# 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: SB 2396

SPONSOR: Senator Fasano

SUBJECT: Public Records; Creating an Exemption for Certain Records of the State Board of Administration

DATE: April 16, 2003 REVISED: 04/22/03

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Rhea | Wilson | GO | Fav/1 amendment |
| 2. | | | CM | |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill creates an exemption from public records requirements for records of the State Board of Administration relating to the alternative investments program of the board. Specifically, the bill exempts the names of other investors and their respective commitment amounts with the contractual counter-party, and personal and financial information concerning private individuals with respect to current or prospective investments; specific investment terms associated with each individual portfolio company investment and data; partnership holdings; economic terms agreed upon by the board and the contractual counter-party; contracts with partnerships; monthly, quarterly, and annual partnership reports; limited-partner briefing materials, capital call notices and individual investment memoranda; and due diligence materials received or prepared by the board.

This bill creates paragraph (c) of subsection (8) of section 215.44 of the Florida Statutes.

## II. Present Situation:

### A. Public Records Overview

Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[1] Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained in

[1] Section 1, ch. 5942 (1909) stated: "That all State, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

ch. 119, F.S., was first enacted in 1967.[2] The act has been the subject of amendment almost annually since its inception.

In 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

> 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.

As a result of the adoption of this constitutional amendment, the statutory right of access contained in the Public Records Law was raised to a substantive constitutional right and the legislative and judicial branches of state government were made subject to government-in-the-sunshine requirements. The amendment also "grandfathered" exemptions that were in effect on July 1, 1993.[3]

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Article I, s. 24(c) of the State Constitution authorizes only the Legislature to create exemptions from government-in-the-sunshine requirements. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption. The exemption may be no broader than necessary to comport with the public necessity. Further, a law that creates a public exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.

A new constitutional requirement for creating public records exemptions was adopted by the electorate in November of 2002. That amendment to Article I, s. 24 of the State Constitution requires that exemptions must be enacted by a two-thirds vote of each house.

In addition to the State Constitution, the Public Records Law[4] specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental entities. Section 119.07(1)(a), F.S., requires:

[2] Chapter 67-125 (1967 L.O.F.)
[3] Article I, s. 24(d) of the State Constitution.
[4] Chapter 119, F.S.

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee…

The Public Records Law states that, unless specifically exempted, all agency[5] 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 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]

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]

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the 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 bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[9]

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 a record confidential, with no provision for its release such that its confidential status will be maintained, that record may not be released by an agency to anyone other than to the persons or entities designated in the statute.[10] 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.[11]

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[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 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 those records exempted by law or the state constitution.

[6] Section 119.011(1), F.S.

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

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

[9] Art. I, s. 24(c) of the State Constitution.

[10] Attorney General Opinion 85-62.

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

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.[12] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are narrowly construed so they are limited to their stated purpose.[13]

Exemptions to open government requirements are subject to repeal five years after their initial enactment unless they are reviewed and saved by the Legislature.[14] An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended if it ". . . expands the scope of the exemption to include more records or information or to include meetings as well as records."[15] The Open Government Sunset Review Act of 1995,[16] provides for the systematic review and repeal of exemptions through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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 Open Government Sunset Review Act 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 statutory criteria 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.[17]

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, as the Florida Supreme Court has ruled in a series of

[12] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365 (Fla. 4th DCA 1997).
[13] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).
[14] An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.
[15] Section 119.15(3)(b), F.S.
[16] Section 119.15, F.S.
[17] Section 119.15(4)(b), F.S.

cases, one session of the Legislature cannot bind another.[18] The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but if it falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act.

Further, s. 119.15(4)(e), 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.

Under s. 119.10, F.S., any public officer violating any provision of ch. 119, F.S., 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.

## B. State Board of Administration

Article IV, s. 4(e) of the State Constitution provides:

> The governor as chair, the chief financial officer, and the attorney general shall constitute the state board of administration, which shall succeed to all the power, control, and authority of the state board of administration established pursuant to Article IX, Section 16 of the Constitution of 1885, and which shall continue as a body at least for the life of Article XII, Section 9(c).[19]

The Division of Bond Finance also is located within the State Board of Administration.[20]

The Legislature also has placed responsibility for managing financial funds and instruments on the State Board of Administration. The SBA's primary responsibilities are in investment and debt management. Sections 215.44 – 215.53, F.S., delegates to the SBA the authority to invest certain funds. The Florida Retirement System's defined benefit and defined contribution plans' assets are managed by the SBA. Additionally, the SBA manages assets for the Local Government Surplus Funds Trust Fund, Florida Division of Bond Finance, Florida Hurricane

[18] As the Florida Supreme Court has ruled in a series of cases, the most recent of which is *Neu v. Miami Herald Publishing Company*, 462 So.2d 821 (Fla. 1985), one legislative body cannot bind a future Legislature to an obligation. In *Neu*, a case addressing the Public Meetings Law, the court stated "A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law." See *Neu v. Miami Herald Publishing Company*, 462 So.2d 821, 824 (Fla. 1985). In an earlier case reviewing a challenge to establishment of geographic municipal boundaries, the court stated that, "[t]he Legislature cannot prohibit a future Legislature by proper enactment changing boundaries which it [the earlier Legislature] established." *Kirklands v. Town of Bradley*, 139 So. 144, 145 (Fla. 1932).

[19] Article XII, s. 9(c) of the State Constitution provides for Motor Vehicle Fuel Taxes.

[20] Section 288.15, F.S.

Catastrophe Fund, Lawton Chiles Endowment Fund, and other small non-qualified governmental entities. Total assets under management are approximately $115 billion, which includes the FRS $80 billion pension fund. Most assets under management are divided among six asset classes; Domestic Equities, International Equities, Fixed Income, Real Estate, Alternative Investments, and Cash.

