Stolen Valor Act, which makes it a crime to falsely represent having been awarded a military honor, declaration, medal,

[1] § 104.241(2), F.S.

badge, etc. There is currently a disagreement among courts in different federal judicial circuits with respect to the constitutionality of that statute.[2]

## III. Effect of Proposed Changes:

Senate Bill 330 subjects candidates to a civil fine of up to $5,000 for falsely representing in an election that they have served, or are serving, in the nation's military. It provides for the expedited hearing of complaints by the Florida Elections Commission or an ALJ at the Division of Administrative Hearings (DOAH), as appropriate, and further authorizes the Commission to adopt rules to provide for such expedited hearing.

Also worth noting are the facts that any person may file a complaint with the Florida Elections Commission; and, any fine assessed is deposited in the State's General Revenue Fund.

The bill takes effect July 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Minimal; may result in some minor, additional revenue from violation penalties.

[2] *See U.S. v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (holding that Stolen Valor Act violates First Amendment free speech rights); *but see*, *U.S. v. Robbins*, 2011 WL 7384 (W.D. Va. 2011) (false statements of fact implicated by the federal statute are *not protected* by the First Amendment). Although *Alvarez* is the only *appellate* decision interpreting the Stolen Valor Act, the U.S. Court of Appeals for the Ninth Circuit has a reputation in the legal community for adopting outlier positions rejected by other circuits. Indeed, the federal district judge in *Robbins* expressly refused to follow the 2-1 majority decision in *Alvarez*, choosing instead to adopt the dissent's position that *false* speech is *not entitled* to first amendment protection.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

The bill grants specific penalty power to the administrative law judge at DOAH, to account for the recent First District Court of Appeals decision in *Davis v. Florida Elections Commission.*[3]

## 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.



[3] 44 So.3d 1211 (Fla. 1st DCA 2010) (ALJ has no statutory authority to institute penalties for election violations originating with the Florida Elections Commission) .

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | CS/SB 90 |
| INTRODUCER: | Education Pre-K - 12 Committee and Senator Gaetz |
| SUBJECT: | Financial Emergencies |
| DATE: | March 15, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Gizzi | Yeatman | CA | **Fav/2 amendments** |
| 2. | Brown | Matthews | ED | **Fav/CS** |
| 3. | Roberts | Roberts | GO | **Pre-meeting** |
| 4. | | | BC | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill requires counties and municipalities that have adopted local efficiency, accountability and coordination plans to include a structural and services consolidation component in the plan, when those entities are in a state of financial emergency. Required elements of a consolidation plan are provided.

This bill also authorizes financial emergency review boards for local governmental entities and district school boards to consult with other governmental entities for the consolidation of all administrative direction and support services when an entity is declared in a state of financial emergency. The bill permits the Governor or Commissioner of Education to require local government entities and district school boards to include a plan for consolidation in the entity's financial emergency plan.

The constitutional ability of the Governor to suspend members of the governing body of a local governmental entity or district school board for a failure to correct a state of financial emergency is clarified.

This bill substantially amends sections 163.07 and 218.503, of the Florida Statutes.

## II. Present Situation:

**Efficiency and Accountability in Local Government Services**
Section 163.07, F.S., outlines a voluntary plan for local governments to use to resolve conflict and increase efficiency regarding the delivery of local government services.[1] Initiation of the plan requires a resolution by majority vote of the governing body(s) of any one of:

- Each of the counties involved;
- The majority of the municipalities within each county; or
- The municipality or combination of municipalities that represent a majority of the municipal population in each county.[2]

Required elements of the resolution include identification of a commission of representatives from the county, municipality, and any affected special districts whose purpose is to develop the plan; identification of support services; and a proposed timetable.[3] The adopted plan must:

- Designate the included area and local government services.
- Describe the existing organization and anticipated reorganization of these services.
- Identify responsible local agencies.
- Designate services that should be delivered regionally or countywide.
- Outline cost reduction and increased provider accountability measures.
- Include a multi-year capital outlay plan for infrastructure.
- Specifically describe any related expansion of municipal boundaries.
- Provide procedures for modifying or terminating the plan.
- Specify modifications to any necessary special acts.
- Provide an effective date.[4]

Any plan developed must conform to current local government comprehensive plans and be approved by majority vote of the governing body(s):

- In each of the counties involved,
- Of a majority of municipalities in each county, and
- Of the municipality(s) that represent a majority of the municipal population in each county.[5]

Following initial approval, the plan must also be approved by a majority of voters in each county, and a majority of voters of the municipalities that represent a majority of the municipal population of each county, through a countywide referendum.[6] Plans involving special district mergers or dissolutions, or municipal annexation require additional compliance.[7]

[1] s. 163.07(2), F.S.
[2] s. 163.07(2), F.S.
[3] *Id.*
[4] s. 163.07(3)(a) – (j), F.S.
[5] s. 163.07(4) and (5)(a), F.S.
[6] s. 163.07(5)(b), F.S.
[7] s. 163.07(6) – (7)

**Financial Emergency**

Chapter 218, F.S., provides the Local Governmental Entity, Charter School, Charter Technical Career Center, and District School Board Financial Emergency Act[8], to preserve the fiscal solvency of local government entities,[9] charter schools, and district school boards that are in a state of financial emergency. Under its provisions, a local governmental entity, charter school, charter technical career center, or district school board that meets one of the statutory indicators of financial distress is required to notify the Governor or Commissioner of Education and the Legislative Auditing Committee.[10]

Statutory indicators of financial distress include any one of the following conditions based on lack of funds:

- Failure within the same fiscal year in which due, to pay short-term loans, make bond debt service or other long term debt payments when due.
- Failure to pay uncontested claims from creditors within 90 days after presented.
- Failure to transfer on time, employee income withholding taxes or contributions for federal social security or employees' pension, retirement or benefit plans.
- Failure to pay current employee wages and salaries or retirement benefits to former employees for one pay period.
- Insufficient resources by the local government, charter school, charter technical career center, or district school board, to fund an unreserved or total fund balance or retained earnings deficit, or unrestricted or total net assets deficit.[11]

Upon notification that one or more of these conditions is met, the Governor or Commissioner of Education, as appropriate, must then determine whether state assistance is needed to resolve or prevent the financial deterioration.[12] If state assistance is needed, then the entity is determined to be in a state of financial emergency.[13]

Once a determination is made, the Governor or Commissioner of Education has the power to implement certain remedial measures to resolve the financial emergency.[14] Pursuant to s. 218.503(3), F.S., the Governor or Commissioner of Education may:

- Require the local governmental entity or district school board's budget to be approved by the Governor or Commissioner of Education, respectively.
- Authorize and provide for repayment of a state loan to the local governmental entity.

[8] The full title of this act is the "Local Governmental Entity, Charter School, Charter Technical Career Center, and District School Board Financial Emergencies Act".
[9] s. 218.502, F.S., defines local government entity to mean "a county, municipality, or special district".
[10] s. 218.503(1)-(2), F.S. Note: a charter school must notify the charter school sponsor, the Commissioner of Education, and the Legislative Auditing Committee; a charter technical career center must notify the charter technical career center sponsor, the Commissioner of Education, and the Legislative Auditing Committee; and the district school board shall notify the Commissioner of Education and the Legislative Auditing Committee.
[11] s. 218.503(1)(a) –(e), F.S. ". . . as reported on the balance sheet or statement of net on the general purpose or fund financial statements."
[12] s. 218.503(3), F.S.
[13] *Id.*
[14] s. 218.503 (3), F.S.

- Prohibit issuance of bonds, notes, certificates of indebtedness, or any other form of debt while in a state of financial emergency.
- Inspect and review the entity's records, information, reports, and assets.
- Consult with local governmental entity and district school board officials and auditors to discuss necessary procedures to bring accounting books, systems, financial procedures and reports into state compliance.
- Provide technical assistance.
- Establish a financial emergency board to oversee local government or district school board activities, appointed by the Governor or State Board of Education as appropriate.
- Require and approve a plan to be prepared by the local governmental entity or district school board that prescribes necessary actions to adjust the entity's debt. [15]

Subsection (5) of s. 218.503, F.S., prohibits a local government entity or district school board from applying for bankruptcy under the Federal Constitution without prior approval from the Governor for local governmental entities or the Commissioner of Education for district school boards.[16]

***Financial Emergency Board***

In assisting a local government entity or district school board declared to be in a state of financial emergency, the Governor, or the Commissioner of Education, may establish a financial emergency board to oversee activities.[17] The Governor or the State Board of Education shall appoint members and select a chair. Once established, the board may:

- Review the entity's records, reports, and assets;
- Consult with local entity officials and auditors and with state officials regarding the necessary steps to bring the entity's accounting books, systems, financial procedures and reports into compliance with state requirements; and
- Review the entity's operations, management, efficiency, productivity, and financing of functions and operations.[18]

All recommendations and reports made by the financial emergency board must be provided to the Governor for local governmental entities or to the Commissioner of Education and the State Board of Education for district school boards.[19]

***Financial Emergency Plan***

Upon declaration of a state of financial emergency, the Governor or Commissioner of Education may require the respective local governmental entity or district school board to develop a plan, subject to Governor or Commissioner approval, that prescribes remedial actions to adjust the entity's current financial state.[20] The adopted plan must include:

[15] s. 218.503(3)(a)-(h), F.S.
[16] s. 218.503(5), F.S.
[17] s. 218.503 (3)(g)1., F.S.
[18] s. 218.503 (3)(g)1. a.-c., F.S.
[19] s. 218.503 (3)(g)2., F.S.
[20] s. 218.503 (3)(h), F.S.

- Provision for full payment of obligations outlined in subsection (1) of s. 218.503, F.S., designated as priority items, which are currently due or will become due.[21]
- Establishment of priority budgeting or zero-based budgeting, to eliminate items that are not affordable.
- The prohibition of a level of operations which can be sustained only with nonrecurring revenues.[22]

***District School Boards***

Section 1011.051, F.S., requires superintendents to provide written notice to the district school board and the Commissioner of Education (Commissioner) if the unreserved general fund balance in a district's approved operating budget is projected to drop below 3 percent of projected general fund revenues.[23] If it is projected to drop below 2 percent, in addition to the notice requirement, the Commissioner must make a determination within 14 days to appoint a financial emergency board if the Commissioner does not reasonably expect that the district has a plan in place to avoid a financial emergency.[24]

The Department of Education reports that the following school districts have either been in a state of financial emergency or are subject to notification requirements:

| School District | Date of Notification | Projected Financial Condition Ratio at Time of Notification (FY 2009-10) | Financial Condition Ratio at June 30, 2010 |
|---|---|---|---|
| Gadsden | March 15, 2010 | 1.74% | 5.72% |
| Indian River | August 30, 2010 | 1.61% | 1.53% |
| Jefferson | April 27, 2010 | 1.90% | 2.84% |
| Taylor | April 30, 2010 | 1.79% | 6.65% |

| School District | Date of Notification | Projected Financial Condition Ratio at Time of Notification (FY 2008-09) | Financial Condition Ratio at June 30, 2010 |
|---|---|---|---|
| Dade | February 23, 2009 | 2.25% | 3.83% |
| Gadsden | February 17, 2009 | 0% | 5.72% |
| Glades | March 5, 2009 | .71% | 16.91% |
| Jefferson | March 9, 2009 | 0% | 2.84% |
| Volusia | March 3, 2009 | 1.40% | 8.75% |
| Washington | March 10, 2009 | 1.66% | 26.13% |

[21] s. 218.503(1), F.S., as previously discussed above, addresses the indicators of financial distress.
[22] s. 218.503 (3)(h)1.-3., F.S.
[23] s. 1011.051(1), F.S.
[24] s. 1011.051(2), F.S.

The following school districts have been included in the Auditor General's "Significant Financial Trends and Findings Reports" as having a financial condition ratio below 3 percent for the 2008-09 fiscal year: Highlands, Jefferson, Manatee, Miami-Dade and Taylor county district school boards.

Exact amounts are reflected in the following table:

| School District | Financial Condition Ratio (FY 2008-09) | Number of Consecutive Years Ratio Under 3% |
|---|---|---|
| Highlands | 2.01% | 1 |
| Jefferson | -8.05% | 2 |
| Manatee | 2.96% | 2 |
| Miami-Dade | 2.36% | 3 |
| Taylor | 0.48% | 6 |

For fiscal year 2009-10, the Auditor General has issued an operational report indicating that Indian River county district school board reported a financial condition ratio below 3 percent.[25] As the Auditor General has not completed audits for fiscal year 2009-10, there may be additional district school boards identified as meeting the threshold ratio in upcoming reports.

## III. Effect of Proposed Changes:

This bill mandates inclusion of consolidation of services plans for entities in a state of financial emergency as follows:

- For counties and municipalities that have adopted the voluntary efficiency plan pursuant to s. 163.07, F.S.; or
- For local entities, including district school boards, for which the Governor or Commissioner of Education has required a corrective plan.

This bill defines consolidation of administrative direction and support services to include such services as asset purchasing and sales, economic and community development, including planning and zoning, building inspections, facilities and fleet management, engineering and construction, and insurance coverage and risk management.

Section 7, article IV, of the state constitution, authorizes the Governor, through executive order, to suspend certain public officers, including state officers who are not subject to impeachment proceedings, and county officers.[26] The Senate then has the authority to remove, or reinstate, the suspended official. A Florida Supreme Court opinion clarified that district school board members are considered to be county officers, for purposes of suspension authority, as are the sheriff, tax collector, property appraiser, supervisor of elections, clerk of the circuit court, county

[25] E-mail from David Ward, Audit Supervisor, Office of the Auditor General (February 15, 2011). The 2008-09 fiscal year findings are published in Office of the Auditor General Report No. 2011-028. Fiscal year 2009-10 findings are contained in Report No. 2011-055.

[26] sec. 7, art. IV., of the state constitution, provides, in part: "(a) By executive order stating the grounds and filed with the custodian of state records, the governor may suspend from office…any county officer, for malfeasance, misfeasance, neglect of duty….The senate may…remove from office or reinstate the suspended official…."

commissioners and elected superintendents of schools.[27] This same opinion indicates, however, that superintendents who are appointed are not subject to removal through this constitutional provision.

Pursuant to the constitutional authority of section 7, article IV, of the state constitution, this bill classifies the failure of a district school board to correct a state of financial emergency as malfeasance, misfeasance, and neglect of duty, which enables a sitting Governor to suspend and recommend removal of district school board members. This language does not appear to reach elected district school superintendents. Also, the bill leaves the discretion with the Governor to determine when to act on the suspension of a member of a district school board or local governmental entity.

This bill does not limit local entities to consolidation with geographically adjacent or demographically similar entities to realize cost savings through shared support.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Counties and municipalities that elect to adopt an efficiency and accountability plan and that are under Governor review and oversight due to financial emergency will be required to include a structural and services consolidation plan as part of the adopted plan under s. 163.07, F.S. Any fiscal impact is indeterminate at this time.

[27] *In re Advisory Opinion to the Governor-School Board Member-Suspension Authority*, 626 So.2d 684, 689-690 (Fla. S.Ct. 1993).

Local government entities and district school boards that are declared by the Governor or Commissioner of Education to be in a state of financial emergency will be required to include the consolidation, sourcing or discontinuance of all administrative direction and support services as part of the entity's adopted financial emergency plan. Any fiscal impact is indeterminate at this time.

Financial emergency boards acting on behalf of an entity that has been declared to be in a state of financial emergency will be authorized to consult with other governmental entities for the consolidation of all administrative direction and support services.

## 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.)

**CS by Education Pre-K – 12 Committee on February 21, 2011:**
The committee substitute:

- Provides clarification that the consolidation of administrative and support services is meant to encompass the same types of services listed in both the voluntary development of an efficiency plan and the plan developed through the entity being in a state of financial emergency; and
- Clarifies the constitutional ability of a Governor to suspend and recommend removal of a district school board member on a malfeasance, misfeasance, or neglect of duty basis through a failure to correct a state of financial emergency.

B. Amendments:

None.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | CS/SB 312 |
| INTRODUCER: | Health Regulation Committee and Senator Richter |
| SUBJECT: | Practice of Denistry |
| DATE: | March 15, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | O'Callaghan | Stovall | HR | **Fav/CS** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

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|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | ☐ | Statement of Substantial Changes |
| B. AMENDMENTS..... | ☐ | Technical amendments were recommended |
| | ☐ | Amendments were recommended |
| | ☐ | Significant amendments were recommended |

## I. Summary:

The committee substitute (CS) requires all Florida licensed dentists and dental hygienists to complete a workforce survey as a part of their licensure renewal, beginning in 2012. The CS provides certain information that is to be collected by the Department of Health (DOH) pursuant to a survey instrument adopted by the Board of Dentistry (Board). The Board is required to issue a nondisciplinary citation to any dentist or dental hygienist who fails to complete the survey within 90 days after the renewal of his or her license to practice as a dentist or dental hygienist. This citation must inform, and the Board must notify, the dentist or dental hygienist that his or her license will not be renewed for any subsequent license renewal unless he or she completes the survey.

