

# 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.)

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Prepared By: Education Committee

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BILL: SPB 7012

SPONSOR: Committee on Education

SUBJECT: College Prepaid and College Savings Program; Open Government Sunset Review

DATE: January 4, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Pre-meeting</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This provisional bill narrows the public records exemptions contained in the Florida Prepaid College Program and the Florida College Savings Program to comport with the Open Government Sunset Review Act.

In particular, the provisional bill requires public disclosure, upon proper request, of any account information that does not identify the benefactor, the survivor, or the designated beneficiary of any account initiated under the Florida College Savings Program. The provisional bill makes similar changes to the public records exemption contained in the Florida Prepaid College Program by requiring public disclosure, upon proper request, of any account information that does not identify the purchaser, survivor, or the qualified beneficiary.

This bill substantially amends the following sections of the Florida Statutes: 1009.98 and 1009.981.

## II. Present Situation:

### Public Records Law

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 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a), 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 Law<sup>1</sup> also specifies conditions under which the public must have access to governmental records. Section 119.011(11), 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 the official business by any agency.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”<sup>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

Under Article I, s. 24(c), of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

Public records law also recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.<sup>4</sup> If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to the persons or entities designated in statute.<sup>5</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or

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<sup>1</sup> Chapter 119, F.S.

<sup>2</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>3</sup> *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>4</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So. 2d 289 (Fla. 1991).

<sup>5</sup> *See Inf. Op. to Chiaro*, January 24, 1997.

information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>6</sup>

Under s. 119.15(2), F.S., an exemption may 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.”

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- 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.”
- 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.” However, only information that would identify the individual is exempted.
- The exemption 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.”

### **The Florida College Savings Program**

The 1999 Legislature enacted the Florida College Savings Program to allow individuals to make contributions to an account to meet qualified education expenses of a designated beneficiary consistent with federal law authorizing these accounts under s. 529 of the Internal Revenue Code.<sup>7</sup> Unlike the Florida Prepaid College Program<sup>8</sup>, which locks in tuition through an advance payment contract, the Florida College Savings Program does not provide any qualified

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<sup>6</sup> Section 119.15(3)(b), F.S.

<sup>7</sup> Section 1, ch. 99-220, L.O.F.

<sup>8</sup> Section 1009.98, F.S.

guarantees that the contributions will be sufficient to meet tuition requirements. In providing the qualified guarantee under the Florida Prepaid College Program, the Florida Prepaid Board manages the contributions of account holders for the benefit of all program participants. In the Florida College Savings Program, the benefactor makes the investment decisions and the contributions and returns are maintained in a specific account for the benefit of the beneficiary.

### **The Florida College Savings Program Public Records Exemption**

The Florida College Savings Program prohibits the public disclosure of information that identifies the benefactors or designated beneficiary of any account initiated under the program as well as any information regarding individual account activities.<sup>9</sup> These records are confidential and exempt.<sup>10</sup> The Florida Prepaid College Board may release the protected information to a community college, college, or university in which a beneficiary may enroll or is enrolled; however, the postsecondary institution must maintain the exempted and confidential status of the records.<sup>11</sup>

This exemption is scheduled to repeal on October 2, 2005, unless saved from repeal through reenactment by the Legislature.

### **Related Public Records Exemption in the Florida Prepaid College Program**

The Florida Prepaid College Program prohibits the public disclosure of information that identifies the purchasers or beneficiary of any prepaid plan under the program and their advance payment activities.<sup>12</sup> However, this exemption predates the 1992 constitutional amendment relating to access to public records. The records are exempt from disclosure but are not confidential and exempt. The Florida Prepaid College Board may release the protected information to a community college, college, or university in which a beneficiary may enroll or is enrolled.<sup>13</sup> The postsecondary institution must maintain the exempted status of the records.<sup>14</sup>

### **Open Government Sunset Review Report**

The Open Government Sunset Review Report of s. 1009.981, F.S., by the Committee on Education<sup>15</sup> found that the Florida College Savings Program public records exemption protects sensitive personal information about individuals participating in the program. Information that identifies account participants and their account activities is not typically accessible to the public and may be used by individuals or entities to commit fraud or visit economic harm upon program participants and their families.

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<sup>9</sup> Section 1009.981(6), F.S.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Section 1009.98(6), F.S.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Committee on Education, The Florida Senate, Interim Project Report 2005-207, *Open Government Sunset Review of the Public Records Exemption of the College Savings Program (s. 1009.981(6), F.S.)*, available at [http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim\\_reports/pdf/2005-207ed.pdf](http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-207ed.pdf)

Accordingly, the report recommended reenactment of the exemption. However, the Open Government Sunset Review Act authorizes the reenactment of a public records exemption on the basis of protecting sensitive personal information concerning individuals, if the exemption only prohibits the disclosure of information that would identify the individuals involved.<sup>16</sup> The Florida College Savings Program public record exemption may protect from public disclosure information that does not solely identify individuals. Therefore, the report recommended a narrowing of the public records exemption to conform with the Open Government Sunset Review Act by limiting the exemption to information that identifies program participants.

