
SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 12, 1998 Revised: _____

Subject: Confidentiality of Certain Records of Public Employees' Retirement Systems and Plans

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The committee substitute makes confidential and exempt from s. 24, Art. I, State Constitution, and from s. 119.07(1), F.S., trade secrets, as defined by s. 812.081, F.S., personal financial records, or confidential business information received by a retirement system or plan for public employees during the process of acquiring, hypothecating, or disposing of private placement investments. The committee substitute creates a more limited exemption for reports and documents relating to value, offers, counteroffers, or negotiations received by a retirement system or plan for public employees in the process of acquiring, hypothecating, or disposing of private placement investments. These types of documents are confidential and exempt only until 30 days after completion of the transaction to which those reports and documents relate.

This committee substitute amends section 112.656, Florida Statutes.

II. Present Situation:

Chapter 112, F.S., provides state law regarding public officers and employees, conditions of employment, travel expenses, and retirement, among other issues. Part VII of the chapter establishes minimum standards for the operation and funding of employee retirement systems and plans that are actuarially sound. Section 112.61, F.S., provides that it is the intent of the Legislature in implementing the provisions of s. 14, Art. X, State Constitution, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.

The provisions of Part VII of ch. 112, F.S., are applicable to all units, agencies, branches, departments, boards, and institutions of state, county, special district, and municipal governments which participate in, operate, or administer a retirement system or plan for public employees,

funded in whole or in part by public funds. The provisions of Part VII are supplemental to, and prevail over conflicting provisions of, existing laws and local ordinances relating to retirement systems and plans.

Section 112.625(1), F.S., defines the term “retirement system or plan” to mean:

Any employee pension benefit plan supported in whole or in part by public funds, provided such plan is not:

- (a) An employee benefit plan described in s. 4(a) of the Employee Retirement Income Security Act of 1974, which is not exempt under s. 4(b)(1) of such act;
- (b) A plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;
- (c) A coverage agreement entered into pursuant to s. 218 of the Social Security Act;
- (d) An individual retirement account or an individual retirement annuity within the meaning of s. 208, or a retirement bond within the meaning of s. 409, of the Internal Revenue Code of 1954;
- (f) An individual account consisting of an annuity contract described in s. 403(b) of the Internal Revenue Code of 1954.

A retirement system or plan for public employees may invest in private placement investments; however, information obtained in the process of acquiring, hypothecating, or disposing of private placement investments is accessible as a public record unless an exemption for this information has been created. As a result, some entities have been unwilling to enter into financial transactions with public employee retirement plans and those plans have lost some investment opportunities.

Currently, the State Board of Administration is provided a public records exemption for its real estate investment program that is similar to the exemption created in this committee substitute. Section 215.44(8), F.S., exempts records and information relating to acquiring, hypothecating, or disposing of real property or related personal property or mortgage interests, as well as interest in collective real estate investment funds, publicly traded securities, or private placement investments. The exemption further provides that all reports and documents relating to value, offers, counteroffers, or negotiations are confidential and exempt until closing is complete and all funds have been disbursed.

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.¹ Section 24, Art. I, State Constitution, provides:

¹Article I, s. 24 of the State Constitution.

(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.

The Public Records Law² specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The Public Records Law states that, unless specifically exempted, all agency³ records are to be 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 all materials made or received by an agency in connection with official business which are used 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

Exemptions to the Public Records Law are permitted by the Florida Constitution and by statute. Section 24, Art. I, State Constitution, permits the Legislature to provide by general law 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. Additionally, a committee substitute that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

²Chapter 119, F.S.

³The 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.

⁴Section 119.011(1), F.S.

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁷Art. I, s. 24(c) of the State Constitution.

The Open Government Sunset Review Act of 1995⁸ states that an exemption may be created 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. 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. The three criteria listed in statute are if the exemption:

- 1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) 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
- 3) 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.⁹

III. Effect of Proposed Changes:

Section 1. The committee substitute makes confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, State Constitution, trade secrets, as defined by s. 812.081, F.S.,¹⁰ personal financial records, or confidential business information received by a retirement system or plan for public employees during the process of acquiring, hypothecating,¹¹ or disposing of private placement investments.