The DOH is required to collect, update, and disseminate dental workforce data and maintain a database to serve as a statewide source of such data. The DOH, in conjunction with the Board, is required to develop strategies to maximize federal and state programs that provide incentives for dentists to practice in federally-designated shortage areas. The DOH and Board must use existing resources to support these activities.

The CS establishes an advisory body to assist the DOH and the Board in addressing matters relating to the state's dental workforce.

The CS also authorizes a professional corporation or limited liability company composed of dentists to pay for prescription drugs purchased by a dentist and designates the dentist as the purchaser and owner of the prescription drugs.

The CS corrects a technical problem in the statutes relating to the appointment of a dental representative to the Board of Directors of the Florida Healthy Kids Corporation, which resulted from the passage of two bills in the 2009 Regular Session dealing with the board membership.

This CS amends the following sections of the Florida Statutes: 499.01 and 624.91.

The CS creates three undesignated sections of law.

## II. Present Situation:

Dentists and dental hygienists are licensed and regulated by the DOH under ch. 466, F.S., related to dentistry, dental hygiene, and dental laboratories, and ch. 456, F.S., related to general provisions for health professionals and occupations. Licenses for both professions are renewed biennially.[1] Section 466.0285, F.S., requires a business entity that employs a dentist or dental hygienist in the operation of a dental office to be a professional corporation or limited liability company composed of dentists.

**Dental Workforce Initiatives**

According to the Institute of Medicine's U.S. Oral Health Workforce in the Coming Decade: Workshop Summary, "The current oral health workforce fails to meet the needs of many segments of the U.S. population."[2] The inability of the dental workforce to provide assistance and basic oral health care to all people in Florida contributes to the number of individuals experiencing poor general health. Dental workforce planning is an essential component of ensuring that there is an adequate and appropriate supply of well-trained health care providers to meet the state of Florida's current and future dental health care service needs.[3]

In the last few years, the DOH has actively addressed dental workforce issues. In January of 2008, the State Surgeon General established the Florida Health Practitioner Oral Healthcare Workforce Ad Hoc Committee (Ad Hoc Committee). The mission of the Ad Hoc Committee was to evaluate and address the complex range of oral health workforce concerns that impact Florida's ability to recruit or retain available practicing dental providers (dentists, dental hygienists, and dental assistants), especially for Florida's disadvantaged and underserved populations. The Ad Hoc Committee published the Health Practitioner Oral Healthcare

[1] Section 466.013(2), F.S.
[2] The workshop summary is available at http://www.iom.edu/Reports/2009/OralHealthWorkforce.aspx (Last visited on January 14, 2011).
[3] *See* DOH, *The Florida Oral Health Workforce Workgroup Report 2009*, December 2009, available at: http://www.doh.state.fl.us/Family/dental/OralHealthcareWorkforce/index.html (Last visited on January 14, 2011).

Workforce Ad Hoc Committee Report in February 2009, which provided recommendations on dental workforce and access to oral health care.[4]

The DOH received a $200,000 federal grant in 2008 to develop a statewide needs assessment and a strategic planning report to be used to improve the state's dental workforce and service delivery infrastructure for the underserved.[5] This grant helped support an Oral Health Workforce Workgroup (the Workgroup) to continue the work of the Ad Hoc Committee and a contract for a statewide needs assessment. The two main objectives of the needs assessment were to conduct a statewide analysis of Florida's oral health workforce relative to traditionally underserved populations and to evaluate access to dental care among low-income children, including children with special health care needs, children in the Medicaid and SCHIP programs and to identify the child and family characteristics that are associated with better access.[6]

Building on the efforts of previous activities, the Workgroup outlined implementation steps that address Florida's oral health workforce needs. The workgroup proposed eight goals, with specific recommendations to support each goal. These goals include:

- Increase education and preventive efforts;
- Improve data collection;
- Increase provider participation in the Medicaid program;
- Increase utilization of allied dental staff;
- Integrate oral health education and prevention into general health and medical programs;
- Increase training opportunities for providers;
- Improve the state oral health infrastructure; and,
- Increase efforts to recruit practitioners to provide care to disadvantaged populations.[7]

The DOH has recently completed a voluntary workforce survey for all Florida licensed dentists and dental hygienists and the DOH is currently analyzing the collected data.[8] The compliance rate of those voluntarily completing the survey was about 90 percent.[9]

The DOH received an additional federal grant in September 2009, to further implement workforce strategies. A third oral health workgroup is operating as part of the Oral Health Florida Coalition.[10]

[4] The Ad Hoc Committee Report is available at http://www.doh.state.fl.us/Family/dental/OralHealthcareWorkforce/200903Dental_Workforce_Report.pdf (Last visited on January 14, 2011).
[5] *Supra* fn. 3.
[6] *Id.*
[7] *Id.*
[8] Professional committee staff received this information via email from a DOH representative on January 18, 2011. A copy of the email is on file with the Health Regulation Committee.
[9] Per Memoranda to the Senate Health Regulation Committee Staff from the Florida Dental Association dated March 3, 2010, on file with the committee.
[10] DOH Bill Analysis, Economic Statement and Fiscal Note for SB 312, dated December 29, 2010, on file in the Senate Health Regulation Committee.

**Physician Workforce Assessment and Development**

In 2007, the Florida Legislature established a structure to facilitate physician workforce assessment and planning in s. 381.4018, F.S. The legislative intent and responsibilities focused on, among other things, the need to ensure that there is an adequate and appropriate supply of well-trained physicians to meet this state's future health care service needs by ensuring the availability and capacity of quality graduate medical schools and students who are well-prepared for a medical education in this state.[11]

**Florida Health Services Corps**

The Florida Health Services Corp (Corps) is established in s. 381.0302, F.S., to encourage qualified medical professionals to practice in underserved locations where there are shortages of such personnel. The program offers scholarships, loan repayment assistance, and financial assistance for relocation to allopathic, osteopathic, chiropractic, podiatric, dental, physician assistant, and nursing students in return for service in a public health care program or in a medically underserved area. In addition, members of the Corps are agents of the state under s. 768.28(9), F.S., related to sovereign immunity and the waiver of sovereign immunity, while providing uncompensated services to medically indigent persons who are referred by the DOH.[12]

**Advisory Bodies**

Section 20.03, F.S., defines "council" or "advisory council" to mean an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.

Section 20.052, F.S., provides that an advisory body created by specific statutory enactment as an adjunct to an executive agency must be established, evaluated, or maintained in accordance with the following provisions:

- It may be created only when it is found to be necessary and beneficial to the furtherance of a public purpose;
- It must be terminated by the Legislature when it is no longer necessary and beneficial to the furtherance of a public purpose;
- The Legislature and the public must be kept informed of the numbers, purposes, memberships, activities, and expenses of the advisory body;
- It may not be created or reestablished unless it meets a statutorily defined purpose; its powers and responsibilities conform with the definitions for governmental units in s. 20.03; F.S., its members, unless expressly provided otherwise in the State Constitution, are appointed for 4-year staggered terms; and its members, unless expressly provided otherwise by specific statutory enactment, serve without additional compensation or honorarium, and are authorized to receive only per diem and reimbursement for travel expenses as provided in s. 112.061, F.S; and

[11] Section 381.4018(2), F.S.
[12] Section 381.0302(11), F.S.

- Any private citizen members must be appointed by the Governor, the head of the department, the executive director of the department, or a Cabinet officer.

Further, unless an exemption is otherwise specifically provided by law, all meetings of an advisory body adjunct to an executive agency are public meetings under s. 286.011, F.S. Minutes, including a record of all votes cast, must be maintained for all meetings. Records of an abolished advisory body must be appropriately stored by the executive agency to which it was made adjunct.

**Health Care Clinic Establishment Permit**

The Florida Drug and Cosmetic Act (Act) is found in part I of ch. 499, F.S. The DOH[13] is responsible for administering and enforcing efforts to prevent fraud, adulteration, misbranding, or false advertising in the preparation, manufacture, repackaging, or distribution of drugs, devices, and cosmetics.[14] The DOH issues 20 different types of permits to persons (defined to also include business entities) who qualify to engage in activity regulated under the Act.[15] The regulatory structure provides for prescription drugs to be under the responsibility of a permit at all times, until a prescription drug is dispensed to a patient, in which case the prescription from the practitioner represents the authority for the patient to possess the prescription drug.[16]

One of the permits issued by the DOH under the Act is the Health Care Clinic Establishment (HCCE) permit. The biennial fee for the HCCE permit is $255 and the permit is valid for 2 years, unless suspended or revoked.[17]

The HCCE permit was established in 2008 to enable a business entity (medical practice) to purchase prescription drugs. In 2009, the Legislature broadened the array of business entities eligible to qualify for the HCCE permit.[18] The HCCE permit is an optional permit that a medical practice may obtain in order to purchase and own prescription drugs in the business entity's name. The HCCE permit is not required if a practitioner in the clinic or practice wants to purchase and own prescription drugs in his or her own name using his or her professional license that authorizes that practitioner to prescribe prescription drugs.

Under the requirements of the permit, a qualifying practitioner[19] or a veterinarian licensed under ch. 474, F.S., is designated to be responsible for complying with all legal and regulatory requirements related to the purchase, recordkeeping, storage, and handling of the prescription drugs purchased and possessed by the business entity. Both the qualifying practitioner and the permitted health care clinic must notify the DOH within 10 days after any change in the qualifying practitioner.

[13] However, as of October 1, 2011, all of the DOH's responsibilities under the Act will be transferred to the Department of Business and Professional Regulation. *See* Section 27, ch. 2010-161, Laws of Florida.
[14] Section 499.002(2), F.S.
[15] *See* s. 499.01(1), F.S.
[16] Section 499.03, F.S.
[17] *See* ch. 64F-12.018, F.A.C., Fees.
[18] *See* ch. s. 2, ch. 2009-221, Laws of Florida.
[19] The health care practitioners defined in s. 456.001, F.S., that are authorized to prescribe prescription drugs include a: medical physician, osteopathic physician, physician assistant, advanced registered nurse practitioner, optometrist, podiatric physician, dentist, or chiropractic physician.

**The Florida Healthy Kids Corporation**

The Florida Healthy Kids Corporation is established in s. 624.91, F.S., to provide comprehensive health insurance coverage to children without adequate health care services. The primary recipients are school-age children with a family income below 200 percent of the federal poverty level[20] who do not qualify for Medicaid.

The 2009 Legislature enacted two laws amending membership of the Board of Directors for the Florida Healthy Kids Corporation, both by creating a subparagraph 11. Chapter 2009-41, Laws of Florida (L.O.F.) which added one member, appointed by the Governor, from among three members nominated by the Florida Dental Association. Chapter 2009-113, L.O.F., added the Secretary of Children and Family Services, or his or her designee. According to the rules of statutory construction found in the preface to the Florida Statutes, when amendatory acts are irreconcilable, the "last passed" version is placed in the text, absent legislative intent to the contrary. As a result, the dental representative is not included in the statutory list of members of the Board of Directors of the Florida Healthy Kids Corporation.

## III. Effect of Proposed Changes:

**Section 1** creates an undesignated section of law to require dentists and dental hygienists to complete a dental workforce survey as a part of their licensure renewal beginning in 2012. The Board is required to adopt procedures and forms for the survey. A dentist or dental hygienist responding to the survey must include a statement that the information provided is true and accurate to the best of his or her knowledge and belief. The CS requires the survey to elicit the following information from the licensee:

- The name of the dental school or dental hygiene program that the dentist or dental hygienist graduated from and the year of graduation;
- The year that the dentist or dental hygienist began practicing or working in this state;
- The geographic location of the dentist's or dental hygienist's practice or address within the state;
- For a dentist in private practice:
  - The number of full-time dental hygienists employed by the dentist during the reporting period,
  - The number of full-time dental assistants employed by the dentist during the reporting period,
  - The average number of patients treated per week by the dentist during the reporting period, and
  - The settings where the dental care was delivered;
- Anticipated plans of the dentist to change the status of his or her license or practice;
- The dentist's areas of specialty or certification;

[20] For 2010, the federal poverty levels were $10,830 for one person; $14,570 for a family of two; $18,310 for a family of three; and $22,050 for a family of four. *See* U.S. Department of Health and Human Services, *The 2010 Poverty Guidelines for the 48 Contiguous States and the District of Columbia*, available at http://aspe.hhs.gov/poverty/10fedreg.shtml (Last visited on January 14, 2011).

- The year that the dentist completed a specialty program recognized by the American Dental Association;
- For the hygienist:
  - The average number of patients treated per week by the hygienist during the reporting period, and
  - The settings where the dental care was delivered;
- The dentist's memberships in professional organizations;
- The number of pro bono hours provided by the dentist or dental hygienist during the last biennium;
- Information concerning the availability and trends relating to critically needed services, including, but not limited to, the following types of care provided by the dentist or dental hygienist:
  - Dental care to children having special needs;
  - Geriatric dental care;
  - Dental services in emergency departments;
  - Medicaid services; and,
  - Other critically needed specialty areas, as determined by the advisory body.

The CS provides that licensure renewal in 2012 is not contingent upon the completion and submission of the dental workforce survey, however the Board may not renew the license of any dentist or dental hygienist for subsequent renewals until the survey is completed and submitted by the licensee. If a dentist or dental hygienist fails to complete the survey within 90 days after the renewal of his or her license to practice as a dentist or dental hygienist, the Board of Dentistry is required to issue a nondisciplinary citation to the dentist or dental hygienist. The nondisciplinary citation must notify the dentist or dental hygienist that his or her license will not be renewed for any subsequent license renewal unless he or she completes the survey.

The Board is also required to notify each dentist or dental hygienist that the survey must be completed before the subsequent license renewal when the license renewal notice is sent to the licensee.

**Section 2** creates an undesignated section of law to require the DOH to serve as the coordinating body for the purpose of collecting and regularly updating and disseminating dental workforce data. The DOH is required to work with stakeholders, including the Florida Dental Association and the Florida Dental Hygiene Association, to assess and share the workforce data in a timely fashion with all interested parties. The DOH is required to maintain a database of dental workforce data.

The DOH, in conjunction with the Board, is required to develop strategies to maximize federal and state programs that provide incentives for dentists to practice in federally-designated shortage areas. The CS requires strategies to include programs such as the Florida Health Services Corp. In addition, the DOH and the Board are required to act as a clearinghouse for collecting and disseminating information concerning the dental workforce and adopt rules to administer this section.

The CS creates an advisory body of at least 15 members. The required members include the following: the State Surgeon General or his or her designee; the dean of each dental school

accredited in the United States and based in this state or his or her designee; a representative from the Florida Dental Association, Florida Dental Hygiene Association, and the Board; and a dentist from each of the dental specialties recognized by the American Dental Association's Commission on Dental Accreditation. The members of the advisory body are to serve without compensation. The DOH and the Board are to work in conjunction with the advisory body to address matters relating to the Florida's dental workforce. The advisory body is also required to provide input on developing questions for the dental workforce survey.

**Section 3** creates an undesignated section of law requiring the DOH and the Board to implement the provisions of this act within existing resources.

**Section 4** amends s. 499.01, F.S., to authorize a professional corporation or limited liability company composed of dentists to pay for prescription drugs purchased by a dentist, using the dentist's professional license, and designates that dentist as the purchaser and owner of the prescription drugs.

**Section 5** amends s. 624.91, F.S., to add a representative from the Florida Dental Association to the Board of Directors of the Florida Healthy Kids Corporation.

**Section 6** provides an effective date of July 1, 2011.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

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

CS for SB 314 is the linked bill, which exempts personal identifying information contained in the dental workforce surveys from the public records requirements under s. 119.07(1), F.S., and article I, subsection 24(a), of the Florida Constitution.

### C. Trust Funds Restrictions:

The provisions of this CS have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

The CS authorizes a dentist to purchase and pay for prescription drugs without obtaining the health care clinic establishment permit, which allows a dental practice that is a health care clinic establishment to avoid the $255 biennial fee for the health care clinic establishment permit.

B. Private Sector Impact:

A dentist or dental hygienist who does not complete the dental workforce survey will not be able to renew his or her dental or dental hygienist license beginning in 2014. If false or misleading information is intentionally provided on the workforce survey, the dentist or dental hygienist providing such information may be subject to administrative or criminal penalties.[21]

C. Government Sector Impact:

The DOH and the Board are required to adopt rules related to the dental workforce survey and convene meetings of the advisory group. Although the CS requires the DOH to implement the CS within existing resources, the DOH has indicated that a .05 full time equivalent (FTE) administrative assistant is required to assist with the activities of the advisory group. If meetings of the advisory group are not handled electronically, then the DOH estimates it will cost approximately $41,000 annually in related travel expenses to convene the 15 members four times per year.[22]

## 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.)

**CS by Health Regulation on January 25, 2011:**
The CS differs from the bill in that it:

- Clarifies that all information collected from the dental workforce survey is to be assessed and shared in a timely fashion with all communities of interest, instead of collected in a timely fashion (which occurs automatically upon licensure renewal); and,
- Clarifies that the advisory body formed in the CS is to provide input as to developing questions for the "dental" workforce survey, not "dentist" workforce surveys, which is in keeping with the rest of the CS.