Investment of funds by the SBA is limited by s. 215.47, F.S. That provision contains limitations on the types of instruments, as well as limitations on the percentages of each fund, that the SBA is allowed to invest in. For example, subsection (14) limits the SBA to no more than 5 percent of any fund in private equity through participation in limited partnerships and limited liability companies. This type of investment falls under the category of "alternative investments". Alternative investment programs are long term investments that are considered risky, because such investments are not monitored by the Securities and Exchange Commission, and because the moneys are invested in individual start-up companies. However, such programs are expected to provide a greater return than do more conservative investments.

The board, like many other state investment boards, intends to invest in "alternative investments." Due to Florida's public records laws, if the board decides to contract with a private equity limited partnership, that partnership's information, along with information regarding the start-up companies, would be a public record when in the possession of the board. This information could include proprietary confidential business information as well as personal information on employees and detailed financial information on individual partners. According to board staff, release of such information would limit the ability of the board to access the best possible investments.

## III. Effect of Proposed Changes:

The bill creates an exemption for certain records of the State Board of Administration related to its alternative investments program. Specifically, the bill creates an exemption for:

- The names of other investors and their respective commitment amounts with the contractual counter-party, and personal and financial information concerning private individuals with respect to current or prospective investments.
- Specific investment terms associated with each individual portfolio company investment and data.
- Partnership holdings, in the case of commingled vehicles.
- Economic terms agreed upon by the board and the contractual counter-party.
- Contracts with partnerships, including all schedules, side letters, and lists of investors with their commitment amounts.
- Monthly, quarterly, and annual partnership reports, including materials and notes from advisory committees and annual meetings.
- Limited-partner briefing materials, capital call notices and individual investment memoranda; and,
- Due diligence materials received or prepared by the board.

The bill does not prevent the disclosure of records relating to:

- < The identity of the contractual counter-party for the investment.
- < The market value of the investment.
- < The aggregate committed, invested, and distributed capital for the investment.
- < Aggregate investment return data for each contractual relationship.

The bill specifies that the board may use the exempt information as necessary in any legal or administrative proceeding.

The bill contains a review and repeal date as provided in s. 119.15, F.S., the Open Government Sunset Review Act of 1995.

The bill also contains a statement of public necessity. The basis for the exemption that is stated is that the release of the documents would substantially limit the ability of the board to gain access to the best possible partnership and fund investments. "The opportunity to invest in many partnerships and funds will not be available to the board if it cannot keep confidential certain personal, financial, and other proprietary information that is not publicly disseminated and is not otherwise available from other sources."

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

Under Article I, s. 24 of the State Constitution, when the Legislature provides for a new exemption, that exemption must pass both houses of the Legislature with a two-thirds vote of each house.

Article I, s. 24(a), Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature may, however, provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and the exemption must be no broader than necessary to accomplish its purpose.

The bill makes exempt "portfolio company data," which would appear to include a great deal of unspecified information and, as a result, could be challenged as overbroad. Further, "economic terms" could be interpreted to include a great deal of unspecified information and could also be considered to be overbroad. Likewise, limited-partner briefing materials and individual investment memoranda, materials and notes from advisory committees and annual meetings, are all very broad descriptions of records that could be challenged as outside the scope stated in the public necessity.

C. Trust Funds Restrictions:

None.

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By providing protection for certain information, some private investors who are currently unwilling to enter into partnership agreements with the State Board of Administration for alternative investments may find the bill provides them with an acceptable balance of investment transparency with private client confidentiality.

C. Government Sector Impact:

The State Board of Administration may be able to expand its alternative investments program if certain information about private investors is protected.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

Public sector pension plans have only lately expanded their investment horizons to treat private equity/venture capital as a standard investment class. Principal reasons for this lag have been constitutional or statutory restrictions on fiduciary activities,[21] the inability of getting reliable valuations of company performance in the unregistered market, and the thin exposure of investment targets by virtue of geography or business segment. Most recently, the California Public Employees' Retirement System (CalPERS) reexamined its policy on venture capital investments by abrogating its position on confidentiality of investment principals and performance. Venture capital[22] is highly volatile and cyclical and operates usually through limited partnerships or aggregations of investment principals. In expanding markets private, start-up companies look to a variety of capital resources, or "angel investors," for backing. In contracting economies, "vulture investors" look for similar investment opportunities in distressed equity and debt.

[21] As late as 1996 the State of Indiana had constitutional restrictions on its pension plan investments that limited them to public sector obligations. In an expanding economy these instruments tend to underperform while in a contracting economy they do well. The "prudent person" rule of the United States Department of Labor essentially restricted risk-taking activities of pension managers that placed large portions of the assets at risk.

[22] The principal forms these investments take are venture capital, leveraged buyouts, mezzanine (equity-like debt) financing, distressed debt, fund-of-funds, and secondary market offerings.

## VIII. Amendments:

#1 by Governmental Oversight & Productivity:
The amendment greatly reduces the scope of information that is made exempt and confidential by the original bill. Specifically, the amendment makes exempt and confidential the following for alternative investments only:

- Information or specific investment terms associated with each individual portfolio company investment, within a partnership or investment management relationship;
- Contractual side letters of, or other information concerning, other investors in current or prospective partnerships or investment management relationships; and
- Due-diligence materials concerning prospective or current partnerships or investment management relationships.

The amendment requires the Auditor General to report to the Commission on Ethics any investment transaction made pursuant to the section that appears to be in violation of part III of chapter 112, as noted during the Auditor General's audits of the State Board of Administration.