Additionally, the committee substitute provides that all reports and documents relating to value, offers, counteroffers, or negotiations received by a retirement system or plan for public employees during the process of acquiring, hypothecating, or disposing of private placement investments are

⁸Section 119.15, F.S.

⁹Section 119.15(4)(b), F.S.

¹⁰Section 812.081(1)(c), F.S., defines “trade secret” to mean the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. “Trade secret” includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be: (1) secret; (2) of value; (3) for use or in use by the business; (4) of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

¹¹ Black’s Law Dictionary defines the term “hypothecate” to mean to pledge property as a security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender; nor is the lender given title to the property; though he has the right to sell the pledged property upon default.

confidential and exempt until 30 days after completion of the transaction to which those reports and documents relate.

Section 2. As required by s. 24, Art. I, State Constitution, the committee substitute provides a statement of public necessity. The committee substitute finds that in order for retirement systems or plans for public employees to operate effectively and efficiently, they must be able to compete successfully in the market for private placement investments. In order for these plans to compete successfully in the market, they must be permitted to transact arms-length negotiations and must be permitted to keep certain types of information confidential during the negotiation process and thereafter. As a result, it is a public necessity that trade secrets, personal financial records, or confidential business records that are received remain confidential and exempt. Further, it is a public necessity that reports and documents relating to value, offers, counteroffers, or negotiations received by a retirement plan for public employees in the process of acquiring, hypothecating, or disposing of private placement investments be kept confidential and exempt until 30 days after completion of the transaction which those reports and documents relate.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I., State Constitution, requires exemptions to be no broader than necessary to accomplish the stated purpose of the law. The stated purpose of the exemption is that in order for retirement systems or plans for public employees to operate effectively and efficiently, they must be able to compete successfully in the market for private placement investments. Further, the stated public necessity finds that successful competition in the market requires the ability to conduct arms-length transactions and requires that certain types of information be kept confidential.

The exemption created by the committee substitute is limited in that it provides that only specific types of information (trade secrets, personal financial information, and confidential business information) received by a retirement system or plan for public employees during the process of acquiring, hypothecating, or disposing of private placement investments are confidential and exempt. It also provides that other types of information (documents or reports related to value, offers, counteroffers, or negotiations) received by a retirement system for public employees in the process of acquiring, hypothecating, or disposing of private placement investments be kept confidential and exempt until 30 days after completion of the transaction to which they relate. Thus, the exemption is tied to the statement of public necessity as is required, and is no broader than necessary to meet the purpose of the exemption.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The creation of the exemption could have a positive impact on the private sector because it could open up public retirement systems and plans as sources of investment funds. Entities that would not look toward these plans for sources of funds due to the possibility that their trade secrets, personal financial information, or confidential business information would become public information will be assured that such information will remain confidential.

C. Government Sector Impact:

The creation of the exemption will permit public retirement plans to make private placement investments which it might not otherwise be able to make.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 215.44(8), F.S., provides an exemption for the State Board of Administration (SBA) that is similar to the exemption provided in the committee substitute.¹² That exemption, however, is limited to the SBA's real estate investment program.

¹²The exemption provides: In order to effectively and efficiently administer the real estate investment program of the State Board of Administration, the Legislature finds a public necessity in protecting specified records of the board. Accordingly, records and information relating to acquiring, hypothecating, or disposing of real property or related personal property or mortgage interests in same, as well as interest in collective real estate investment funds, publicly traded securities, or private placement investments, are confidential and exempt from s. 119.07(1) in order to protect proprietary information requisite to the boards' ability to transact arms length negotiations necessary to successfully compete in the real estate investment market. All reports and documents relating to value, offers, counteroffers, or negotiations are confidential and exempt from s. 119.07(1) until closing is complete and all funds have been disbursed. Reports and documents relating to tenants, leases, contracts, rent rolls, and negotiations in progress are confidential and exempt from the provisions of s. 119.07(1) until the executive director determines that releasing such information would not be detrimental to the interests of the board and would not cause a conflict with the fiduciary responsibilities of the State Board of Administration.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