B. Amendments:

None.



[21] *See* ss. 456.072, 837.06, and 456.067, F.S.
[22] *Supra* fn. 10.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | CS/SB 314 |
| INTRODUCER: | Health Regulation Committee and Senator Richter |
| SUBJECT: | Public Records/Dental Workforce Surveys |
| DATE: | March 15, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | O'Callaghan | Stovall | HR | **Fav/CS** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | BC | |
| 4. | | | RC | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | ☐ | Statement of Substantial Changes |
| B. AMENDMENTS..... | ☐ | Technical amendments were recommended |
| | ☐ | Amendments were recommended |
| | ☐ | Significant amendments were recommended |

## I. Summary:

The committee substitute (CS) makes confidential and exempt from public records requirements all personal identifying information contained in records provided by dentists or dental hygienists in response to dental workforce surveys and held by the Department of Health (DOH). The CS specifies circumstances under which the confidential and exempt information may be released.

The CS provides for review and repeal of the exemption pursuant to the Open Government Sunset Review Act and provides a statement of the public necessity for the exemption.

Because this CS creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.[1]

This CS creates three undesignated sections of law.

[1] FLA. CONST. art. I, s. 24(c).

## II. Present Situation:

### Public Records

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.[2] 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.[3] Article I, s. 24, of the State Constitution, provides that:

> (a) 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 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,[4] which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.[5] Section 119.07(1)(a), F.S., states:

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

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.[6]

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[2] Section 1390, 1391 F.S. (Rev. 1892).
[3] FLA. CONST. art. I, s. 24.
[4] Chapter 119, F.S.
[5] 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. *See supra* fn. 3.
[6] Section 119.011(12), F.S.

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] 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 accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

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.[13] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[14]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act (Act)[15] provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, 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.[16] 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, which administration would be significantly impaired without the exemption;

[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).
[9] *Supra* fn. 1.
[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] *Supra* fn. 1.
[13] Florida Attorney General Opinion 85-62.
[14] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).
[15] Section 119.15, F.S.
[16] Section 119.15(6)(b),F.S.

- 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.[17]

The Act also requires the Legislature to consider the following:
- 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[18] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

> notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

**Workforce Surveys**

CS for SB 312 requires all Florida licensed dentists and dental hygienists to complete a workforce survey as a part of their licensure renewal, beginning in 2012. The CS for SB 312 provides that licensure renewal in 2012 is not contingent upon the completion and submission of the dental workforce survey; however, the Board may not renew the license of any dentist or dental hygienist for subsequent renewals until the survey is completed and submitted by the licensee.

[17] *Id.*
[18] *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

Medical physicians and osteopathic physicians are required to respond to physician workforce surveys required as a condition of license renewal.[19] All personal identifying information contained in records provided by physicians in response to these physician workforce surveys are confidential and exempt under s. 458.3193, F.S.

## III. Effect of Proposed Changes:

**Section 1** creates an undesignated section of law to provide that personal identifying information that is contained in records provided by dentists or dental hygienists licensed under ch. 466, F.S., in response to dental workforce surveys required as a condition of license renewal and held by the DOH is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The CS authorizes disclosure of such information:

- With the written consent of the individual to whom the information pertains or the individual's legally authorized representative,
- By court order upon a showing of good cause, or
- To a research entity, if the entity seeks the records or data pursuant to a research protocol approved by the DOH, maintains the records or data in accordance with the approved protocol, and enters into a purchase and data-use agreement with the department, the fee provisions of which are consistent with s. 119.07(4), F.S. The agreement must restrict the release of information that would identify individuals, limit the use of records or data to the approved research protocol, and prohibit any other use of the records or data. Copies of such records or data remain the property of the DOH. The DOH may deny a research entity's request for records or data if the protocol provides for intrusive follow-back contacts, does not plan for the destruction of confidential records after the research is concluded, is administratively burdensome, or does not have scientific merit.

The CS provides that the public records exemption created in this act is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** creates an undesignated section of law providing justification of public necessity for the exemption. The public necessity statement states that responding to the dental workforce survey is a condition of licensure renewal for dentists and dental hygienists licensed in Florida, and that candid and honest responses to the workforce survey will ensure that timely and accurate information is available to the DOH. The failure to maintain the confidentiality of the personal identifying information would prevent the resolution of important state interests to ensure the availability of dentists or dental hygienists in this state.

**Section 3** provides that this public records exemption takes effect on the same date that its linked substantive bill, CS for SB 312, takes effect.

[19] Section 381.4018, F.S.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

**Vote Requirement**
Section 24(c), art. I, of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this CS creates a new public records exemption, it requires a two-thirds vote for passage.

**Subject Requirement**
Section 24(c), art. I, of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This CS complies with that requirement.

**Public Necessity Statement**
Section 24(c), art. I, of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this CS creates a new public records exemption, it includes a public necessity statement.

C. Trust Funds Restrictions:

The provisions of this CS have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This CS will protect personal identifying information of dentists and dental hygienists who respond to the dental workforce survey, which is a requirement of licensure renewal.

C. Government Sector Impact:

The DOH and the Board will need to ensure that policies and procedures are in place to prevent the release of the personal identifying information except under the limited situations provided for in the CS.

## 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.)

**CS by Health Regulation on January 25, 2011:**
The CS differs from the bill in that it links the CS to its substantive companion bill, CS for SB 312, to which the public records exemption applies.

B. Amendments:

None.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 420 |
| INTRODUCER: | Health Regulation Committee |
| SUBJECT: | OGSR/Florida Center for Brain Tumor Research |
| DATE: | March 15, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | O'Callaghan | Stovall | HR | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of an Open Government Sunset Review of the public records exemptions for the Florida Center for Brain Tumor Research (FCBTR). The bill saves from repeal and re-enacts the exemption related to information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that jurisdiction. Instead of re-enacting the exemption for an individual's medical record, the bill revises the law to exempt information which identifies a donor of specimens or information to the brain tumor registry and repository. In addition, the bill authorizes disclosure of exempted information maintained by the FCBTR for bona fide research under specified conditions.

Because this bill expands an existing exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 381.8531, F.S.

## II. Present Situation:

### Florida's Public Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.[1] In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

[1] Section 1390, 1391 F.S. (Rev. 1892).

Section 24(a), Art. I, of the Florida 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 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.

The Public Records Act is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[2] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[3] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[4] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[5]

Only the Legislature is authorized to create exemptions from open government requirements.[6] 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 accomplish the stated purpose of the law.[7] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[8]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is

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[2] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

[3] Section 119.011(2), F.S., defines "agency" 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."

[4] *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[5] *Wait v. Florida Power & Light Co.,* 372 So. 2d 420 (Fla. 1979).

[6] FLA. CONST. art. I, s. 24(c) (1992).

[7] *Memorial Hospital-West Volusia, Inc. 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).

[8] *Supra* fn. 6.

made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[9] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[10]

Access to public records is a substantive right and therefore, a statute affecting that right is presumptively prospective in its application.[11] There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.[12]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment.[14] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[15] 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.[16] An exemption meets the statutory criteria if it:

- 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 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 the safety of such individuals; 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 which 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.[17]

The act also requires the Legislature to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:[18]

- 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?

[9] Attorney General Opinion 85-62, August 1, 1985.
[10] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).
[11] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).
[12] *Id.*
[13] Section 119.15, F.S.
[14] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the 5-year review.
[15] Section 119.15(6)(b), F.S.
[16] *Id.*
[17] *Id.*
[18] Section 119.15(6)(a), F.S.

- 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?

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[19] If the exemption is r-eenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[20] then a public necessity statement and a two-thirds vote for passage are not required.[21]

**Brain Tumors**

Malignant brain tumors are one of the most virulent forms of cancer. Brain tumors can be either primary – those that start in the brain and generally stay there, or metastatic – those that begin as a cancer elsewhere in the body and spread to the brain.[22] Some tumors are not cancer but can cause disability and death because of their location in the brain.[23] They can press on sensitive areas and cause serious health problems and surgery to remove them has risks.

Brain tumors are the:
- Second leading cause of cancer-related deaths in children under age 20 (leukemia is the first);
- Second leading cause of cancer-related deaths in males up to age 39;
- Second leading cause of cancer-related deaths in females under age 20; and
- Fifth leading cause of cancer-related deaths in females ages 20–39.6[24]

An estimated 62,930 new cases of primary brain tumors were expected to be diagnosed in 2010 and includes both malignant (23,720) and non-malignant (39,210) brain tumors.[25]

Patients with moderately severe malignant tumors typically survive for two to 5 years, whereas those with severe forms live only 12 to 15 months on average, even with optimal treatment.[26] The normal course of treatment for malignant tumors is surgery followed by a combination of chemotherapy and radiation.

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[19] *Supra* fn. 6.
[20] An example of an exception to a public records exemption would be allowing another agency access to confidential or exempt records.
[21] *Cf., State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).
[22] National Brain Tumor Society, *Brain Tumor FAQ*, available at: http://www.braintumor.org/patients-family-friends/about-brain-tumors/brain-tumor-faq.html (Last visited on January 4, 2011).
[23] *Id.*
[24] American Brain Tumor Association: *Facts and Statistics, 2010*, available at: http://www.abta.org/sitefiles/pdflibrary/ABTA-FactsandStatistics2010v3.pdf (Last visited on January 4, 2011) (citing Ahmedin Jemal et al.; *Cancer Statistics, 2009*; CA: A Cancer Journal for Clinicians; American Cancer Society; May 2009).
[25] *Id.*
[26] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009, citing Patrick Y. Wen and Santosh Kesari, "Malignant Gliomas in Adults," *The New England Journal of Medicine* 2008; 359: 492-507. (A copy of the report is on file with the Florida Senate Committee on Health Regulation).

**The Florida Center for Brain Tumor Research**

The Florida Legislature established the FCBTR within the Evelyn F. and William L. McKnight Brain Institute of the University of Florida on July 1, 2006.[27] The Legislature initially appropriated $500,000 for the FCBTR.[28] In 2009 and 2010, the Legislature appropriated $500,000 to the FCBTR.[29]

The purpose of the FCBTR is to find cures for brain tumors by:

- Establishing a coordinated effort among the state's public and private universities and hospitals and the biomedical industry to discover brain tumor cures and develop brain tumor treatment modalities;
- Expanding the state's economy by attracting biomedical researchers and research companies to the state;
- Developing and maintaining a brain tumor registry that is an automated, electronic, and centralized database of individuals with brain tumors; and
- Fostering collaboration with brain cancer research organizations and other institutions, providing a central repository for brain tumor biopsies from individuals throughout the state, improving and monitoring brain tumor biomedical research programs within the state, facilitating funding opportunities, and fostering improved technology transfer of brain tumor research findings into clinical trials and widespread public use.[30]

A Scientific Advisory Council (The Council) is established within the FCBTR.[31] The Council is required to meet at least annually, however it generally meets twice per year.[32] The Council consists of members from the University of Florida, the Scripps Research Institute Florida, Cleveland Clinic in Florida, M.D. Anderson Cancer Center Orlando, Mayo Clinic in Jacksonville, H. Lee Moffitt Cancer Center and Research Institute, the University of Miami, and a neurosurgeon in private practice.[33]

**The Registry**

The FCBTR maintains a collaborative, statewide registry of banked cancerous and non-cancerous brain tumor specimens, matched samples of DNA, plasma, serum and cerebrospinal fluid, clinical and demographic information, and quality-of-life assessments obtained from patients.[34]

As of January 5, 2010, 742 patients contributed tissue to the bank. There are 2,550 brain tumor tissue samples and 2,469 plasma, serum, DNA, and cerebrospinal fluid samples stored in the

[27] Section 381.853, F.S., was enacted in ch. 2006-258, Laws of Florida.
[28] The FCBTR is to be funded through private, state, and federal sources. See s. 381.853(4)(g), F.S.
[29] *See* ch. 2009-81 and ch. 2010-152, Laws of Florida.
[30] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009. A copy of this report is on file with the Florida Senate Health Regulation Committee.
[31] Section 381.853(5), F.S.
[32] Response to the Florida House of Representative's questionnaire by the Florida Center for Brain Tumor Research dated September 8, 2010. A copy of this response is on file with the Florida Senate Health Regulation Committee.
[33] *Id. See also* s. 381.853(5)(a), F.S.
[34] *Supra* fn. 26.

FCBTR bio-repository. One hundred forty-two samples have been distributed from the bio-repository for research purposes.[35]

Patients, located in and outside of Florida, are asked to participate in the FCBTR's bio-repository and registry, which has been approved by an Institutional Review Board,[36] to provide valuable specimens and data for future research.[37] The patient signs an informed consent form to authorize the collection and banking of his or her specimens.[38] The banked materials are made available to researchers in Florida and beyond who are investigating improved treatments and cures for brain tumors.[39]

A web-based database stores demographic, clinical and quality-of-life data, creates a registry of participants, and bar-codes and tracks the samples. This clinical database contains information available (in unidentifiable format) to researchers who study brain tumors.[40] Although the registry receives information that identifies an individual donor, neither the registry nor the FCBTR obtain a copy of the donor's medical record.[41] According to a representative from the FCBTR, no researcher has requested information that identifies an individual donor.[42] However, it is conceivable that certain researchers may need such information to further their research objectives. Currently, the law does not authorize release of this information for research purposes.

**Protecting Health Information in Research**

The federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule establishes national standards, and requires appropriate safeguards, to protect individuals' medical records and other personal health information.[43] The Privacy Rule applies only to "covered entities," which are health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically.[44] The Privacy Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records and to request corrections; it also sets limits and conditions on the uses

[35] *Id.*
[36] An Institutional Review Board is any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects to assure the protection of the rights and welfare of the human subjects. *See* 21 C.F.R. Part 56.
[37] *Supra* fn. 26.
[38] Section 381.853(3), F.S., provides for a patient to sign a form to opt-out of participation in the registry; however the FCBTR requires an informed consent to participate in the registry.
[39] *Supra* fn. 26.
[40] *Id.*
[41] Email received by professional staff of the Florida Senate Health Regulation Committee from a representative of the FCBTR on July 27, 2010. A copy of the email is on file with the committee.
[42] *Id.*
[43] U.S. Department of Health and Human Services, *Health Information Privacy: The Privacy Rule*, available at http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html (Last visited on January 5, 2011).
[44] *Id. See also* U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).

and disclosures that may be made of such information without patient authorization.[45] The Privacy Rule supplements other federal protections for research involving human subjects.[46]

Many organizations, institutions, and researchers that use, collect, access, and disclose individually identifiable health information are not covered entities.[47] To gain access for research purposes to protected health information created or maintained by covered entities, the researcher or other organization may have to provide supporting documentation on which the covered entity may rely in meeting the requirements, conditions, and limitations of the Privacy Rule.[48]

In 2009, the Institute of Medicine's Committee on Health Research and the Privacy of Health Information issued a report concluding that the HIPAA Privacy Rule does not adequately protect the privacy of people's personal health information and hinders important health research discoveries.[49]

The FCBTR also has a Certificate of Confidentiality from the National Institutes of Health.[50] Certificates of Confidentiality offer an important protection for the privacy of research study participants by protecting identifiable research information from forced disclosure (e.g., through a subpoena or court order).[51] The HIPPA Privacy Rule does not protect against all forced disclosure since it permits disclosures required by law, for example. Various Federal agencies may grant a Certificate of Confidentiality for studies that collect information that, if disclosed, could damage subjects' financial standing, employability, insurability, or reputation, or have other adverse consequences. By protecting research and institutions from forced disclosure of such information, Certificates of Confidentiality help achieve research objectives and promote participation in research studies.[52]

**Institutional Review Boards (IRB)**

Under federal Food and Drug Administration regulations, an IRB is an appropriately constituted group that has been formally designated to review and monitor biomedical research involving human subjects.[53] An IRB has the authority to approve, require modifications in (to secure

[45] *Supra* fn. 43.
[46] *See e.g.*, The Common Rule, 45 C.F.R. Part 46, Subpart A and the Food and Drug Administration's human subject protections regulations 21 C.F.R. Parts 50 and 56, which primarily address subjects involved in clinical investigations.
[47] U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).
[48] NIH Publication Number 03-5388 Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule, April 2003, available at: http://privacyruleandresearch.nih.gov/pdf/HIPAA_Privacy_Rule_Booklet.pdf, (Last visited on January 5, 2011).
[49] The Institute of Medicine, *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*. The National Academies' press release announcing the report is available at: http://www.iom.edu/Reports/2009/Beyond-the-HIPAA-Privacy-Rule-Enhancing-Privacy-Improving-Health-Through-Research.aspx, (Last visited on January 5, 2011).
[50] *Supra* fn. 26.
[51] U.S. Department of Health and Human Services, *Certificates of Confidentiality: Background Information*, available at http://grants.nih.gov/grants/policy/coc/background.htm (Last visited on January 5, 2011).
[52] *Id.*
[53] *See supra* fn. 36.

approval), or disapprove research. This group review serves an important role in the protection of the rights and welfare of human research subjects.[54]

The purpose of IRB review is to assure, both in advance and by periodic review, that appropriate steps are taken to protect the rights and welfare of humans participating as subjects in the research.[55] To accomplish this purpose, IRBs use a group process to review research protocols and related materials (e.g., informed consent documents and investigator brochures) to ensure protection of the rights and welfare of human subjects of research.[56]

IRB approval means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

**Public Records Exemption for the FCBTR**

Chapter 2006-259, L.O.F., enacted concurrently with the establishment of the FCBTR, made certain information held by the FCBTR confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution.[57]

The exempted information includes an individual's medical records and any information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. This law was codified in s. 381.8531, F.S., which is subject to the Open Government Sunset Review Act.[58] Accordingly, it will be repealed automatically on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Exemptions from the public records law must be created by a general law which must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[59] The Legislature expressed the reasons supporting the public necessity for making an individual's medical records held by the brain tumor registry confidential and exempt from the public records requirements as follows:

> Matters of personal health are traditionally private and confidential concerns between the patient and the health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors. For these reasons, the individual's expectation of and right to privacy in all matters regarding his or her personal health

[54] U.S. Food and Drug Administration, *Institutional Review Boards Frequently Asked Questions-Information Sheet*, available at http://www.fda.gov/RegulatoryInformation/Guidances/ucm126420.htm (Last visited on January 5, 2011).
[55] *Id.*
[56] *Id.*
[57] The FCBTR also operates under the public records exemptions in s. 760.40, F.S., related to genetic testing and DNA analysis. DNA analysis is defined in s. 760.40, F.S., to mean the medical and biological examination and analysis of a person to identify the presence and composition of genes in that person's body. The term includes DNA typing and genetic testing. Results of a DNA analysis are confidential and exempt from the public records law.
[58] Section 119.15, F.S.
[59] *Supra* fn. 7.

