

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 894

SPONSOR: Governmental Oversight & Productivity Committee and Senators Garcia and Horne

SUBJECT: Public Records Exemption/Education System

DATE: April 17, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.	_____	_____	AGG	_____
3.	_____	_____	AP	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute makes confidential and exempt from public records requirements identifying information about an applicant for a university or community college president or the Commissioner of Education. Further, the bill closes meetings at which applications for these positions are discussed. Upon nomination of a candidate, all records of that candidate are available for review and meetings regarding the candidate are open.

This committee substitute creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.¹ Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.²

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption:

1. Must state with specificity the public necessity justifying the exemption;
2. Must be no broader than necessary to accomplish the stated purpose of the law;
3. Must relate to one subject;
4. Must contain only exemptions to public records or meetings requirements; and
5. May contain provisions governing enforcement.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."³ The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.⁴

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁵ If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁶

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

¹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

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

³ *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

⁴ *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2^d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

⁵ Attorney General Opinion 85-62.

⁶ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.⁷ For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.⁸ The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.⁹

The Open Government Sunset Review Act of 1995 - Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?

⁷ *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

⁸ *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).

⁹ *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

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

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Education Reorganization Transition Task Force Report – The Education Governance Reorganization Transition Task Force (the “Task Force”) was charged by the Florida Legislature to recommend a plan for a smooth and timely transition of Florida’s current education governance system to the new seamless kindergarten through graduate school system envisioned in the Education Reorganization Act of 2000. The Task Force issued 10 major recommendations for legislative consideration. Recommendation No. 6 of the report provides that the Legislature should authorize the appointment of university boards of trustees and establish their duties and authority. The Committee Substitute for Senate Bill 2108 provides for the establishment of university boards of trustees and identifies their duties.

As part of Recommendation No. 6, the Task Force stated in paragraph 9, the following:

The Legislature should authorize each institutional Board of Trustees to select and appoint its institutional president subject to ratification by the Florida Board of Education. *The institution’s Board of Trustees will conduct presidential searches outside the “sunshine” until such time that they are prepared to nominate a candidate to the interim Florida Board of Education. At that time, all files, interviews, meetings, appearances and comments shall be open to the public.* Finalist candidates shall meet with faculty, students, staff, alumni, boosters and other support organizations deemed appropriate by the trustees in a public forum. The Board of Trustees would evaluate the President on an annual basis for the purpose of measuring effectiveness related to

implementation and application of accountability system that will achieve both institution's role in the larger K-20 education system [*emphasis added*].

III. Effect of Proposed Changes:

The committee substitute makes confidential and exempt from the requirements of Art. I, s. 24(a) of the State Constitution, and s. 119.07, F.S., information that would identify an applicant for the position of:

1. The Commissioner of Education and that is in the possession of the Florida Board of Education;
2. A president of a state university and that is in the possession of a university board of trustees; or
3. A president of a community college and that is in the possession of a community college board of trustees.

Upon nomination of a candidate, all files, interviews, meetings, appearances and comments of the nominee are open for public inspection.

The committee substitute also makes meetings or portions of meetings at which identifying information of applicants is discussed exempt from the provisions of Art. I, s. 24(b) of the State Constitution, and s. 286.011, F.S. After nomination of a candidate, meetings at which the nominee is discussed are open.

The committee substitute provides a statement of public necessity for the limited exemption as is required by the State Constitution. Disclosure of information that would identify an applicant could threaten or harm an applicant's current professional position if the applicant's present employer were to become aware of the application. As a result, an applicant could be discouraged from pursuing an available position, which would reduce the size of the pool of available applicants. A limitation on the number of qualified applicants seeking these positions would reduce the size of the pool of available applicants, which could have a significant impact on the administration of programs and services offered by these entities. Once a candidate is nominated, however, open review of that candidate's credentials is necessary.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The committee substitute closes identifying information in records of all applicants except the candidate who is ultimately nominated and closes meetings at which these records are discussed. It could be argued that the exemption is broader than necessary and that it does not permit oversight of the application process. While the exemption does exempt identifying information, however, it would not prohibit an analysis of other factors, such as the race, gender, and ethnicity of the applicant pool.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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