In addition, the report recommended that the Legislature examine a similar public records exemption contained within the Florida Prepaid Program. Although not constitutionally or statutorily required,<sup>17</sup> the Florida Prepaid Program's public record exemption may protect information from public disclosure beyond which is necessary to prevent the disclosure of sensitive personal information concerning program participants.

Finally, the report recognizes that the Open Government Sunset Review Act is a policy decision made by a former Legislature. If this Legislature does not choose to adhere to the policy, it may reenact the exemption and thus override the act as long as the constitutional requirements are met.

### **III. Effect of Proposed Changes:**

The provisional bill saves from repeal and revises an existing public records exemption, codified in s. 1009.981(6), F.S., for information that identifies the benefactor, survivor, or the designated beneficiary of any account initiated under the Florida College Savings Program. In addition, the provisional bill revises an existing public records exemption, codified in s. 1009.98(6), F.S., for information that identifies the purchaser, survivor, or the qualified beneficiary of any account initiated under the Florida Prepaid College Program. The provisional bill is based upon the findings and recommendations of Interim Project 2005-207 of the Committee on Education, which is an Open Government Sunset Review of the public records exemption.

Rather than protect any information regarding "individual account activities" and "advance payment account activities," as the law currently does, the provisional bill amends ss. 1009.98(6), F.S., and 1009.981(6), F.S., to eliminate these undefined terms<sup>18</sup> and to prohibit from public disclosure any information that identifies program participants. The provisional bill narrows the public records exemption to conform to the Open Government Sunset Review Act,

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<sup>16</sup> Section 119.15(4)(b)2., F.S.

<sup>17</sup> The exemption predates s. 24, Art. I of the State Constitution and s. 119.15, F.S.

<sup>18</sup> Although the terms, "benefactor" and "beneficiary" are defined in s. 1009.97, F.S., the terms "individual account activities" and "advance payment account activities" are not defined. However, the Florida Prepaid College Board collects the following information from program participants: the names of the account owner and the beneficiary; the social security numbers of the account owner and the beneficiary; contact information including the addresses, telephone numbers, and e-mail addresses; the family income of the account owner and relationship to the beneficiary; and the grade, the birth date, and the race and sex of the beneficiary. In addition, the Florida Prepaid Board collects account information, which includes the investment option selected, the allocation between investment options, the cost and market value of the investment options, the amount invested by the account owner, the investment income or loss on the amounts invested, sources of funding, payment methods, fees paid, and distributions from the account. This information may constitute account activities protected from public disclosure under current law.

which authorizes the reenactment of a public records exemption on the grounds of protecting sensitive personal information concerning individuals, if the exemption only prohibits public disclosure of any information that identifies the individuals concerned.

The bill specifies that information that identifies survivors of the benefactor or purchaser of either program is protected from public disclosure. A survivor's identity is protected from disclosure under current law under the protection afforded individual account activities and advance payment account activities. Accordingly, the addition of the term "survivor" does not expand the public records exemptions.

The provisional bill eliminates the sunset provision and reenacts the exemptions in all other aspects. The provisional bill takes effect October 1, 2005.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

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

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. The provisional bill appears to relate to one subject and contains only provisions relating to exemptions.

In 2002, the voters approved a revision to this section of the constitution to provide that general laws granting exemptions from the constitutional open-government requirements must pass by a two-thirds vote of each house of the Legislature. The provisional bill narrows the exemptions for both programs and, accordingly, would not require a two-thirds vote of each house of the Legislature for enactment. Moreover, the Florida Prepaid College Program's public records exemption affected by this provisional bill predates the constitutional provisions concerning public records and meetings.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

According to the Florida Prepaid Board, the public records exemption under review has the potential to uniquely affect 13,689 account holders, their families, and the designated beneficiaries under the Florida College Savings Program.<sup>19</sup> Moreover, the Florida Prepaid Board, to date, has sold 974,431 contracts in the Florida Prepaid College Program.

The public records exemption also has the potential to uniquely affect qualified tuition plans in other states, which, absent the exemption, would be able to contact and solicit program participants to their benefit and to the potential detriment of the Florida College Savings Program.

**C. Government Sector Impact:**

The public records exemption has the potential to uniquely affect qualified tuition plans in other states, which, absent the exemption, would be able to solicit program participants to the potential detriment of the Florida College Savings Program. The Florida Prepaid College Board alleges that if a sufficient number of program participants terminate their participation in the savings program at the insistence of other qualified tuition plans in other states, the cost of participation for the remaining participants would increase.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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<sup>19</sup> Survey response of the Florida Prepaid College Board dated September 10, 2004.





## **VIII. Summary of Amendments:**

None.

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

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