> necessitates this exemption. [In addition], …the release of such record could be defamatory to the patient or could cause unwarranted damage to the name or reputation of that patient.

Research from the review disclosed that the FCBTR does not receive a donor's medical records. However, the FCBTR does receive tissue samples, certain medical information about the donor that is extracted from the donor's medical record, and information which identifies the donor. The FCBTR has requested that the exemption be revised to reflect the practice of the FCBTR.[60] This will help ensure that a potential donor is not discouraged from donating to the repository.

The Legislature expressed the reasons supporting the public necessity for making information received by the brain tumor registry from an individual from another state or nation or the Federal Government that is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law confidential and exempt from the Florida public records requirement because without this protection, another state or nation or the Federal Government might be less likely to provide information to the registry in the furtherance of its duties and responsibilities.

Representatives from the FCBTR indicated that they have received information from a person from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law.[61] The representative cited protections under HIPAA and its implementing regulations and state law, as well as the federal Common Rule as the basis for protection from public disclosure in those jurisdictions.[62]

As a part of participating in the Open Government Sunset Review process, the FCBTR requested the authority under Florida's law to release identifying information consistent with federal and another state's laws if applicable when necessary to further the purposes of the research and when additional safeguards are in place to protect that information.[63]

Based on research conducted as part of the Open Government Sunset Review Act as required by s. 381.8531(2), F.S., professional staff in the Senate Committee on Health Regulation recommends that the Legislature:

- Re-enact and modify the public records exemption in s. 381.8531, F.S., to delete the exemption for an individual's medical record and instead exempt any personal identifying information pertaining to a donor to the registry and repository. This exemption reflects the practice of the FCBTR, furthers the purpose of the FCBTR to foster research objectives, and complies with the statutory requirements for an exemption because it protects information of a personal nature;
- Authorize the release of identifying information when it is specifically needed to further a particular medical or scientific research project related to brain tumors and when additional privacy safeguards are in place; and

[60] *Supra* fn. 41.
[61] *Supra* fn. 32.
[62] *Id. See supra* fn. 46 for information regarding the Common Rule.
[63] *Supra* fn. 41.

- Re-enact the exemption related to information received by the brain tumor registry from an individual from another state or nation. Continuing the exemption promotes donations from persons in other jurisdictions which, in turn, will further the purposes of the FCBTR.

## III. Effect of Proposed Changes:

The bill exempts information held by the FCBTR before, on, or after July 1, 2011,[64] which identifies an individual who has donated specimens or information to the brain tumor registry and repository from public disclosure. This information is made confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution. The bill eliminates the exemption from public disclosure for an individual's medical record because the FCBTR does not receive or maintain an individual's medical record.

The bill provides for disclosure of a donor's personal identifying information or any information that is received from an individual from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law when the research cannot otherwise be conducted without that information. Specific conditions for such release are included in the bill. The confidential and exempt information may only be disclosed to a person engaged in bona fide research if the researcher agrees to:

- Submit to the FCBTR a research plan that has been approved by an institutional review board and that specifies the exact nature of the information requested, the intended use of the information, and the reason that the research could not practicably be conducted without the information;
- Sign a confidentiality agreement with the FCBTR;
- Maintain the confidentiality of the personal identifying information or otherwise confidential or exempt information; and
- To the extent permitted by law and after the research is concluded, destroy any confidential records or information obtained.

Notwithstanding the authorization in state law for such release of identifying information, the disclosure must comply with applicable federal law.

Because the exemption from the public records law is modified and broadens the scope of the exemption, a statement pertaining to the public necessity for the exemption is provided and a two-thirds vote of each house is required to enact the bill. Additionally, the law must be scheduled for review again under the Open Government Sunset Review Act. Accordingly, the proposed committee bill provides for repeal of this law on October 2, 2016, if not reviewed and saved from repeal through reenactment by the Legislature.

The act will take effect on July 1, 2011.

[64] The phrase "before, on, or after July 1, 2011" provides a clear legislative intent that the law should apply retroactively. As mentioned previously in the analysis, there must be a clear legislative intent for a statute affecting substantive rights to apply retroactively. *See supra* fn. 11, 12.

**Other Potential Implications**:

If the Legislature chooses not to retain or modify the public records exemption for the FCBTR repository and registry, the exemption will expire on October 2, 2011. Without the exemption, certain information in the repository and registry of the FCBTR might become public, deter donations, and impede the timely discovery of treatments or cures for brain tumors.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public records exemption in s. 381.8531, F.S. Because the bill expands the exemption, it contains a constitutionally required statement of public necessity for the expansion. Additionally, this bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by s. 24(c), Art. I, of the Florida Constitution, because it expands the public records exemption.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of subsection 19(f), Art. III, of the Florida Constitution.

## 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.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 568 |
| INTRODUCER: | Judiciary Committee |
| SUBJECT: | OGSR/Court Records Related to Court Monitors |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Treadwell/Maclure | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and orders finding no probable cause in guardianship proceedings. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

The bill retains the exemptions and makes organizational changes for clarity. The bill also removes the confidential status of court orders appointing nonemergency court monitors and makes these orders exempt rather than confidential and exempt. In addition, the bill eliminates a reference to "court determinations" in the public-records exemption relating to determinations and orders finding no probable cause for further court action.

This bill substantially amends section 774.1076, Florida Statutes.

## II. Present Situation:

### Florida 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.[1] 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:

[1] Sections 1390, 1391 F.S. (Rev. 1892).

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 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.[2]

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.[3]

The term "public records" 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.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open-government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

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[2] FLA. CONST. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), F.S.
[5] 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."
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[7] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[8] FLA. CONST. art. I, s. 24(c).
[9] *Id.*
[10] *Id.*
[11] Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.
[12] FLA. CONST. art. I, s. 24(c).

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.[13] If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[15]

**Public Access to Court Records**

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,[16] the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."[17] Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.[18] This constitutional provision provides for public access to judicial records, except for those records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.[19]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[20] 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.[21] Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves. [22] An identifiable public purpose is served if the exemption meets one of three specified purposes and 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 statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

[13] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[14] *Id.*
[15] *Id.* at 54.
[16] *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).
[17] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).
[18] FLA. CONST. art. I, s. 24.
[19] *Id.*
[20] Section 119.15(3), F.S.
[21] Section 119.15(5)(a), F.S.
[22] Section 119.15(6)(b), F.S.

- 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 the safety of such individuals; 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 which 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.[23]

The act also requires consideration of the following:

- 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?[24]

**Guardianship**

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.[25] A guardianship is:

> a trust relationship of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs.[26]

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.[27] If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.[28] If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.[29]

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[23] *Id*.
[24] Section 119.15(6)(a), F.S.
[25] Section 744.1012, F.S.
[26] 28 FLA. JUR. 2D *Guardian and Ward* s. 1 (2004).
[27] Section 744.331(3), F.S.
[28] Section 744.331(4), F.S.
[29] *See* s. 744.331(6)(b) and (f), F.S.

**Authority of a Guardian**

An order appointing a guardian must prescribe the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.[30] The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.[31] A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.[32] Some of the guardians' powers may only be exercised with court approval.[33]

**Court Monitoring in Guardianship Cases**

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."[34] Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.[35] According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."[36]

**Nonemergency Court Monitors**

Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. However, a family or any person with a personal interest in the proceedings may not serve as a monitor.[37] The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.[38] A monitor may receive a reasonable fee paid from the property of the ward for his or her services.[39] If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[40]

[30] Section 744.344(1), F.S.
[31] Section 744.344(2), F.S.
[32] *See* ss. 744.361(4) and 744.444, F.S.
[33] Section 744.441, F.S.
[34] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Ward*, 13 (2003).
[35] *Id.*
[36] *Id.* at 4.
[37] Section 744.107(1), F.S.
[38] Section 744.107(3), F.S. These actions include amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.
[39] Section 744.107(4), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as a court monitor.
[40] *Id.*

**Emergency Court Monitors**

Upon inquiry of an interested party or its own volition, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties.[41] The court must specifically find that:

- There appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired; or
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[42]

Within 15 days after the entry of the order appointing the monitor, the monitor must file his or her report of findings and recommendations to the court. The court reviews the report and determines whether there is probable cause to take further action to protect the ward.[43] If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.[44] Following the show-cause hearing, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.[45]

Identical to the provisions governing nonemergency court monitors, an emergency court monitor may receive a reasonable fee paid from the property of the ward for his or her services.[46] If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[47]

**Court-Records Exemptions Relating to Court Monitors**

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[48] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[49] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court

[41] Section 744.1075(1)(a), F.S.
[42] *Id.*
[43] Section 744.1075(3), F.S.
[44] Section 744.1075(4)(a), F.S.
[45] Section 744.1075(4)(c), F.S. These actions include: entering a judgment of contempt; ordering an accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; or initiating proceedings to remove the guardian.
[46] Section 744.1075(5), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as an emergency court monitor.
[47] *Id.*
[48] Section 744.1076(1)(a), F.S. The companion exemption for emergency court monitors contained in s. 744.1076(2)(a), F.S., is only "exempt" rather than "confidential and exempt."
[49] Section 744.1076(1)(b), F.S.

makes a finding of probable cause for further court action after consideration of the court monitor's report.[50] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[51] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[52] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[53] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[54] However, the court may allow access to these determinations and orders upon a showing of good cause.

In its statement of public necessity accompanying the creation of these exemptions, the Legislature recognized that:

> release of the exempt order [appointing court monitors] would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.[55]

With regard to the reports of court monitors, the Legislature recognized that release of these reports would produce undue harm to the ward and hinder the investigation of the monitor. In addition, the Legislature stated that the reports may contain sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

The Legislature concluded that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause must be made

[50] Section 744.1076(1)(c), F.S.
[51] Section 744.1076(2)(a), F.S.
[52] Section 744.1076(2)(b), F.S.
[53] Section 744.1076(2)(c), F.S.
[54] Section 744. 1076(3), F.S.
[55] Laws of Fla. 2006-129, s. 2.

confidential and exempt because unfounded allegations against a guardian could be damaging to the reputation of the guardian and cause undue embarrassment as well as could invade the guardian's privacy.[56]

The public-records exemptions will stand repealed on October 2, 2011, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

**Judiciary Committee's Open Government Sunset Review**

During its review of these public-records exemptions under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee interviewed judges, guardianship practitioners, clerks of court, the Florida Department of Elder Affairs, The Florida Bar, and other interested parties to gauge the utility of the exemptions. Senate professional staff also reviewed guardianship files in which a court monitor had been appointed. As a result of the interviews and file review, Senate professional staff recommended that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.[57] Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[58]

Senate professional staff also recommended that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommended that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an "order finding no probable cause" is confidential and exempt from public disclosure.

## III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for certain court records relating to court monitors in guardianship proceedings found in s. 744.1076, F.S. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

[56] *Id.*
[57] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[58] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

The bill retains the exemptions and makes organizational changes to the statute for clarity. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency and to allow nonemergency court monitors to share the order with others as necessary to aid in the monitor's investigation. However, under the bill, these orders would retain their current exempt status.

Additionally, the bill removes a reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause because, in practice, the probable cause determination is typically contained in a written order included in the guardianship file. In effect, the bill simplifies the exemption by clearly stating that any order finding no probable cause will be confidential and exempt from public disclosure.

The bill provides an effective date of October 1, 2011.

**Other Potential Implications:**

If the Legislature chooses not to retain the public-records exemptions for orders and reports of court monitors, the exemptions will expire on October 2, 2011. Absent the exemptions, certain sensitive information pertaining to the guardian or the ward may be available to the public, and the court monitor's investigation may be impeded by the disclosure of the order appointing the court monitor.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records exemptions. This bill complies with the requirement of Article I, Section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

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.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 570 |
| INTRODUCER: | Judiciary Committee |
| SUBJECT: | OGSR/Interference with Custody |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Daniell/Maclure | Maclure | JU | **JU** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Currently, the public-records exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. The bill retains the public-records exemption by deleting language providing for the scheduled repeal of the exemption.

This bill substantially amends section 787.03, Florida Statutes.

## II. Present Situation:

### Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.[1] In 1992, Floridians adopted an amendment to the

[1] Sections 1390, 1391, F.S. (Rev. 1892).

State Constitution that raised the statutory right of access to public records to a constitutional level.[2] Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency[4] records are available for public inspection. Section 119.011(12), F.S., defines the term "public records" very broadly to include "all documents, ... tapes, photographs, films, sounds recordings … made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Unless made exempt, all such materials are open for public inspection at the moment they become records.[5]

Only the Legislature is authorized to create exemptions to open-government requirements. 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 accomplish the stated purpose of the law. 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.[6]

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[7] If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[8]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[9] provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, 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. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[10] An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and

[2] FLA. CONST. art. I, s. 24.
[3] Chapter 119, F.S.
[4] An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.
[5] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[6] FLA. CONST. art. I, s. 24(c).
[7] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[8] *Id*. at 54.
[9] Section 119.15, F.S.
[10] Section 119.15(6)(b), F.S.

cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- 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 information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.[11]

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- 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?
- 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?[12]

**Interference with Custody**

The Legislature in 1974 created the offense of interference with custody. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.[13] Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.[14]

[11] *Id*.
[12] Section 119.15(6)(a), F.S.
[13] Section 787.03(1), F.S.
[14] Section 787.03(2), F.S.

The statute prescribes three defenses to the offense of interference with custody:

> (a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.
> (b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, [F.S.,] and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.
> (c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.[15]

Distinct from the three defenses, the statute further specifies that the statute does not apply:

> in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.[16]

To avail himself or herself of this exception, a person who takes a minor or incompetent person must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the minor or incompetent person resided. The report must include the name of the person taking the minor or incompetent person, the current address and telephone number of the person and the minor or incompetent person, and the reasons the minor or incompetent person was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act[17] or the Uniform Child Custody Jurisdiction and Enforcement Act.[18]
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the minor or incompetent person.[19]

[15] Section 787.03(4)(a)-(c), F.S.
[16] Section 787.03(6)(a), F.S.
[17] 28 U.S.C. s. 1738A.
[18] Sections 61.501-61.542, F.S.
[19] Section 787.03(6)(b), F.S.

**Public-Records Exemption for Interference with Custody**

Under an accompanying public-records exemption, the current address and telephone number of the person taking the minor or incompetent person, as well as the address and telephone number of the minor or incompetent person, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.[20] As originally enacted in 2000, this exemption applied to "information provided" to a sheriff or state attorney as part of the report filed within 10 days of taking a "child." Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.[21] The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.[22]

During the 2005 Regular Session, the Legislature reenacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.[23]

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. As a consequence, the 2005 legislation reenacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it was reviewed and saved from repeal through reenactment.[24] During the 2006 Regular Session, the Legislature passed House Bill 7113, reenacting and revising the public-records exemption for interference with custody.[25] Among other changes, the 2006 legislation included within the scope of the public-records exemption the address and telephone information for an incompetent person who is taken, in addition to the same information for a child.

The public-records exemption for interference with custody is again scheduled for repeal on October 2, 2011, unless saved from repeal through reenactment by the Legislature. In reviewing the public-records exemption under the Open Government Sunset Review Act, Senate professional staff of the Judiciary Committee found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or incompetent person. In order to gauge how this exemption functions and its importance,

[20] Section 787.03(6)(c), F.S.
[21] See s. 787.03(6)(c), F.S. (2000).
[22] Comm. on Judiciary, The Florida Senate, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody, s. 787.03, F.S.* (Interim Report 2005-217) (Nov. 2004), *available at* http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-217ju.pdf (last visited Aug. 31, 2010).
[23] Chapter 2005-89, Laws of Fla.
[24] See s. 787.03(7), F.S. (2005); s. 1, ch. 2005-89, L.O.F.
[25] Chapter 2006-115, Laws of Fla.

professional staff sent questionnaires to interested parties, including the Florida Prosecuting Attorneys Association, the Florida Sheriffs Association, and the Florida Coalition Against Domestic Violence. Responses from the questionnaire indicated that the exemption is necessary to provide protection to victims of domestic violence, as well as a child or incompetent person who may also be in danger.[26] Based on the questionnaire responses, this public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.[27]

Professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

## III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. This public-records exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

This bill retains the public-records exemption related to the interference with custody statute by deleting language providing for the scheduled repeal of the exemption.

This bill provides an effective date of October 1, 2011.

**Other Potential Implications**:

If the Legislature chooses not to retain the public-records exemption for interference with custody, the exemption will expire on October 2, 2011. Absent the exemption, the address and telephone number of the person fleeing with a child or incompetent person due to domestic violence would be public and accessible by the person who is alleged to have created the safety threat.

[26] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[27] Section 119.15(6)(b)2., F.S.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains the public-records exemption for specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. This bill appears to comply with the requirements of Article I, Section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

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:

In order to gain the exception provided in statute for a person fleeing domestic violence or seeking to protect a minor or incompetent person from harm, the person must file a report on their whereabouts with the sheriff or state attorney within 10 days after taking the minor or incompetent person. Some survey respondents expressed concern that the 10-day period was too long. One sheriff explained that law enforcement may spend several days investigating the disappearance of the minor or incompetent person without the benefit of knowing that the minor or incompetent person is safe and in the company of a person having legal custody of the minor or incompetent person. However, according to a representative of an organization that advocates on behalf of domestic violence victims, the 10-day period should not be reduced because a

person fleeing domestic violence often needs that amount of time to find a safe place to stay and file the report.[28]

## 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.



[28] E-mail from Nina Zollo, Florida Coalition Against Domestic Violence, to professional staff of the Judiciary Committee (Sept. 7, 2010) (on file with the Senate Committee on Judiciary).

589468

585-02556-11

Proposed Committee Substitute by the Committee on Governmental Oversight and Accountability

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 744.7082, F.S., which provides an exemption from public-records requirements for information that identifies certain donors or prospective donors to the direct-support organization for the Statewide Public Guardianship Office; removing superfluous and duplicative language; repealing s. 2, ch. 2006-179, Laws of Florida, which provides for repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) of section 744.7082, Florida Statutes, is amended to read:

744.7082 Direct-support organization; definition; use of property; board of directors; audit; dissolution.—

(6) PUBLIC RECORDS.—Personal identifying information ~~The identity~~ of a donor or prospective donor ~~of funds or property~~ to the direct-support organization who desires to remain anonymous~~, and all information identifying the donor or prospective donor,~~ is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and s. 24(a), Art. I of the State Constitution~~, and that anonymity must be maintained in any publication concerning the direct-support organization~~.

Section 2. Section 2 of chapter 2006-179, Law of Florida, is repealed.

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585-02556-11

Section 3. This act shall take effect October 1, 2011.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 572 |
| INTRODUCER: | Judiciary Committee |
| SUBJECT: | OGSR/Statewide Public Guardianship Office |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, 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 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.

The Public-Records Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[1] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions from open government requirements.[5] 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 accomplish the stated purpose of the law.[6] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[7]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[8] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[9]

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[1] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

[2] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, 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."

[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[4] *Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979).

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia, Inc. 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).

[7] Article I, s. 24(c) of the State Constitution.

[8] Attorney General Opinion 85-62, August 1, 1985.

[9] *Williams v. City of Minneola,* 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied,* 589 So. 2d 289 (Fla. 1991).

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[10] provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.[11] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[12] 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.[13] An exemption meets the statutory criteria if it:

- 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 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 the safety of such individuals; 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 which 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.[14]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[15]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[16] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[17] then a public necessity statement and a two-thirds vote for passage are not required.

**Guardianship**

In 2006, the Florida Legislature significantly revised guardianship laws.[18] A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an

[10] Section 119.15, F.S.
[11] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.
[12] Section 119.15(6)(b), F.S.
[13] *Id*.
[14] *Id*.
[15] Section 119.15(6)(a), F.S.
[16] Article I, s. 24(c) of the State Constitution.
[17] An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.
[18] See ch. 2006-178, Laws of Fla.

adult with mental or physical disabilities. Section 744.102(4), F.S., defines "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property or both. A ward is defined as a person for whom a guardian has been appointed.[19]

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians[20] and reviews and approves instruction and training for professional guardians.[21] The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.[22]

**Public-Records Exemption for Donors' Identifying Information**

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.[23] The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office.[24]

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation's primary vehicle for fundraising. The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

[19] Section 744.102(22), F.S.
[20] Section 744.1083, F.S.
[21] Section 744.1085(3), F.S.
[22] See section 744.712, F.S., this grant program has not yet been funded.
[23] Department of Elderly Affairs Statewide Public Guardianship Office.
[24] Section 744.7082(1), F.S.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.[25] The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt

[25] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.[26]

## III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

The bill provides an effective date of October 1, 2011.

**Other Potential Implications**:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act. This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.[27]

### C. Trust Funds Restrictions:

None.

[26] Section 119.15(6)(b), F.S.

[27] Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.

## 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.

**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 Governmental Oversight and Accountability Committee

BILL: PCS/SB 572 (589468)

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Statewide Public Guardianship Office

DATE: March 16, 2011 REVISED:

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, 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 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.

The Public-Records Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[1] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions from open government requirements.[5] 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 accomplish the stated purpose of the law.[6] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[7]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[8] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[9]

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[1] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

[2] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, 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."

[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[4] *Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979).

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia, Inc. 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).

[7] Article I, s. 24(c) of the State Constitution.

[8] Attorney General Opinion 85-62, August 1, 1985.

[9] *Williams v. City of Minneola,* 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied,* 589 So. 2d 289 (Fla. 1991).

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[10] provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.[11] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[12] 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.[13] An exemption meets the statutory criteria if it:

- 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 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 the safety of such individuals; 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 which 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.[14]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[15]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[16] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[17] then a public necessity statement and a two-thirds vote for passage are not required.

**Guardianship**

In 2006, the Florida Legislature significantly revised guardianship laws.[18] A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an

[10] Section 119.15, F.S.
[11] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.
[12] Section 119.15(6)(b), F.S.
[13] *Id*.
[14] *Id*.
[15] Section 119.15(6)(a), F.S.
[16] Article I, s. 24(c) of the State Constitution.
[17] An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.
[18] See ch. 2006-178, Laws of Fla.

adult with mental or physical disabilities. Section 744.102(4), F.S., defines "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property or both. A ward is defined as a person for whom a guardian has been appointed.[19]

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians[20] and reviews and approves instruction and training for professional guardians.[21] The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.[22]

**Public-Records Exemption for Donors' Identifying Information**

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.[23] The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office.[24]

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation's primary vehicle for fundraising. The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

[19] Section 744.102(22), F.S.
[20] Section 744.1083, F.S.
[21] Section 744.1085(3), F.S.
[22] See section 744.712, F.S., this grant program has not yet been funded.
[23] Department of Elderly Affairs Statewide Public Guardianship Office.
[24] Section 744.7082(1), F.S.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.[25] The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt

[25] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.[26]

## III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

The bill makes organizational and drafting changes for clarity.

The bill provides an effective date of October 1, 2011.

**Other Potential Implications**:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act. This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.[27]

[26] Section 119.15(6)(b), F.S.

[27] Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.

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

**PCS by Governmental Oversight and Accountability on March 23, 2011:**
Makes organizational and drafting changes for clarity.

B. Amendments:

None.

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Proposed Committee Substitute by the Committee on Governmental Oversight and Accountability

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 119.071, F.S., which provides an exemption from public-records requirements for identification and location information of certain current and former employees of the Department of Juvenile Justice and their family members; revising the job classifications specified in the exemption to reflect those classifications used by the department; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (4) of section 119.071, Florida Statutes, is amended to read:

119.071 General exemptions from inspection or copying of public records.—

(4) AGENCY PERSONNEL INFORMATION.—

(d)1.a. The home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement personnel, including correctional and correctional probation officers, personnel of the Department of Children and Family Services whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, or other criminal activities, personnel of the Department of Health whose duties are to support the investigation of child abuse or neglect, and



personnel of the Department of Revenue or local governments whose responsibilities include revenue collection and enforcement or child support enforcement; the home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1).

b. The home addresses, telephone numbers, and photographs of firefighters certified in compliance with s. 633.35; the home addresses, telephone numbers, photographs, and places of employment of the spouses and children of such firefighters; and the names and locations of schools and day care facilities attended by the children of such firefighters are exempt from s. 119.07(1).

c. The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from s. 119.07(1).

d. The home addresses, telephone numbers, social security numbers, and photographs of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors; the home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of current or former state attorneys, assistant state attorneys, statewide prosecutors, or



assistant statewide prosecutors; and the names and locations of schools and day care facilities attended by the children of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

e. The home addresses and telephone numbers of general magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers; the home addresses, telephone numbers, and places of employment of the spouses and children of general magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers; and the names and locations of schools and day care facilities attended by the children of general magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution if the general magistrate, special magistrate, judge of compensation claims, administrative law judge of the Division of Administrative Hearings, or child support hearing officer provides a written statement that the general magistrate, special magistrate, judge of compensation claims, administrative law judge of the Division of Administrative Hearings, or child support hearing officer has made reasonable efforts to protect such information from being accessible through other means available to the public. This



sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15, and shall stand repealed on October 2, 2013, unless reviewed and saved from repeal through reenactment by the Legislature.

f. The home addresses, telephone numbers, and photographs of current or former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers of any local government agency or water management district whose duties include hiring and firing employees, labor contract negotiation, administration, or other personnel-related duties; the names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

g. The home addresses, telephone numbers, and photographs of current or former code enforcement officers; the names, home addresses, telephone numbers, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

h. The home addresses, telephone numbers, places of employment, and photographs of current or former guardians ad litem, as defined in s. 39.820; the names, home addresses, telephone numbers, and places of employment of the spouses and children of such persons; and the names and locations of schools and day care facilities attended by the children of such persons



are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the guardian ad litem provides a written statement that the guardian ad litem has made reasonable efforts to protect such information from being accessible through other means available to the public. This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature.

i. The home addresses, telephone numbers, and photographs of current or former juvenile probation officers, juvenile probation supervisors, detention superintendents, assistant detention superintendents, ~~senior~~ juvenile justice detention officers I and II, juvenile justice detention officer supervisors, juvenile justice residential officers, juvenile justice residential officer supervisors I and II, juvenile justice counselors, juvenile justice counselor supervisors, human services counselor administrators, senior human services counselor administrators ~~juvenile detention officers, house parents I and II, house parent supervisors, group treatment leaders, group treatment leader supervisors~~, rehabilitation therapists, and social services counselors of the Department of Juvenile Justice; the names, home addresses, telephone numbers, and places of employment of spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and~~


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~~shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.~~

j. The home addresses, telephone numbers, and photographs of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel; the home addresses, telephone numbers, and places of employment of the spouses and children of such defenders or counsel; and the names and locations of schools and day care facilities attended by the children of such defenders or counsel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature.

2. An agency that is the custodian of the information specified in subparagraph 1. and that is not the employer of the officer, employee, justice, judge, or other person specified in subparagraph 1. shall maintain the exempt status of that information only if the officer, employee, justice, judge, other person, or employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency.

Section 2. This act shall take effect October 1, 2011.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 600 |
| INTRODUCER: | Criminal Justice Committee |
| SUBJECT: | OGSR/Certain Specified Personal Information of DJJ Direct Care Employees |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Dugger | Cannon | CJ | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Committee on Criminal Justice.

Current law[1] provides that certain personal identifying and locating information of current or former specified direct care employees of the Department of Juvenile Justice (DJJ), their spouses, and their children is exempt from public-records requirements. This exemption is subject to review under the Open Government Sunset Review Act[2] and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. This bill reenacts the exemption.

The bill also updates the position titles of protected employees to reflect position title reclassifications and amends the exemption to protect the employees only if they have provided a written statement indicating that they have made reasonable efforts to protect the exempted information from being accessible through other means available to the public.

This bill does not expand the scope of the public-records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill amends section 119.071(4)(d)1.i., Florida Statutes.

[1] Section 119.071(4)(d)1.i., F.S.
[2] Section 119.15, F.S.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Paragraphs (a) and (c) of Section 24, Art. I of the State Constitution provide the following:

> (a) Every person has the right to inspect or copy any public records 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 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.
>
> (c) This section shall be self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b); provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader then necessary to accomplish the state purpose of the law…..Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) and (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Florida's public-records law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[3] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[4] records are to be available for public inspection.

[3] s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

[4] s. 119.011(2), F.S., defines "agency" as "…any state, county, district, authority, or municipal officer, department, division, 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."

Section 119.011(12), F.S., defines the term "public record" to include 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. 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 "intended to perpetuate, communicate, or formalize knowledge."[5] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[6]

Only the Legislature is authorized to create exemptions to open-government requirements.[7] 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 accomplish the stated purpose of the law.[8] A bill enacting an exemption[9] may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.[10]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[11] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[14] 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.[15] An exemption meets the statutory criteria if it:

[5] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640(Fla. 1980).
[6] *Wait v. Florida Power & Light Company,* 372 So.2d 420 (Fla. 1979)
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).
[9] s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[10] Article 1, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62, August 1, 1985.
[12] *Williams v. City of Minneola,* 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla.1991).
[13] Section 119.15, F.S.
[14] Section 119.15(6)(b), F.S.
[15] *Id*.

- 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 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 the safety of such individuals; 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 which 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.[16]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[17]

**Current Exemptions in Section 119.071(4)(d), F.S., Pertaining to Agency Personnel**

Section 119.071(4)(d), F.S., currently provides public-records exemptions for specified personal identifying and locating information of the following current and former agency personnel, as well as for specified personal identifying and locating information of their spouses and children:

- Law enforcement and specified agency investigative personnel;
- Certified firefighters;
- Justices and judges;
- Local and statewide prosecuting attorneys;
- Magistrates, administrative law judges, and child support hearing officers;
- Local government agency and water management district human resources administrators;
- Code enforcement officers;
- Guardians ad litem;
- Specified Department of Juvenile Justice personnel; and
- Public defenders and criminal conflict and civil regional counsel.

Although there is some inconsistency among the types of information that are exempted, the following information is protected in all of the above-listed exemptions:

- The home addresses and telephone numbers of the agency personnel;
- The home addresses, telephone numbers, and places of employment of the spouses and children of the agency personnel; and
- The names and locations of schools and day care facilities attended by the children of the agency personnel.

**Exemption Under Review**

The public-records exemption under review[18] makes the following information exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution:

[16] *Id.*
[17] Section 119.15(6)(a), F.S.
[18] Section 119.071(4)(d)1.i., F.S.

- The home addresses, telephone numbers, and photographs of current or former:
  - Juvenile probation officers,
  - Juvenile probation supervisors,
  - Detention superintendents,
  - Assistant detention superintendents,
  - Senior juvenile detention officers,
  - Juvenile detention officer supervisors,
  - Juvenile detention officers,
  - House parents I and II,
  - House parent supervisors,
  - Group treatment leaders,
  - Group treatment leader supervisors,
  - Rehabilitation therapists, and
  - Social services counselors.
- The names, home addresses, telephone numbers, and places of employment of spouses and children of such personnel.
- The names and locations of schools and day care facilities attended by the children of such personnel.

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Committee on Criminal Justice recommended that the Legislature retain the public-records exemption established in s. 119.071(4)(d)1.i., F.S. This recommendation was made in light of information gathered for the Open Government Sunset Review, which indicates that there is a public necessity to continue to protect personal identifying and locating information of specified DJJ personnel and their families because disclosure would jeopardize their safety.[19]

## III. Effect of Proposed Changes:

This bill removes the repeal date, thereby reenacting the public-records exemption under review.

It also amends the exemption to update the position titles of protected employees to reflect position title reclassifications by DJJ. The updated position titles are as follows:

- Juvenile probation officers,
- Juvenile probation supervisors,
- Detention superintendents,
- Assistant detention superintendents,
- Juvenile justice detention officers I and II,
- Juvenile justice detention officer supervisors,

[19]According to DJJ staff, the exempt records contain information that is of a sensitive, personal nature concerning those DJJ employees who have direct contact and provide care and supervision to juvenile offenders. DJJ staff state that it is paramount to the safety of these employees and their families that their personal information remain exempt. Direct care employees and their families are subject to the same risk of threats and reprisals from juveniles, their families, and gang members as those personnel who work in law enforcement, corrections, and the court system. Additionally, DJJ staff assert that providing easier access to the employee's personal identifying information will interfere with the department's administration of the juvenile justice system by jeopardizing the workplace safety of its employees. Information gathered for this Open Government Sunset Review is on file with the Senate Committee on Criminal Justice.

- Juvenile justice residential officers,
- Juvenile justice residential officer supervisors I and II,
- Juvenile justice counselors,
- Juvenile justice counselor supervisors,
- Human services counselor administrators,
- Senior human services counselor administrators,
- Rehabilitation therapists, and
- Social services counselors.

The bill requires a DJJ employee in a category protected by the exemption to submit a written statement that he or she has made reasonable efforts to protect the exempt information from being accessible through other means available to the public before the exemption applies.

The bill specifies an effective date of October 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public-records exemption specified in s. 119.071(4)(d)1.i., F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

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.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | PCS/SB 600 (169444) |
| INTRODUCER: | Governmental Oversight and Accountability Committee |
| SUBJECT: | OGSR/Certain Specified Personal Information of DJJ Direct Care Employees |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Dugger | Cannon | CJ | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Committee on Criminal Justice.

Current law[1] provides that certain personal identifying and locating information of current or former specified direct care employees of the Department of Juvenile Justice (DJJ), their spouses, and their children is exempt from public-records requirements. This exemption is subject to review under the Open Government Sunset Review Act[2] and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. This bill reenacts the exemption.

The bill also updates the position titles of protected employees to reflect position title reclassifications.

[1] Section 119.071(4)(d)1.i., F.S.
[2] Section 119.15, F.S.

This bill does not expand the scope of the public-records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill amends section 119.071(4)(d)1.i., Florida Statutes.

## II. Present Situation:

**Florida's Public-Records Laws**

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Paragraphs (a) and (c) of Section 24, Art. I of the State Constitution provide the following:

> (a) Every person has the right to inspect or copy any public records 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 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.
>
> (c) This section shall be self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b); provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader then necessary to accomplish the state purpose of the law…..Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) and (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Florida's public-records law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[3] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under

[3] s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

supervision by the custodian of the public record. Unless specifically exempted, all agency[4] records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" to include 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. 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 "intended to perpetuate, communicate, or formalize knowledge."[5] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[6]

Only the Legislature is authorized to create exemptions to open-government requirements.[7] 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 accomplish the stated purpose of the law.[8] A bill enacting an exemption[9] may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.[10]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[11] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[14] An identifiable public purpose is served if the exemption meets one of three specified criteria and if the

[4] s. 119.011(2), F.S., defines "agency" as "…any state, county, district, authority, or municipal officer, department, division, 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."
[5] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).
[6] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).
[9] s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[10] Article 1, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62, August 1, 1985.
[12] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla.1991).
[13] Section 119.15, F.S.
[14] Section 119.15(6)(b), F.S.

Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[15] An exemption meets the statutory criteria if it:

- 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 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 the safety of such individuals; 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 which 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.[16]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[17]

**Current Exemptions in Section 119.071(4)(d), F.S., Pertaining to Agency Personnel**

Section 119.071(4)(d), F.S., currently provides public-records exemptions for specified personal identifying and locating information of the following current and former agency personnel, as well as for specified personal identifying and locating information of their spouses and children:
- Law enforcement and specified agency investigative personnel;
- Certified firefighters;
- Justices and judges;
- Local and statewide prosecuting attorneys;
- Magistrates, administrative law judges, and child support hearing officers;
- Local government agency and water management district human resources administrators;
- Code enforcement officers;
- Guardians ad litem;
- Specified Department of Juvenile Justice personnel; and
- Public defenders and criminal conflict and civil regional counsel.

Although there is some inconsistency among the types of information that are exempted, the following information is protected in all of the above-listed exemptions:
- The home addresses and telephone numbers of the agency personnel;
- The home addresses, telephone numbers, and places of employment of the spouses and children of the agency personnel; and
- The names and locations of schools and day care facilities attended by the children of the agency personnel.

[15] *Id*.
[16] *Id*.
[17] Section 119.15(6)(a), F.S.

**Exemption Under Review**

The public-records exemption under review[18] makes the following information exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution:

- The home addresses, telephone numbers, and photographs of current or former:
  - Juvenile probation officers,
  - Juvenile probation supervisors,
  - Detention superintendents,
  - Assistant detention superintendents,
  - Senior juvenile detention officers,
  - Juvenile detention officer supervisors,
  - Juvenile detention officers,
  - House parents I and II,
  - House parent supervisors,
  - Group treatment leaders,
  - Group treatment leader supervisors,
  - Rehabilitation therapists, and
  - Social services counselors.
- The names, home addresses, telephone numbers, and places of employment of spouses and children of such personnel.
- The names and locations of schools and day care facilities attended by the children of such personnel.

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Committee on Criminal Justice recommended that the Legislature retain the public-records exemption established in s. 119.071(4)(d)1.i., F.S. This recommendation was made in light of information gathered for the Open Government Sunset Review, which indicates that there is a public necessity to continue to protect personal identifying and locating information of specified DJJ personnel and their families because disclosure would jeopardize their safety.[19]

## III. Effect of Proposed Changes:

This bill removes the repeal date, thereby reenacting the public-records exemption under review.

It also amends the exemption to update the position titles of protected employees to reflect position title reclassifications by DJJ. The updated position titles are as follows:

- Juvenile probation officers,
- Juvenile probation supervisors,

[18] Section 119.071(4)(d)1.i., F.S.

[19] According to DJJ staff, the exempt records contain information that is of a sensitive, personal nature concerning those DJJ employees who have direct contact and provide care and supervision to juvenile offenders. DJJ staff state that it is paramount to the safety of these employees and their families that their personal information remain exempt. Direct care employees and their families are subject to the same risk of threats and reprisals from juveniles, their families, and gang members as those personnel who work in law enforcement, corrections, and the court system. Additionally, DJJ staff assert that providing easier access to the employee's personal identifying information will interfere with the department's administration of the juvenile justice system by jeopardizing the workplace safety of its employees. Information gathered for this Open Government Sunset Review is on file with the Senate Committee on Criminal Justice.

- Detention superintendents,
- Assistant detention superintendents,
- Juvenile justice detention officers I and II,
- Juvenile justice detention officer supervisors,
- Juvenile justice residential officers,
- Juvenile justice residential officer supervisors I and II,
- Juvenile justice counselors,
- Juvenile justice counselor supervisors,
- Human services counselor administrators,
- Senior human services counselor administrators,
- Rehabilitation therapists, and
- Social services counselors.

The bill specifies an effective date of October 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public-records exemption specified in s. 119.071(4)(d)1.i., F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

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

**PCS by Governmental Oversight and Accountability on March 23, 2011:**
To treat DJJ employees equally with other agency personnel protected by personal identifying and locating information exemptions, the proposed committee substitute removes the requirement that a DJJ employee in a category protected by the exemption must submit a written statement that he or she has made reasonable efforts to protect the exempt information from being accessible through other means available to the public before the exemption applies.

B. Amendments:

None.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 602 |
| INTRODUCER: | Criminal Justice Committee |
| SUBJECT: | OGSR/Biometric Identification Information |
| DATE: | March 16, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Erickson | Cannon | CJ | **Favorable** |
| 2. | Naf | Roberts | GO | **Pre-meeting** |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

Section 119.071(5)(g), F.S., exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of the exemption (July 1, 2006).[1] Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

This exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. The bill reenacts the exemption. The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote.

This bill reenacts section 119.071(5)(g) of the Florida Statutes.

## II. Present Situation:

### Constitutional Requirements Regarding Public Records

Article I, section 24 of the Florida Constitution, as it relates to records, provides that every person has the right to inspect or copy any public record that is 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 with respect to records exempted pursuant to this section or specifically made confidential by the Florida Constitution. This section is self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the

[1] Section 3, ch. 2006-181, L.O.F.

exemption of records from the requirements of this section provided such law: (1) states with specificity the public necessity justifying the exemption and is no broader than necessary; (2) contains only exemptions from the requirements of this section and provisions governing the enforcement of this section; and (3) relates to one subject. A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

The Legislature is also required by this section to enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the Legislature may adopt rules governing enforcement of this section in relation to records of the legislative branch.

**The Public Records Act**

The Public Records Act[2] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

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

Unless specifically exempted, all agency[3] 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.[4]

The Florida Supreme Court has interpreted this definition to encompass "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[5]

There is a difference between records the Legislature has made exempt from public inspection and those made confidential and exempt. If the Legislature makes a record confidential and exempt, the exempted record may not be released by an agency to anyone other than to the persons or entities designated by law.

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[2] Chapter 119, F.S.
[3] The term "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."
[4] Section 119.011(12), F.S.
[5] *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla.1980).

**The Open Government Sunset Review Act**

Section 119.15, F.S., the Open Government Sunset Review Act, establishes a process for the review and repeal or reenactment of public records exemptions. The act provides that in the fifth year after enactment of a new exemption or substantial amendment[6] of an existing exemption, the exemption is repealed on October 2nd of the fifth year, unless the Legislature reenacts the exemption.[7] An exemption may be created, revised, or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves.[8] An identifiable public purpose is served if the exemption meets one the following purposes and 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:

- 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 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;[9] 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.[10]

The Legislature must also consider the following as part of the sunset review process:

- 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?[11]

[6] An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(4)(b), F.S.
[7] Section 119.15(3), F.S.
[8] Art. I, s. 24(c), Fla. Const; s. 119.15(6), F.S.
[9] Only information that would identify the individuals may be exempted for this purpose.
[10] Section 119.15(6)(b), F.S.
[11] Section 119.15(6)(a), F.S.

**Biometric Identification Exemption (s. 119.071(5), F.S.)**

In 2006, the Legislature created s. 119.071(5)(g), F.S.,[12] which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006).[13] Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

The Legislature provided the following statement of public necessity for enacting the exemption:

> The Legislature finds that it is a public necessity that biometric identification information held by an agency before, on, or after the effective date of this exemption be made exempt from public records requirements. Biometric identification information is used to verify the identity of persons and by its very nature involves matters uniquely related to individual persons. The use of multiple methods of biometric identification is a growing technology in detecting and solving crime, in preventing identity theft, and in providing enhanced levels of security in agency and other operations. Given existing technological capabilities for duplicating, enhancing, modifying, and transferring records, the availability of biometric identification information creates the opportunity for improper, illegal, or otherwise harmful use of such information. At the same time, use of biometric identification information by agencies is a useful and increasingly valuable tool. Thus, the Legislature finds that it is a public necessity to protect biometric identification information held by an agency before, on, or after the effective date of this act.[14]

Section 119.071(5)(g), F.S., stands repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature. *The Florida Department of Law Enforcement (FDLE), one of the agencies most affected by retention or repeal of the exemption, recommends retention of the exemption. Senate professional staff concurs with this recommendation.*

The FDLE indicates that the identifiable public purpose or goal of the exemption in s. 119.071(5)(g), F.S., is to prevent fingerprints and other biometric identification information from being used for improper purposes, such as identity theft and fraud as well as security breaches.[15] Disclosure of the information also has the potential to hinder, compromise, or prevent criminal intelligence gathering, a criminal investigation, or a criminal prosecution, if the information were used, for example, to create phony or altered fingerprint cards or create false evidence of fingerprint impressions at a crime scene. The efficient and effective administration of the FDLE would be significantly impaired by public disclosure because the biometric

[12] Ch. 2006-181, L.O.F.
[13] Section 3, ch. 2006-181, L.O.F.
[14] Section 2, ch. 2006-181, L.O.F.
[15] Response of the FDLE to the *Senate Committee on Criminal Justice Open Government Sunset Review Questionnaire to the Florida Department of Law Enforcement*, dated September 22, 2010 (on file with the Senate Committee on Criminal Justice). All information in the remainder of the "Present Situation" section of this analysis is from this source, unless otherwise indicated.

identification information could be demanded for an unlawful purpose. An agency cannot inquire as to the purpose or proposed use for which an entity makes a public records request.

Persons most uniquely affected by the exemption (as opposed to the general public) are those persons whose fingerprints have been submitted to an agency for any reason, which includes arrest prints and applicant prints (i.e., criminal history background checks for employment, licensing, name change, sealing/expungement, eligibility, etc.). Other forms of biometric identification may be taken as latent lifts from a crime scene.

Fingerprints are taken and submitted to the FDLE by agencies and fingerprint scanning services. These fingerprints may be inked impressions or electronic submissions, which include applicant prints, arrest prints (from criminal justices agencies), or latent lifts from crime scenes.[16] Applicant prints are taken as required or authorized by law; arrest prints and latent lifts are taken as needed for criminal justice purposes. Arrest prints and, as authorized, applicant prints are stored in the Automated Fingerprint Identification System (AFIS) authorized under s. 943.05(2), F.S.[17]

The purposes for which the FDLE collects, receives, maintains, or shares the biometric identification information covered by the exemption include:

- Positive identification, usually against criminal records;
- Criminal justice or forensic purposes (e.g., latent lifts are compared to known standards for crime scene analysis and to identify unknown, missing, and deceased persons);
- Employment or licensing background checks; and
- As otherwise required by law (e.g., for comparison with criminal records).

The FDLE shares arrest prints and latent lifts with other criminal justice agencies (covered by the exemption) for criminal justice purposes. These receiving agencies also protect against public disclosure of the biometric identification information.

Other law enforcement agencies may retain copies of the fingerprints of persons the agencies have arrested or booked. Other criminal justice agencies which have local AFIS maintain arrest fingerprints. Crime scene fingerprints (and other biometric identification information) are collected and maintained as part of criminal investigations and may be shared with other agencies that engage in forensic identification as well as prosecution of criminal defendants. Courts may collect fingerprints to identify judgments in criminal cases.

Federal law prohibits public disclosure of the biometric identification information in s. 119.071(5)(g), F.S., to the extent such information is considered a part of a national criminal history record.[18]

[16] The FDLE indicates that the fingerprints and other biometric identification information are not readily obtainable by alternative means.
[17] Pursuant to s. 943.051(4), F.S., criminal history records must be based on fingerprints.
[18] Florida Attorney General Opinion 99-01 (January 6, 1999) and 28 C.F.R § 20.33.

According to the FDLE, the biometric identification information exempted pursuant to s. 119.07(5)(g), F.S., is also protected to a limited extent by s. 937.028(1), F.S., which applies only to "fingerprints [which] have been taken for the purpose of identifying a child, in the event a child becomes missing." Biometric identification information associated with a criminal investigation may be protected as active criminal investigative information under s. 119.07(2)(c)1., F.S. Arrest fingerprints which identify the subject of a criminal history record that has been expunged or sealed are confidential pursuant to s. 943.0585(4) and s. 943.059(4), F.S. The FDLE states that these described exemptions do not duplicate s. 119.07(5)(g), F.S., but serve different and distinct purpose. Consequently, these exemptions do not appear appropriate to merge.

Senate professional staff have reviewed these exemptions and other exemptions and none of them appear to be appropriate for merger or repeal (as clearly being duplicative of or completely subsumed within the exemption in s. 119.07(5)(g), F.S.).

## III. Effect of Proposed Changes:

The bill reenacts s. 119.071(5)(g), F.S., which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006). The biometric identification information consists of the following information:

- Any record of friction ridge detail;
- Fingerprints;
- Palm prints; and
- Footprints.

The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote of each house of the Legislature for passage.

The effective date of the bill is October 1, 2011.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

Article I, section 24 of the Florida Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.

If a reenactment of an exemption does not expand the scope of the exemption, it does not require a new repealer date, public necessity statement, or a two-thirds vote.[19] It is only when the exemption is expanded (i.e., more records are exempt, records are exempt for a longer period of time, etc.) that these three requirements come into play, because that is tantamount to creating a new exemption.

The reenactment of the exemption in s. 119.071(5)(g), F.S., does not expand the exemption.

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.



[19] See Art. I, s. 24(c), Fla. Const., and s. 119.15, F.S.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | CS/SB 380 |
| INTRODUCER: | Children, Families and Elder Affairs Committee and Senator Wise |
| SUBJECT: | Certification of Child Welfare Personnel |
| DATE: | March 20, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Preston | Walsh | CF | **Fav/CS** |
| 2. | McKay | Roberts | GO | **Pre-meeting** |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

The bill amends legislative intent by eliminating the responsibility of the Department of Children and Family Services (DCF or department) to establish, maintain and oversee child welfare training academies and by requiring that persons providing child welfare services earn and maintain a certification from a third party credentialing entity that is approved by DCF. The bill creates definitions for the terms "child welfare certification," "core competency," "pre-service curriculum," and "professional credentialing entity." The bill also provides requirements for a credentialing entity to secure DCF approval and requires the department to approve core competencies and related pre-service curricula. The use of the Child Welfare Training Trust Fund is amended, and the child welfare training academies are eliminated. The bill provides for entities to contract for training and grants reciprocity to individuals who hold certificates issued by the department for a specified period of time. The bill also eliminates the ability of the department to develop certification programs.

The bill substantially amends ss. 402.40 and 402.731 of the Florida Statutes.

## II. Present Situation:

### Statewide Training

Currently, the department is required to establish, maintain, and oversee a comprehensive system of child welfare training, and all persons providing child welfare services are required to successfully complete the training program pertinent to their areas of responsibility.[1] The department is also authorized to create certification programs for its employees and service providers to ensure that only qualified employees and service providers provide client services.[2] Core competencies have been established collaboratively by the department with the stakeholder community and according to the department, community-based care (CBC) agencies and sheriffs' offices can supplement or augment the minimum curriculum standards to meet their local needs.

The department has the authority to develop rules[3] that include qualifications for certification, including training and testing requirements, continuing education requirements for ongoing certification, and decertification procedures to be used to determine when an individual no longer meets the qualifications for certification and to implement the decertification of an employee or agent.[4]

The department is also required to establish child welfare training academies to perform one or more of the following: to offer one or more of the developed training curricula; to administer the certification process; to develop, validate, and periodically evaluate additional training curricula determined to be necessary, including advanced training that is specific to a region or contractor, or that meets a particular training need; or to offer any additional training curricula.[5] The department is required to competitively solicit all training academy contracts.[6]

Department rule defines "certification" as the process whereby an individual must demonstrate the knowledge, skills, abilities and priorities necessary to competently discharge the duties of a Florida child protection professional, as evidenced by the successful completion of all applicable classroom instruction, field training, testing, and job-performance requirements of his or her position classification.[7] Typically, each individual in a position requiring certification must be certified within one year of the date of hire, or within one year of having successfully completed a post-test or a waiver test, whichever is earlier. Certification is a condition of employment in

[1] *See* s. 402.40, F.S.
[2] *See* s. 402.731, F.S.
[3] *See* ss. 402.40 and 402.731, F.S. On October 14, 2010, a training and certification rule was adopted to carry out the provisions of ss. 402.40 and 402.731, F.S., and codify policy which has been in existence for the past ten years. The rule applies uniform, minimum, initial and on-going training and certification standards to all DCF, community based care and sheriff's office employees working in child welfare. *See* 65C-33, FAC.
[4] *See* s. 402.731, F.S.
[5] *See* s. 402.40, F.S.
[6] *Id.* The department currently has contracts with the University of South Florida and Florida International University, not only to train and certify child welfare trainers, but also to track and document the certification and recertification of all child welfare staff, and to coordinate all registration for, and participation in, the pre-service training and testing of all newly-hired child welfare staff.
[7] *See* Chapter 65C-33.001(3), F.A.C.

those positions requiring certification. Absent special circumstances, certification is valid for a period of no longer than three years.[8]

Each type of child protection certification has a different training, testing and certification requirement, all of which are established by the department. Currently, there are 11 types of certification designations for child protection professionals:

- Child Protective Investigator;
- Child Protective Investigations Supervisor;
- Child Protective Investigations Specialist;
- Child Protection Case Manager;
- Child Protection Case Management Supervisor;
- Child Protection Case Management Specialist;
- Child Protection Licensing Counselor;
- Child Protection Licensing Supervisor;
- Child Protection Licensing Specialist;
- Child Protection Specialized Services Professional; and
- Child Welfare Trainer.[9]

According to the department, during calendar year 2010, DCF initially certified 938 and recertified 1,239 child welfare professionals in the investigative, case management, and licensing specialties. Since there are currently approximately 1,475 child protective investigators (employed either through DCF or sheriff's offices) and 2,200 case managers statewide, more than half of the state's child welfare professionals (2,177 or 59%) who are required to be certified are currently certified. The remaining individuals are in the process of achieving certification, because they are staff who are newly hired or who have not yet met minimum certification requirements.[10]

In addition, there are currently 344 child welfare professionals who have met certification requirements to be a Child Welfare Trainer. These staff are employed by community-based care agencies, sheriff's offices, or the department; however, child welfare training may be only one of their job duties. Certified child welfare trainers teach the department-approved standard pre-service curriculum, and the content must be delivered in its entirety to all newly-hired child protective investigative and case management staff statewide.[11] The intent of this model is it ensure that all necessary statutory, policy, procedural and best practice information is conveyed to child welfare personnel by qualified child welfare trainers and that minimum competency requirements are consistent statewide.[12]

[8] *See* Chapter 65C-33.002(7), F.A.C.
[9] *See* Chapter 65C-33.002(4), F.A.C.
[10] Department of Children and Family Services. Department of Children and Families Staff Analysis and Economic Impact, SB 380, January 25, 2011.
[11] *See* s.402.40, F.S.
[12] *Id.*

The department reports[13] that CBCs and sheriff's offices are allowed to contract for or otherwise arrange for additional training or certifications from local or state providers. Funding is provided to regions, circuits, community-based care agencies and sheriffs offices to deliver the department training curriculum to child welfare staff either internally or through contract; however those entities may add to the content to meet any local training need.

**Child Welfare Certificate Offered by Schools of Social Work at State Universities**

Schools of social work in many of the state's universities offer a child welfare certificate. The department has developed partnerships with these entities in order to coordinate education and training requirements for those students earning social work degrees who want to work in child welfare. For example, the School of Social Work at Florida State University will allow students who successfully pass the pre-service DCF exam to waive the university required certificate exam. Also current employees of the department and the CBCs may be eligible to exempt the university internship requirement.[14]

**Federal Requirements for Child Welfare Training**

Federal regulations require states to prepare a five-year comprehensive Child and Family Services Plan (CFSP),[15] which lays the groundwork for a system of coordinated, integrated, and culturally relevant family-focused services in state child welfare agencies. The Annual Progress and Services Report (APSR) provides yearly updates on the progress made toward accomplishing the goals and objectives in the CFSP. Completion of the APSR satisfies federal regulations by providing updates on a state's annual progress for the previous fiscal year and planned activities for the upcoming fiscal year.[16,17]

A state's CFSP must include a staff development and training plan in support of the goals and objectives in the CFSP which addresses both of the title IV-B programs covered by the plan.[18] Training must be an on-going activity and must include content from various disciplines and knowledge bases relevant to child and family services policies, programs and practices.

Training activities in this plan must also be included in the department's Title IV-E training program.[19] These elements are required to receive federal funding. According to the department,

[13] Department of Children and Family Services. Department of Children and Families Staff Analysis and Economic Impact, SB 380, January 25, 2011.
[14] Florida State University, College of Social Work, Child Welfare Certificate Program. Available at: http://csw.fsu.edu/index.php?clickLink=child_REQ. (Last visited February 3, 2011).
[15] *See* 45 CFR 1357.15 and 1357.16.
[16] U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. Available at: http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2008/pi0803.htm#overview . (Last visited: February 2, 2011).
[17] In order to receive funds for FFY 2011, for Child Welfare Services (title IV-B), Child Abuse Prevention and Treatment Act (CAPTA), Chafee Foster Care Independence Program (CFCIP) and Education and Training Vouchers (ETV) programs, the APSR had to be submitted to the Children's Bureau by June 30, 2010.
[18] *See* 45 CFR. § 1357.15(t).
[19] *See* 45 CFR 1356.60(b)(2)..

failure to obtain approval prior to implementation of any changes to the training requirements could jeopardize those resources.[20]

**Child Welfare Training Trust Fund**

The Child Welfare Training Trust Fund was created to fund child welfare training, including securing consultants to develop the training system. The trust fund receives one dollar from certain noncriminal traffic infractions,[21] receives monies from an additional fee on birth certificates and dissolution of marriage filings,[22] and may receive funds from any other public or private source.[23]

**The Florida Certification Board**

The Florida Certification Board (FCB or Board) provides a number of certifications, including those for substance abuse counselors, prevention specialists, criminal justice professionals, mental health professionals, and behavioral health technicians in Florida. The Board does not offer or provide child welfare training.[24]

While the current training and certification program administered by the department meets the entry-level training and testing needs of CBC providers, the FCB's CBC partners indicated a desire to explore the development of an additional level of certification that is specific to child welfare case managers.[25] In response, the board added the Child Welfare Case Manager (CWCM) to its professional certification programs. The CWCM certification is a voluntary designation of professional competency.[26] The FCB reports that 193 individuals have an active CWCM certification, and almost all of those individuals are employed by CBCs.

## III. Effect of Proposed Changes:

Provisions in the bill eliminate the department's child welfare training program and instead require that individuals providing child welfare services earn and maintain a professional certification from a department approved certification entity. The bill also removes the ability of the department to create certification programs, so individuals wanting or needing child welfare certification will have to acquire that certification from a third-party credentialing entity that is approved by DCF.

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[20] Department of Children and Family Services. Department of Children and Families Staff Analysis and Economic Impact, SB 380, January 25, 2011.
[21] *See* ss. 318.14(19)(b) and 318.18, F.S.
[22] *See* ss. 382.0255 and 28.101, F.S.
[23] *See* s. 402.40, F.S.
[24] The Florida Certification Board, Available at: http://www.flcertificationboard.org/. (Last visited February 2, 2011).
[25] *Id*. The FCB was approached in 2006 by Community Based Care of Seminole, Inc. and Big Bend Community Based Care, Inc. to explore the possibility of creating a Child Welfare Case Manager (CWCM) credential in the state of Florida.
[26] *Id.* In order to receive the CWCM, the Board reviews the application portfolio submitted by an applicant, administers the written exam when required, and issues the certification. The department sanctioned training is accepted by the FCB. There is a one time $150 certification fee, a $75 exam fee, and a $125 renewal fee due annually in October. Certified individuals must complete 20 CEUs annually in order to be recertified.

The department reports that the Florida Certification Board is the only "professional credentialing entity" as defined in the bill currently in existence. While the bill provides that credentialing entities shall for a period of no less than a year from the implementation of certification programs grant reciprocity and award certification to individuals in good standing who hold certification issued by the department at no cost to the state or the individual, it remains unclear what the consequences would be in a number of situations. For example:

- The board requires a minimum of a bachelor's degree in order to meet the requirements for certification.[27] This could subject those individuals currently employed who have no degree and are unable to earn a degree within the period of reciprocity to termination from employment and would prevent non-degreed individuals from being hired in the future.
- The board does not currently offer the variety of certifications that are offered by the department, including one for child protective investigators. It is unclear how those individuals would obtain the certifications required for employment in their specific practice areas.

While the bill provides that the department, the CBCs and sheriff's offices may contract for training, currently, however, neither the Board or any other organization offers child welfare or protective investigator training.

Eliminating the department training program would appear to have some impact on the partnerships the department has with schools of social work at universities.

The bill also broadens the use of the Child Welfare Training Trust Fund, from being used to fund a comprehensive system of child welfare training, including the development of the training and the establishment of training academies, to funding professional development. It is unclear what impact this will have on the trust fund.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

None.

### C. Trust Funds Restrictions:

None.

[27] The board requires a minimum of a bachelor's degree from an accredited college or university in a related or unrelated field. Related fields are social work, psychology, sociology, human services, counseling, child development, education, guidance counseling, public administration, public health administration, criminology, or criminal justice. The Florida Certification Board, Available at: http://www.flcertificationboard.org/. (Last visited February 2, 2011).

D. Other Constitutional Issues:

Article II, section 3 of the Florida Constitution creates the three branches of Florida's government, and prohibits one branch from exercising the powers of another branch. This separation of powers doctrine includes a prohibition on one branch delegating its constitutionally assigned powers to another branch.[28] Therefore, statutes granting power to the executive branch "must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion."[29] The Legislature may delegate some discretion in the operation and enforcement of the law, but it cannot delegate the power to say what the law is.[30]

If the bill removes ascertainable minimal standards and guidelines set by the Legislature, and replaces them with the unfixed standards of a private entity, there may be a delegation issue, as such standards may not substitute for and supplant the Legislature's duty to determine the law.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Florida Certification Board charges the individual applicant for the CWCM certification a certification fee, an exam fee if an exam is required, and an annual renewal fee.

While the bill provides for reciprocity for a period of at least a year from the time of implementation of department approved certification programs, all child welfare staff who are required to be certified will eventually have to have obtain, at cost to the individual or the employing entity, certification from a credentialing entity in order to continue to be employed. The bill does not specify who will assume the cost associated with the certification and renewal certification provided through the newly defined professional credentialing entity, but it would appear to be either the individual seeking certification or his or her respective employing agency.

[28] *Chiles v. Children A, B, C, D, E & F*, 589 So.2d 260, 264 (Fla.1991).
[29] *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So.2d 769, 770 (Fla. 2005), citing *Lewis v. Bank of Pasco County*, 346 So.2d 53, 55-56 (Fla.1976).
[30] *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 363 (Fla. 1st DCA 1985).

C. Government Sector Impact:

While the provisions of the bill will create a fiscal impact on government, the exact amount is unknown. The department has reported[31] that:

- The proposed changes would reduce department costs in terms of the annual contracts for the development and maintenance of the pre-service curriculum as well as for the Training Academy; this reduction would be approximately $1.3 million dollars per year, including 10-12 University of South Florida and Florida International University staff. Additional department training and certification costs may be necessary pending or absent an approved professional credentialing entity. However, since the board doesn't provide training and with the elimination of a single, statewide pre-service curriculum as proposed by the bill, this savings would likely be offset by the need for other entities to develop or purchase new pre-service curricula and all accompanying materials, thereby resulting in additional costs to be borne by employing case management agencies. At this time this cost cannot be determined.

- Currently the department provides a number of certifications not provided by any third-party entity. It is not known what the costs would be to develop a third-party credential for those child welfare specializations.

- The department has raised the issue of liability that might have to be assumed by a third-party credentialing entity, community based care agency, or sheriff's office as a result of the decentralization of minimum training standards. It is unknown if third-party credentialing entities will be subject to lawsuits due to malpractice of child welfare professionals certified by those entities.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

It is unclear whether the vendors to be "approved" to supply the services required by the bill must be selected via competitive solicitation. Section 287.057(3)(f)9., F.S., exempts "child abuse prevention programs" from competitive solicitation, but the services to be supplied by vendors pursuant to the requirements of this bill do not appear to be covered by that exemption. Since the bill strikes some competitive procurement language in lines 154-159, the Legislature may wish to make clear what type of competitive process, if any, is required by this bill.

If more than one vendor is allowed to provide the services required by the bill, it appears possible that more than one set of certification standards might be created.

[31] Department of Children and Families Staff Analysis and Economic Impact, SB 380, January 25, 2011.

## VIII. Additional Information:

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

**CS by Children, Families, and Elder Affairs on February 8, 2011:**
Makes substantial changes to ss. 402.40 and 402.731, Florida Statutes, relating to child welfare training and supervision including:

- Provides that the department work in collaboration with child welfare stakeholders to ensure that child welfare staff have the knowledge and skills to competently provide child welfare services;
- Adds a definition for the terms "core competencies" and "pre-service curricula;
- Provides for the department to approve core competencies and related pre-service curricula;
- Provides that the development of pre-service curricula be a collaborative effort that includes third-party credentialing entities;
- Provides that community-based care agencies, sheriff's offices, and the department may contract for the delivery of pre-service and any additional child welfare training as long as the curriculum satisfies the approved core competencies;
- Provides that credentialing entities shall for a period of no less than a year from the implementation of certification programs grant reciprocity and award certification to individuals in good standing who hold certification issued by the department at no cost to the state or the individual;
- Restores the department's rulemaking authority; and
- Eliminates the ability of DCF to create certification programs.

B. Amendments:

None.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | CS/SB 480 |
| INTRODUCER: | Community Affairs Committee and Senator Wise |
| SUBJECT: | Florida Endowment for Vocational Rehabilitation |
| DATE: | March 15, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Wolfgang | Yeatman | CA | **Fav/CS** |
| 2. | Brown | Matthews | HE | **Favorable** |
| 3. | Roberts | Roberts | GO | **Pre-meeting** |
| 4. | | | BC | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | ☐ | Statement of Substantial Changes |
| B. AMENDMENTS..... | ☐ | Technical amendments were recommended |
| | ☐ | Amendments were recommended |
| | ☐ | Significant amendments were recommended |

## I. Summary:

The bill abolishes the State Board of Administration's (SBA) role in investing and reinvesting monies in the endowment fund of the Florida Endowment Foundation for Vocational Rehabilitation (Foundation).

The bill eliminates the threshold in law for the endowment fund principal.

The bill provides for dedicated funds through civil traffic collections remitted to the Department of Revenue (DOR) to be deposited directly into the endowment fund.

This bill substantially amends section 413.615 of the Florida Statutes.

## II. Present Situation:

### Federal Law

The Federal Rehabilitation Services Administration (RSA) provides leadership and fiscal resources to assist state and other agencies in providing vocational rehabilitation (VR),

independent living, and other services to individuals with disabilities.[1] To be eligible to participate in the federal program and other rehabilitation services, states must submit to the RSA a state plan for VR services to be administered by a designated state agency.[2] In Florida, the Department of Education (DOE) is the designated state agency.[3]

**Civil Penalties for Traffic Infractions**

Civil penalties imposed under Chapter 318, F.S., for traffic infractions are collected by the clerk of the court and distributed pursuant to s. 318.21, F.S. Section 318.21(1) and (2), F.S., specifies that the following amounts of all civil penalties imposed under Chapter 318, F.S., and collected by the clerk of court are to be remitted monthly to the Department of Revenue for deposit as follows:

- $1 from every civil penalty for the Child Welfare Training Trust Fund.
- $1 from every civil penalty for the Juvenile Justice Training Trust Fund.
- Of the remaining civil penalties:
  - 20.6 percent goes into state general revenue, except that the first $300,000 shall be deposited into the Grants and Donations Trust Fund in the Justice Administrative Commission;
  - 7.2 percent for the Emergency Medical Services Trust Fund;
  - 5.1 percent for the Additional Court Cost Clearing Trust Fund;
  - 8.2 percent for the Brain and Spinal Cord Injury Rehabilitation Trust Fund;
  - 2 percent for the endowment fund of the Florida Endowment Foundation for Vocational Rehabilitation; and
  - 0.5 percent for the clerk of the court for administrative costs.

Section 318.18(3)(f), F.S., imposes an additional fine of up to $250 if a violation of a traffic regulation to assist mobility-impaired persons[4] results in an injury to the pedestrian or damage to the property of the pedestrian. Section 318.21(5), F.S., requires the additional fine to be distributed as follows:

- 60 percent is remitted to the Department of Revenue for deposit in the Florida Endowment Foundation for Vocational Rehabilitation.
- 40 percent is distributed as provided in ss. 318.21(1) and (2), F.S.

**The Florida Endowment (Foundation) for Vocational Rehabilitation**

Created by the Florida Legislature in 1990,[5] the Florida Endowment Foundation for Vocational Rehabilitation, parent organization of The Able Trust, is a non-profit public/private partnership with the stated goal of assisting Floridians with disabilities in achieving employment. The Trust receives its funding from a perpetual endowment, grants, gifts and support from the public and private sectors. The Trust supports non-profit vocational rehabilitation programs throughout Florida with fund-raising, grant-making and public awareness of disability issues. The Able

[1] Office of Special Education and Related Services, U.S. Department of Education. *See* http://www2.ed.gov/about/offices/list/osers/rsa/index.html.
[2] 29 U.S.C. § 721.
[3] s. 413.201, F.S.
[4] s. 316.1303, F.S.
[5] Section 413.615, F.S.

Trust website indicates that it supports a diversity of projects, including on-the-job coaching, supported employment, job skills-training, job development, employer outreach, Americans with Disabilities Act facility compliance, skills evaluation and programs leading to employment.[6]

For Fiscal Year ending June 30, 2008, the Able Trust reports $5.7 million in overall revenue.[7] Of this, the Trust received $2.8 million from funds collected by civil traffic penalties. Collections from Fiscal Year 2009 totaled $2.5 million and from Fiscal Year 2010, $1.8 million.[8]

**The State Board of Administration**

The State Board of Administration (SBA or the Board) is comprised of the Governor as chair, the Chief Financial Officer, and the Attorney General and basically functions as an investment fund manager for various public purposes. Principal funds which the SBA currently manages include the Florida Retirement Pension Plan, the Investment Plan, the Florida Hurricane Catastrophe Fund, and the Chiles Endowment Fund.[9] The SBA also is currently charged with investing and reinvesting moneys of the endowment fund in accordance with s. 215.44, F.S. Money in the endowment in excess of the endowment fund principal, or a lower amount requested in writing by the Foundation, is annually transmitted to the Foundation for deposit in its operating account. The board uses operating account funds to provide for:

- Planning, research, and policy development for issues related to the employment and training of disabled citizens, and publication and dissemination of such information as may serve the objectives of this section.
- Promotion of initiatives for disabled citizens.
- Funding of programs which engage in, contract for, foster, finance, or aid in job training and counseling for disabled citizens or research, education, demonstration, or other activities related thereto.
- Funding of programs which engage in, contract for, foster, finance, or aid in activities designed to advance better public understanding and appreciation of the field of vocational rehabilitation.
- Funding of programs, property, or facilities which aid, strengthen, and extend in any proper and useful manner the objectives, work, services, and physical facilities of the division, in accordance with the purposes of this section.

Under current law, the endowment fund principal must be $1 million for the 2000-2001 fiscal year and must be increased by five percent in each subsequent fiscal year.[10]

## III. Effect of Proposed Changes:

This bill abolishes SBA's role in managing funding for the VR. This change will enable the Foundation to receive monies allocated on a much more frequent basis.

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[6] *See* The Able Trust, About the Able Trust, *available at* http://www.abletrust.org/about/.
[7] http://www.guidestar.org/pqShowGsReport.do?partner=amex&ein=59-3052307
[8] *The Able Trust SBA Activity (FY 1993-FY 2011)*, Report updated January 31, 2011.
[9] This information is available on the SBA website at:
http://www.sbafla.com/fsb/TheFundsWeManage/tabid/731/Default.aspx
[10] s. 413.615(4), F.S.

The percentage of money allocated to the Foundation remains the same, as this bill provides that the 2 percent of the remainder of all civil penalties currently earmarked for the Foundation under provisions of Chapter 318, F.S., are to be remitted to the Department of Revenue for distribution directly to the Foundation. The bill also clarifies the remission to the Department of Revenue of the additional money through fines collected specifically for violation of traffic regulations against disabled persons[11] due to pedestrian injury or property damage[12] for direct distribution under the current 60/40 percent formula.[13]

The bill removes the threshold in law for the endowment fund principal. It is unclear what, if any, impact removal of the required reserve would have on the continued viability of the endowment.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill allows the board of the Foundation to consolidate all of its investments under its own investment committee. The fiscal impact of having only the Foundation manage its own funds is indeterminate.

The Department of Revenue indicates that they do not expect an operational impact.

[11] s. 316.1303, F.S.
[12] s. 318.18(3)(f), F.S.
[13] This is the same distribution scheme currently in law under s. 318.21(5), F.S.

The State Board of Administration indicates that they are best suited to manage a small number of large mandates, and that this bill, removing their role, is consistent with that policy.

## 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.)

**CS by Community Affairs on February 21, 2011:**
Fixes a technical amendment to clarify what "remainder of the funds" means.

B. Amendments:

None.

716756

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Governmental Oversight and Accountability (Bogdanoff) recommended the following:

**Senate Amendment**

Delete lines 35 - 54

and insert:

this state. If the ~~whenever such~~ printing can be performed in this state ~~done at no greater expense than the expense of awarding a contract to a vendor located outside the state and can be done~~ at a level of quality comparable to that obtainable from the ~~a~~ vendor submitting the lowest bid located outside the state, the preference shall be the greater of:~~.~~

(a) The preference granted by the state or political subdivision in which the lowest responsible and responsive

716756

vendor has its principal place of business; or

(b) Five percent if the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state.

(2) Any vendor whose principal place of business is in

Delete lines 86 - 91

and insert:

(b) Paragraph (a) ~~However, this section~~ does not apply to transportation projects for which federal aid funds are available.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 386 |
| INTRODUCER: | Senator Bogdanoff |
| SUBJECT: | Florida Business Preference |
| DATE: | March 19, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | McKay | Roberts | GO | **Pre-meeting** |
| 2. | | | CA | |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill modifies the existing in-state vendor preference for public printing contracts to include counties, municipalities, school districts, and other political subdivisions as entities that may grant preference; and, specifies the preference. In Ch. 287, F.S., procurements, the preference for in-state vendors is 5 percent, when a low bid is submitted by a vendor from a state without an in-state vendor preference.

This bill substantially amends, the following sections of the Florida Statutes: ss. 283.35 and 287.084.

## II. Present Situation:

### Public Printing Vendor Preference

Chapter 283 of the Florida Statutes regulates public printing. Section 283.35, F.S., provides that every agency must give preference to vendors located within the state when awarding contracts to have materials printed, whenever such printing can be done at no greater expense than the expense of awarding a contract to a vendor located outside the state and can be done at a level of quality comparable to that obtainable from a vendor located outside the state.

For purposes of Ch. 283, F.S., "agency" is defined as any official, officer, department, board, commission, division, bureau, section, district, office, authority, committee, or council, or any other unit of organization, however designated, of the executive branch of state government, and the Public Service Commission.

**State Agency Procurement Vendor Preference**

Chapter 287 of the Florida Statutes regulates agency procurement of personal property and services. Section 287.084, F.S., provides that when an agency[1], county, municipality, school district, or other political subdivision of the state is required to make purchases of personal property through competitive solicitation and the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision thereof which grants a preference for the purchase of such personal property to a person whose principal place of business is in such state, then the agency, county, municipality, school district, or other political subdivision of this state may award a preference to the lowest responsible and responsive vendor having a principal place of business within this state, which preference is equal to the preference granted by the state or political subdivision thereof in which the lowest responsible and responsive vendor has its principal place of business. However, this section does not apply to transportation projects for which federal aid funds are available. If a solicitation provides for the granting of a preference as is provided in this section, any vendor whose principal place of business is outside the State of Florida must accompany any written bid, proposal, or reply documents with a written opinion of an attorney at law licensed to practice law in that foreign state, as to the preferences, if any or none, granted by the law of that state to its own business entities whose principal places of business are in that foreign state in the letting of any or all public contracts.

**PRIDE Enterprises**

The Legislature created Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) in 1983 as a private, non-profit corporation to lease and manage the state prison industries program. Previously, the Department of Corrections (the department) operated the state's prison industries. Pursuant to s.
946.501(2), F.S., PRIDE's mission is to:

- Provide a joint effort between the department, the correctional work programs, and other vocational training programs to reinforce relevant education, training, and postrelease job placement and help reduce recommitment.
- Serve the security goals of the state through the reduction of idleness of inmates and the provision of an incentive for good behavior in prison.
- Reduce the cost of state government by operating enterprises primarily with inmate labor, which enterprises do not seek to unreasonably compete with private enterprise.

To help PRIDE meet its mission, the Legislature granted it certain privileges. PRIDE has sovereign immunity,[2] and is not subject to the authority of any state agency, except the auditing and investigatory powers of the Legislature and the Governor.[3] PRIDE also has a purchasing preference, requiring state agencies to buy its products when they are of similar quality and price to those offered by outside vendors.[4]

[1] As used in Ch. 287, F.S., "agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.
[2] Section 946.5026, F.S.
[3] Sections 946.502(5) and 946.516, F.S.
[4] Section 946.515, F.S.

## III. Effect of Proposed Changes:

**Section 1** provides a short title: the "Buy Florida Act."

**Section 2** amends s. 283.35, F.S., by expanding application of the printing preference to each county, municipality, school district, or other political subdivision of the state. The preference must be:

- Equal to the preference granted by the state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business; or
- Five percent if the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state; and;
- the printing can be performed in this state done at a level of quality comparable to that obtainable from the vendor submitting the lowest bid located outside the state.

The preference does not apply to a contract for printing awarded to the corporation defined in part II of chapter 946, F.S., known as the Prison Rehabilitative Industries and Diversified Enterprises, Inc., or PRIDE Enterprises.

Any vendor whose principal place of business is in another state must accompany any written bid, proposal, or reply documents with a written opinion of an attorney licensed in that state, regarding any preferences granted by that state to its own business entities whose principal places of business are in that state in the letting of public contracts.

**Section 3** amends s. 287.084, F.S., to add an additional provision to the exiting preference. In a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, the preference to the lowest responsible and responsive vendor having a principal place of business in this state must be 5 percent.

The bill also exempts bids submitted by PRIDE Enterprises from the preference provisions.

The bill takes effect July 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Local preference laws potentially implicate the Equal Protection Clause (14th Amendment) and the Commerce Clause (Article I, Section 8) of the U.S. Constitution. Under the Equal Protection Clause, a local preference law would need to be rationally related to a legitimate state interest: the challenged legislation must have a legitimate purpose, and it must be reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. Rational basis review is a fairly deferential standard.

The Commerce Clause is not only a positive grant of power to Congress, but also a negative constraint upon the states.[5] However, even if a law discriminates against interstate commerce, preference laws are generally upheld where the governmental entity is acting as "market participant," rather than a "market regulator."

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

The Legislature may wish to clarify exactly how in-state preferences apply when PRIDE Enterprises submits a bid; it is unclear whether PRIDE may not receive a preference, or whether other in-state vendors may not receive the preference.

If the provisions of lines 45-49 are intended to apply to both preceding paragraphs, the language could be modified to make that intent clearer.

[5] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

## 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.

**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 Governmental Oversight and Accountability Committee

| | |
|---|---|
| BILL: | SB 1182 |
| INTRODUCER: | Senator Ring |
| SUBJECT: | State Board of Administration |
| DATE: | March 19, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | McKay | Roberts | GO | **Pre-meeting** |
| 2. | | | BC | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill amends s. 215.44(1), F.S., to specify that the State Board of Administration does not need a trust agreement with a governmental entity to invest their assets in the Local Government Surplus Funds Trust Fund; these entities will instead be required to complete enrollment materials provided by the board. The bill clarifies that any investments done through a trust agreement are not restricted by the list of authorized investments. The bill also corrects cross references, and changes terminology used in certification and disclosure provisions.

This bill amends the following sections of the Florida Statutes: 215.44 and 215.4755.

## II. Present Situation:

### The State Board of Administration

The State Board of Administration (SBA) is comprised of the Governor, Chief Financial Officer and Attorney General.[1] The SBA manages thirty-six separate statutory investment portfolios, the largest one of which is the multi-employer Florida Retirement System. The SBA must invest and reinvest available funds of the System Trust Fund in accordance with the specified statutory provisions.[2] The System Trust Fund is the trust fund established by statute in the State Treasury for the purpose of holding and investing the contributions paid by members and employers and paying the benefits to which members or their beneficiaries may become entitled.[3] Other trust

[1] Section 16, art. IX, Constitution of 1885, and continued by s. 9, art. IX, State Constitution, as revised in 1968 and subsequently amended.
[2] Section 121.151, F.S.
[3] Section 121.021(36), F.S.

funds may be established in the State Treasury to administer the System Trust Fund. In making investments for the System Trust Fund the board may not make any investments not in conformance with the Florida Retirement System Defined Benefit Plan Investment Policy Statement.[4]

The SBA also manages investments on behalf of the Hurricane Catastrophe Fund, the Florida Lottery, the Pre-Paid College Fund, its own separately constituted Division of Bond Finance, and pooled money market funds for local governments (Florida Prime), among others. Assets under management as of November 30, 2010, totaled $145.6 billion.

The Trustees and agency investment personnel are named fiduciaries for the management of funds under their control. As such, they must adhere to the duties of prudence, loyalty, sole and exclusive benefit in the discharge of their responsibilities. The SBA also houses a statutory Investment Advisory Council whose purpose is to provide the staff and Trustees with non-fiduciary advice on trends and conditions in the institutional investment marketplace. The SBA participates with its peer plans in a number of institutional investor organizations on matters affecting national and international finance.

Section 215.47, F.S., specifies the types of investments authorized for use by the SBA. Section 215.477, specifying the certification and disclosure requirements for investment advisors and managers, was created by House Bill 1307 in the 2010 Regular Session.[5]

## III. Effect of Proposed Changes:

**Section 1** amends s. 215.44(1), F.S., to specify that the State Board of Administration does not need a trust agreement with a governmental entity to invest their assets in the Local Government Surplus Funds Trust Fund created in s. 218.405, F.S. These entities will be required to complete enrollment materials provided by the board, which simplifies the investment process. The bill also amends subsection (3) to clarify that any investments done through a trust agreement are not restricted by the list provided in s. 215.47, F.S.

**Section 2** amends s. 215.4755, F.S., to correct cross-references, replace the word "individual" with "employee at a broker-dealer firm," and deletes "perceived" from the types of conflicts of interest that must be disclosed, leaving "actual or potential" conflicts.

The bill takes effect July 1, 2011.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

[4] Section 215.475(1), F.S.
[5] Section 11 of Chapter 2010-180, L.O.F.

B. Public Records/Open Meetings Issues:

None.

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.